Agenda E-19 (Summary)
Rules
September 2009

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed amendments to Appellate Rules 1, 4, and 29 and Form 4 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law . . . . . pp. 2-3

2. a. Approve the proposed amendments to Bankruptcy Rules 1007, 1014, 1015, 1018, 1019, 4001, 4004, 5009, 7001, and 9001, and new Rule 5012 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law . . . . . pp. 4-7

   b. Approve the proposed revision of Exhibit D to Official Form 1 and of Official Form 23 to take effect on December 1, 2009. . . . . pp. 5-7

3. Approve the proposed amendments to Civil Rules 8(c), 26, and 56 and Illustrative Form 52 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law. . . . . pp. 9-19

4. Approve the proposed amendments to Criminal Rules 12.3, 15, 21, and 32.1 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law . . . . . pp. 20-24

5. Approve the proposed amendments to Evidence Rule 804(b)(3) and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law. . . . . pp. 26-27

6. Approve the proposed *Guidelines for Distinguishing Between Matters Appropriate for Standing Orders and Matters Appropriate for Local Rules and for Posting Standing Orders on a Court's Web Site* and transmit them, along with an explanatory report, to the courts. . . . . pp. 28-29

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

Agenda E-19
Rules
September 2009

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure met on June 1-2, 2009. All members attended, with the exception of Chief Justice Ronald George. John Kester and Deputy Attorney General David Ogden attended part of the meeting.

Representing the advisory rules committees were: Judge Carl E. Stewart, chair, and Professor Catherine T. Struve, reporter, of the Advisory Committee on Appellate Rules; Judge Laura Taylor Swain, chair, and Professor S. Elizabeth Gibson, reporter, of the Advisory Committee on Bankruptcy Rules; Judge Mark R. Kravitz, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge Richard C. Tallman, chair, and Professor Sara Sun Beale, reporter, of the Advisory Committee on Criminal Rules; and Judge Robert L. Hinkle, chair, and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Peter G. McCabe, the Committee's Secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief of the Administrative Office's Rules Committee Support Office; James N. Ishida, Jeffrey N. Barr, and Henry Wigglesworth, attorneys in the Office of Judges Programs in the Administrative Office; Joe

Cecil, Tom Willging, and Emery G. Lee of the Federal Judicial Center; and Professors Geoffrey C. Hazard and R. Joseph Kimble, consultants to the Committee. Elizabeth Shapiro and Karyn Temple Clagget attended the meeting, representing the Department of Justice. Professor Nancy King, assistant reporter to the Advisory Committee on Criminal Rules, participated by phone.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 1, 4, and 29 and Form 4 with a recommendation that they be approved and transmitted to the Judicial Conference. Except as noted below, the proposed changes were circulated to the bench and bar for comment in August 2008. The scheduled public hearings on the proposed changes were canceled because no one asked to testify.

The proposed amendments to Rule 1 clarify that the word "state" when used in the rules includes the District of Columbia and any United States commonwealth or territory.

The proposed amendments to Rule 4(a)(7) correct cross-references to Civil Rule 58(a), which was renumbered as part of the restyling of the Civil Rules, effective December 1, 2007. The amendments were not published for public comment because they are technical and conforming.

The proposed amendments to Rule 29(a) delete the reference to a "Territory, Commonwealth, or the District of Columbia" as unnecessary in light of the new definition in Rule 1(b).

The proposed amendments to Rule 29(c) require an amicus curiae to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel contributed money with the intention of funding the preparation or submission of the brief, and to identify every person (other than the amicus, its members, and its counsel) who contributed

money that was intended to fund the brief's preparation or submission. The disclosure requirement, which is modeled on Supreme Court Rule 37.6, serves to deter counsel from using an amicus brief to circumvent page limits on the parties' brief. It also is intended to help judges assess whether the amicus itself considers the issue sufficiently important to justify the cost and effort of filing an amicus brief.

The proposed revision of Form 4, Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis, limits the disclosure of personal-identifier information on the form consistent with the privacy provisions of Rule 25(a)(5).

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference —

Approve the proposed amendments to Appellate Rules 1, 4, and 29 and Form 4 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to the Federal Rules of Appellate Procedure are in Appendix A, with an excerpt from the advisory committee report.

Informational Items

Proposed amendments to Rule 40, which clarify the applicability of the 45-day period for filing a petition for rehearing in a case that involves a federal officer or employee, were withdrawn for further consideration in light of the pendency of a case before the Supreme Court that could affect the rule. A proposed change to a provision in Rule 4, also relating to calculating a filing deadline in a case involving a federal officer or employee, had earlier been tabled because the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), raised questions about changing a time period in a rule when that period was also set by statute.

A joint subcommittee of members from the advisory committee and the Civil Rules Committee is studying issues of mutual concern. The issues include whether parties can

"manufacture finality" to appeal by voluntarily dismissing unresolved peripheral claims when the district court has ruled on the main claims in the case.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 1007, 1014, 1015, 1018, 1019, 4001, 4004, 5009, 7001, and 9001, new Rule 5012, and proposed revisions to Exhibit D to Official Form 1 and to Official Form 23, with a recommendation that they be approved and transmitted to the Judicial Conference. Except as noted below, the proposed changes were circulated to the bench and bar for comment in August 2008. The scheduled public hearings on the proposed changes were canceled because no one asked to testify.

The proposed amendments to Rule 1007 shorten the time for a debtor in an involuntary case to file the list of creditors that must be included on schedules filed in the case. The proposed amendments also give individual debtors in a chapter 7 case additional time to file a statement of completion of the mandatory course in personal financial management.

The proposed amendments to Rule 1019 provide a new time period to object to a claim of exemptions when a case is converted to chapter 7 from chapter 11, 12, or 13. The new time period does not apply, however, if the conversion occurs more than one year after the entry of the first order confirming a plan, or if the case was previously pending under chapter 7 and the objection period had expired in the original chapter 7 case.

The proposed amendments to Rule 4001 adjust the time deadlines in the rule consistent with the amendments to Rule 9006(a) that are scheduled to take effect in December 2009, which simplify the method to compute time under the rules. The changes were not published for public comment because they are technical and conforming.

The proposed amendments to Rule 4004 clarify that the time deadline governing the filing of a *complaint* objecting to a debtor's discharge in a chapter 7 case also applies to a *motion* objecting to the discharge. In addition, the amendments set a deadline to file a motion in a chapter 13 case objecting to a debtor's discharge. In chapter 11 and 13 cases, a court must withhold entering the discharge if the individual debtor fails to file a statement attesting to the completion of a mandatory personal financial-management course.

Under the proposed amendments to Rule 7001, specified objections to a discharge in chapter 7 and 13 cases are not treated as adversary proceedings, because they typically are resolved more easily than other discharge objections and do not require the more elaborate procedures applicable to adversary proceedings.

The proposed revision of Exhibit D to Official Form 1 modifies the debtor's statement of compliance with the credit-counseling requirement. The reference in the statement to the five-day time period in which an individual debtor requested credit counseling, but failed to obtain it before filing a chapter 7 petition, is revised and the time period increased to seven days. The changes are consistent with similar changes to 11 U.S.C. § 109(h)(3)(A)(ii). The revision was not published for public comment because it is technical and conforming.

The proposed revision of Official Form 23 adjusts the deadline to file a statement of completion of a personal financial-management course, consistent with the proposed amendments to Rule 1007(c), which extend the deadline for filing the statement from 45 days to 60 days. The changes were not published for public comment because they are technical and conforming.

Amendments to five rules, Rules 1014, 1015, 1018, 5009, and 9001, and new Rule 5012, are proposed consistent with the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Pub. L. No. 109-8), adding chapter 15 to the Bankruptcy Code. New

chapter 15 governs ancillary and other cross-border insolvency cases. Its primary purpose is to foster cooperation and coordination between United States courts and foreign courts in which insolvency proceedings are pending against the same debtor. A case is commenced under new chapter 15 when a foreign representative files a petition for recognition of the foreign proceeding. If the court recognizes the foreign proceeding, limited relief is immediately provided, including an automatic stay, and several other sections of the Code become applicable.

The proposed amendments to Rule 1014 authorize a court to determine the district in which a case should proceed when multiple petitions – including a chapter 15 petition – involving the same debtor are pending in different districts.

The proposed amendments to Rule 1015 explicitly recognize a court's authority to consolidate or jointly administer cases when one or more of the petitions – including a petition under chapter 15 – is filed by, against, or regarding the same debtor.

The proposed amendments to Rule 1018 apply selected Part VII rules designated to govern proceedings contesting an involuntary petition to proceedings contesting a chapter 15 petition for recognition. The amendments also clarify that Rule 1018 does not apply to matters that are "merely related" to a contested involuntary petition.

The proposed amendments to Rule 5009 require a foreign representative to file a final report describing the nature and results of that representative's activities in the court. The foreign representative must notify interested parties of the report. Those parties have 30 days to file objections. The amendments also require the clerk to notify individual chapter 7 and chapter 13 debtors that their case may be closed without the entry of a discharge if they fail to file a timely statement that they have completed a personal financial-management course.

Proposed new Rule 5012 sets out notice provisions and establishes procedures in chapter 15 cases for obtaining court approval of an agreement or protocol coordinating insolvency proceedings pending in another country involving the debtor.

The proposed amendments to Rule 9001 apply the definitions of words and phrases listed in § 1502 of the Code, governing cross-border insolvencies, to the rules.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference —

a. Approve the proposed amendments to Bankruptcy Rules 1007, 1014, 1015, 1018, 1019, 4001, 4004, 5009, 7001, and 9001, and new Rule 5012 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

b. Approve the proposed revision of Exhibit D to Official Form 1 and of Official Form 23 to take effect on December 1, 2009.

The proposed amendments to the Federal Rules of Bankruptcy Procedure are in Appendix B, with an excerpt from the advisory committee report.

Rules Approved for Publication and Comment

The advisory committee submitted proposed amendments to Rules 2003, 2019, 3001, and 4004, and new Rules 1004.2 and 3002.1, and proposed revisions of Official Forms 22A, 22B, and 22C with a request that they be published for comment. The Committee approved the advisory committee's recommendation to publish the proposed amendments for public comment.

Proposed new Rule 1004.2, which was previously published for comment, requires that a petition for recognition of a foreign proceeding under chapter 15 identify the countries where a foreign proceeding is pending against the same debtor and the country where the debtor has the center of its main interests. The rule sets out applicable notice provisions and generally requires that a challenge to the designation of the debtor's center of main interests be raised before the hearing on the petition for recognition.

The proposed amendments to Rule 2003 require the official presiding at a creditors' or equity security holders' meeting to file a statement after the meeting adjourns indicating when the next meeting will be held.

The proposed amendments to Rule 2019 substantially expand the types of financial information that must be disclosed about certain creditors and equity security holders in chapter 9 Municipality and chapter 11 Reorganization cases and about the entities that must disclose the information.

The proposed amendments to Rule 3001 require additional information to accompany certain proofs of claim in a case involving an individual debtor. The amendments also specify the penalties for claim-holders that fail to provide the additional information.

Proposed new Rule 3002.1 establishes notice requirements governing: (1) payment changes; (2) assessment of fees, expenses, and charges; and (3) final cure payments relating to a home mortgage claim. The rule implements § 1322(b)(5) of the Code, which permits a chapter 13 debtor to cure a default and to maintain payments of a home mortgage over the course of the debtor's plan.

The proposed amendments to Rule 4004 allow a party to seek an extension of time, under specified circumstances, to object to a discharge after the time for filing objections has expired.

The proposed revisions of Official Forms 22A, 22B, and 22C make modest changes, including deleting certain references to "household size," clarifying the requirements for reporting regular payments by another person for household purposes, and providing additional instructions about when joint filers should complete separate forms.

Informational Items

The advisory committee is revising and modernizing bankruptcy forms. As part of this project, the advisory committee is analyzing the forms' content, ways to make the forms easier to use and more effective to meet the needs of the judiciary and all those involved in resolving bankruptcy matters, and possible approaches to take advantage of technology advances. The advisory committee has retained the services of a consultant who is expert in designing forms.

The advisory committee is also reviewing Part VIII of the Bankruptcy Rules, which address appeals to district courts and bankruptcy appellate panels. The advisory committee is considering whether the rules should be revised to align them more closely with the Federal Rules of Appellate Procedure. Though based on the original Appellate Rules, Part VIII has not been updated to account for the amendments to the Appellate Rules or for changes in practice during the past 25 years. A miniconference of judges, lawyers, and academics was held in March 2009 in conjunction with the advisory committee's spring meeting to explore the benefits of, and concerns raised by, such a revision. An additional miniconference has been scheduled for September 2009 at Harvard Law School in conjunction with the advisory committee's fall meeting.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rules 8(c), 26, and 56, and Illustrative Form 52, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments to Rules 26 and 56 were circulated to the bench and bar for comment in August 2008. Approximately 90 witnesses testified at the three public hearings on the proposed amendments to Rules 26 and 56. The

proposed amendment to Rule 8(c) was circulated earlier for comment in August 2007, and the scheduled public hearings were canceled because no one asked to testify.

The proposed amendment to Rule 8(c) deletes the reference to "discharge in bankruptcy" from the rule's list of affirmative defenses that must be asserted in response to a pleading. Under 11 U.S.C. § 524(a), a discharge voids a judgment to the extent that it determines the debtor's personal liability for the discharged debt. Though the self-executing statutory provision controls and vitiates the affirmative-defense pleading requirement, the continued reference to "discharge" in Rule 8's list of affirmative defenses generates confusion, has led to incorrect decisions, and causes unnecessary litigation. The amendment conforms Rule 8 to the statute. The Committee Note was revised to address the Department of Justice's concern that courts and litigants should be aware that some categories of debt are excepted from discharge.

The proposed amendments to Rule 26 apply work-product protection to the discovery of draft reports by testifying expert witnesses and, with three important exceptions, communications between those witnesses and retaining counsel. The proposed amendments also address witnesses who will provide expert testimony but who are not required to provide a Rule 26(a)(2)(B) report because they are not retained or specially employed to provide such testimony, or they are not employees who regularly give expert testimony. Under the amendments, the lawyer relying on such a witness must disclose the subject matter and summarize the facts and opinions that the witness is expected to offer.

The proposed amendments address the problems created by extensive changes to Rule 26 in 1993, which were interpreted to allow discovery of all communications between counsel and expert witnesses and all draft expert reports and to require reports from all witnesses offering expert testimony. More than 15 years of experience with the rule has shown significant practical problems. Both sets of amendments to Rule 26 are broadly supported by lawyers and bar

organizations, including the American Bar Association, the Council of the American Bar Association Section on Litigation, the American College of Trial Lawyers, the American Association for Justice (formerly ATLA), the Federal Magistrate Judges' Association, the Lawyers for Civil Justice, the Federation of Defense & Corporate Counsel, the International Association of Defense Counsel, and the United States Department of Justice.

Experience with the 1993 amendments to Rule 26, requiring discovery of draft expert reports and broad disclosure of any communications between an expert and the retaining lawyer, has shown that lawyers and experts take elaborate steps to avoid creating any discoverable record and at the same time take elaborate steps to attempt to discover the other side's drafts and communications. The artificial and wasteful discovery-avoidance practices include lawyers hiring two sets of experts – one for consultation, to do the work and develop the opinions, and one to provide the testimony – to avoid creating a discoverable record of the collaborative interaction with the experts. The practices also include tortuous steps to avoid having the expert take any notes, make any record of preliminary analyses or opinions, or produce any draft report. Instead, the only record is a single, final report. These steps add to the costs and burdens of discovery, impede the efficient and proper use of experts by both sides, needlessly lengthen depositions, detract from cross-examination into the merits of the expert's opinions, make some qualified individuals unwilling to serve as experts, and can reduce the quality of the experts' work.

Notwithstanding these tactics, lawyers devote much time during depositions of the adversary's expert witnesses attempting to uncover information about the development of that expert's opinions, in an often futile effort to show that the expert's opinions were shaped by the lawyer retaining the expert's services. Testimony and statements from many experienced plaintiff and defense lawyers presented to the advisory committee before and during the public

comment period showed that such questioning during depositions was rarely successful in doing anything but prolonging the questioning. Questions that focus on the lawyer's involvement instead of on the strengths or weaknesses of the expert's opinions do little to expose substantive problems with those opinions. Instead, the principal and most successful means to discredit an expert's opinions are by cross-examining on the substance of those opinions and presenting evidence showing why the opinions are incorrect or flawed.

The advisory committee's analysis of practice under the 1993 amendments to Rule 26 showed that many experienced lawyers recognize the inefficiencies of retaining two sets of experts, imposing artificial record-keeping practices on their experts, and wasting valuable deposition time in exploring every communication between lawyer and expert and every change in the expert's draft reports. Many experienced lawyers routinely stipulate at the outset of a case that they will not seek draft reports from each other's experts in discovery and will not seek to discover such communications. In response to persistent calls from its members for a more systematic improvement of discovery, the American Bar Association issued a resolution recommending that federal and state procedural rules be amended to prohibit the discovery of draft expert reports and limit discovery of attorney-expert communications, without hindering discovery into the expert's opinions and the facts or data used to derive or support them. The State of New Jersey did enact such a rule and the advisory committee obtained information from lawyers practicing on both sides of the "v" and in a variety of subject areas about their experiences with it. Those practitioners reported a remarkable degree of consensus in enthusiasm for and approval of the amended rule. The New Jersey practitioners emphasized that discovery had improved since the amended rule was promulgated, with no decline in the quality of information about expert opinions.

The proposed amendments to Rule 26 recognize that discovery into the bases of an expert's opinion is critical. The amendments make clear that while discovery into draft reports and many communications between an expert and retaining lawyer is subject to work-product protection, discovery is not limited for the areas important to learning the strengths and weaknesses of an expert's opinion. The amended rule specifically provides that communications between lawyer and expert about the following are open to discovery: (1) compensation for the expert's study or testimony; (2) facts or data provided by the lawyer that the expert considered in forming opinions; and (3) assumptions provided to the expert by the lawyer that the expert relied upon in forming an opinion.

In considering whether to amend the rule, the advisory committee carefully examined the views of a group of academics who opposed the amendments. These academics expressed concern that the amendments could prevent a party from learning and showing that the opinions of an expert witness were unduly influenced by the lawyer retaining the expert's services. These concerns were not borne out by the practitioners' experience. After extensive study, the advisory committee was satisfied that the best means of scrutinizing the merits of an expert's opinion is by cross-examining the expert on the substantive strength and weaknesses of the opinions and by presenting evidence bearing on those issues. The advisory committee was satisfied that discovery into draft reports and all communications between the expert and retaining counsel was not an effective way to learn or expose the weaknesses of the expert's opinions; was time-consuming and expensive; and led to wasteful litigation practices to avoid creating such communications and drafts in the first place.

Establishing work-product protection for draft reports and some categories of attorney-expert communications will not impede effective discovery or examination at trial. In some cases, a party may be able to make the showings of need and hardship that overcome work-

product protection. But in all cases, the parties remain free to explore what the expert considered, adopted, rejected, or failed to consider in forming the opinions to be expressed at trial. And, as observed in the Committee Note, nothing in the Rule 26 amendments affects the court's gatekeeping responsibilities under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

The proposed amendments to Rule 56 are intended to improve the procedures for presenting and deciding summary-judgment motions, to make the procedures more consistent across the districts, and to close the gap that has developed between the rule text and actual practice. The proposed amendments are not intended to change the summary-judgment standard or burdens.

The text of Rule 56 has not been significantly changed for over 40 years. During this time, the Supreme Court has developed the contemporary summary-judgment standards in a trio of well-known cases, and the district courts have, in turn, prescribed local rules with practices and procedures that are inconsistent in many respects with the national rule text and with each other. The local rule variations do not appear to be justified by unique or different conditions in the districts. The fact that there are so many local rules governing summary-judgment motion practice demonstrates the inadequacy of the national rule.

Although there is wide variation in the local rules and individual-judge rules, there are similarities among them. The proposed amendments draw from many summary-judgment provisions common in the current local rules. For example, the amendments adopt a provision found in many local rules that requires a party asserting a fact that cannot be genuinely disputed to provide a "pinpoint citation" to the record supporting its fact position. Other salient changes: (1) recognize that a party may submit an unsworn written declaration, certificate, verification, or statement under penalty of perjury in accordance with 28 U.S.C. § 1746 as a substitute for an

affidavit to support or oppose a summary-judgment motion; (2) provide courts with options when an assertion of fact has not been properly supported by the party or responded to by the opposing party, including considering the fact undisputed for purposes of the motion, granting summary judgment if supported by the motion and supporting materials, or affording the party an opportunity to amend the motion; (3) set a time period, subject to variation by local rule or court order in a case, for a party to file a summary-judgment motion; and (4) explicitly recognize that "partial summary judgments" may be entered.

The public comment drew the advisory committee's attention to two provisions that raised significant interest. The first dealt with a single word change in the rule that took effect in December 2007 as part of the comprehensive Style Project and remained unchanged in the Rule 56 proposal published for comment in August 2008. The second was a proposed amendment that would have enhanced consistency by putting in the national rule the practice of many courts requiring parties to submit a "point-counterpoint" statement of undisputed facts. This proposed "point-counterpoint" provision in the national rule was a default, subject to variation by a court's order in a case. With the exception of these two important aspects, the public comment on all other provisions of the proposed amendments was highly favorable.

The first aspect of divided public comment related to a change made in 2007 with virtually no comment. As part of the Style Project, the word "shall," which appeared in many rules, was changed in each rule to clarify whether it meant "must," "may," or "should." The word "shall" is inherently ambiguous. Whether "shall" meant, in a particular rule, "must," "may," or "should," had to be determined by studying the context and how courts had interpreted and applied the rule. In 2007, the word "shall" in Rule 56(a) was changed to "should" in stating the standard governing a court's decision to grant summary judgment. ("The judgment sought *should* be rendered if [the record shows] that there is no genuine issue as to any material fact and

that the movant is entitled to judgment as a matter of law.") The change to "should" was based on the advisory committee's and Standing Committee's study of the case law. Like all the changes made as part of the Style Project, the change to "should" in Rule 56(a) was accompanied by a statement that the change was intended to be stylistic only and not intended to change the substantive meaning or make prior case law inapplicable. That change was virtually unnoticed until the current proposed amendments to Rule 56 were published for comment. Those amendments left the word "should" unchanged, consistent with the intent to improve the procedures for litigating summary-judgment motions but not to change the standard for granting or denying them.

Many comments expressed a strong preference for "must" or "shall," based in part on a concern that retaining "should" in rule text would lead to undesirable failures to grant appropriate summary judgments. Proponents of the word "must" pointed to language in opinions stating that a grant of summary judgment is directed when the movant is "entitled" to judgment as a matter of law. These comments emphasized the importance of summary judgment as a protection against the burdens imposed by unnecessary trial and against the shift of settlement bargaining power that follows a denial of a valid summary-judgment motion.

Equally vigorous comments expressed a strong preference for retaining "should." These comments emphasized the importance of the trial court having some discretion in handling summary-judgment motions, particularly motions for partial summary judgment that leave some issues to be tried, and the trial record will provide a superior basis for deciding the issues as to which summary judgment was sought. These comments emphasized case law supporting the continued use of the word "should" as opposed to changing the word to "must." And trial-court judges pointed out that a trial may consume much less court time than would be needed to

determine whether a summary judgment can be granted, besides providing a more reliable basis for the decision at the trial level and a better record for appellate review.

After considering these comments, and after extensive research into the case law in different contexts, the advisory committee concluded that it could not accurately or properly decide whether "shall" in Rule 56(a) meant "must" or "should" in all cases. Both the proponents of "must" and of "should" found support for their position in the case law. The case law ambiguity on whether "shall" means "must" or "should" is further complicated by circuit differences in the summary-judgment standard and differences in the standard depending on the subject matter. But the cases reflect, in part, the fact that they were decided based on the word "shall" in the statement of the standard for granting summary-judgment motions. The advisory committee decided that changing the word "shall" created an unacceptable risk of changing the substantive summary-judgment standard as it had developed in different circuits and different subject areas. The advisory committee decided that the words of Rule 56(a) – "The court *shall* grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law" – had achieved the status of a term of art or "sacred phrase" that could not be safely changed for stylistic reasons without risking a change to substantive meaning. Instead, the advisory committee decided to restore the word "shall" to avoid the unintended consequences of either "must" or "should" and to allow the case law to continue to develop.

After extensive public comment, the advisory committee decided to withdraw the "point-counterpoint" proposal that was included in the rule text published for comment. Under the proposal, a movant would be required to include with the motion and brief a "point-counterpoint" statement of facts that are asserted to be undisputed and entitle the movant to summary judgment. The respondent, in addition to submitting a brief, would have to address

each fact by accepting it, disputing it, or accepting it in part and disputing it in part (which could be done for purposes of the motion only). A court could vary the procedure by order in a case. The point-counterpoint statements were intended to identify the essential issues and provide a more efficient and reliable process for the judge to rule on the motion.

During the public comment period, the advisory committee heard from lawyers and judges who found the point-counterpoint statement useful and efficient. But the advisory committee also heard that the procedure can be burdensome and expensive, with parties submitting long and unwieldy lists of facts and counter-facts. Some courts adopted the point-counterpoint procedure by local rule and subsequently abandoned it or are rethinking it. Testimony and comments did not provide sufficient support for including the point-counterpoint procedure in the national rule. Instead, the rule is revised to continue to provide discretion to the courts to adopt the procedure or not, by entering an order in an individual case or by local rule.

The proposed revision of Illustrative Form 52, Report of the Parties' Planning Meeting, (formerly Form 35), corrects an inadvertent omission made during the comprehensive revision of illustrative forms in 2007. The revision reinstates two provisions that took effect in 2006 but were omitted in the comprehensive revision in 2007. The provisions require that a discovery plan include: (1) a reference to the way that electronically stored information would be handled in discovery or disclosure; and (2) a reference to an agreement between parties regarding claims of privilege or work-product protection. The two provisions are consistent with amendments to Rule 16(b)(3) that took effect in 2006. The proposed revision is not published for public comment because it is technical and conforming.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference —

Approve the proposed amendments to Civil Rules 8(c), 26, and 56 and Illustrative Form 52 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to the Federal Rules of Civil Procedure are in Appendix C, with an excerpt from the advisory committee report.

Rule Approved for Publication and Comment

The advisory committee submitted proposed amendments to Supplemental Rule E(4)(f) of the Federal Rules of Civil Procedure with a request that publication for comment be deferred. The amendments delete the reference to a repealed statute and include a cross-reference to the forfeiture provisions in Supplemental Rule G. The Committee approved the advisory committee's recommendation to publish the proposed amendments for public comment at a suitable time in the future.

Informational Items

The advisory committee is planning to hold a major conference in May 2010 to investigate growing concerns about pretrial costs, burdens, and delays. The conference will examine possible rule and other changes. It will be held at the Duke University School of Law.

The advisory committee is considering amending Rule 45, dealing with subpoenas to nonparties, to address several problems that have raised concerns of misuse or possible abuse.

The advisory committee is also studying security concerns raised by personal service of pleadings and other papers under Rule 4 on government officials, including federal judges, sued in an individual capacity in connection with the performance of official duties. The advisory

committee is gathering data and considering whether the concerns are better addressed by legislation or by proposed amendments to Rule 4.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Rules 12.3, 15, 21, and 32.1, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench and bar for comment in August 2008. Scheduled public hearings on the amendments were canceled. The two individuals asking to testify on the proposed amendments agreed to present their testimony in conjunction with the advisory committee's April 2009 meeting.

The proposed amendment to Rule 12.3 provides that a victim's address and telephone number should be disclosed to the defense when a public-authority defense is raised only if the defendant establishes a need for the information. The amendment parallels a similar change made in 2008 to Rule 12.1, dealing with notice of an alibi defense, providing the court with discretion to order disclosure of the information or to fashion an alternative procedure that gives the defendant the information necessary to prepare a defense but also protects the victim's interests. The amendments are consistent with the Crime Victims' Rights Act (18 U.S.C. § 3771).

The proposed amendments to Rule 15 authorize a deposition taken outside the United States to occur without the defendant's presence in limited circumstances and only if the court makes specific findings. Under the amendments, the trial court must make case-specific findings before allowing such a deposition, including that: (1) the witness's testimony could provide substantial proof of a material fact in a felony prosecution; (2) there is a substantial likelihood the witness's attendance at trial cannot be obtained; (3) the defendant cannot be present at the

deposition or it would not be possible to securely transport the defendant to the witness's location for a deposition; and (4) the defendant can meaningfully participate in the deposition through reasonable means. The amendments do not address the admissibility of the testimony produced by such a deposition; courts will continue to resolve that issue in accordance with the Federal Rules of Evidence and the Constitution.

Current Rule 15 does not expressly authorize depositions of witnesses in another country when the defendant is in the United States. But several courts of appeals have authorized such depositions in limited circumstances. The Second Circuit in *United States v. Salin*, 855 F.2d 944, 947 (2nd Cir. 1988), found proper the deposition of a witness held in custody in France although the defendant was in United States custody and could not be securely transported. The Third Circuit in *United States v. Gifford*, 892 F.2d 263, 264 (3rd Cir. 1989), approved a government-requested deposition of two witnesses in Belgium who were unavailable for trial when the defendant was able to participate by telephone. The Fourth Circuit in *United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), approved a deposition of two witnesses in Saudi Arabia, without the defendant's presence. The defendant remained in the United States and was ultimately convicted of affiliation with an al-Queda terrorist cell located in Saudi Arabia. The Ninth Circuit in *United States v. Medjuck*, 156 F.3d 916, 920 (9th Cir. 1998), approved the deposition of witnesses in Canada, without the defendant's presence. Those witnesses were unable to testify in the United States. In each case, the court found that procedures were in place that permitted the defendant to participate in the deposition from the United States.

In these cases, the courts have approved depositions of witnesses in foreign countries without the presence of the defendant, based on the need for the deposition and the ability to implement procedures for the defendant to meaningfully participate. But the cases have not

created a consistent or predictable procedure to govern when such depositions are proper and what procedures are necessary. The Department of Justice contends that a national rule would avoid unnecessary confusion caused by different deposition standards being developed by individual courts and would give useful guidance to both courts and lawyers. The Department emphasizes that there is a vital need for such depositions in cases in which a critical prosecution witness lives in or flees to another country, outside federal-court subpoena power. Although such cases are not common, they can involve important interests. The need for a clear procedure is particularly acute in national security cases.

In response to concerns that the proposed amendments would inappropriately increase the number of such depositions, the Department points to the high cost and the elaborate and numerous steps required for a federal prosecutor to depose a witness in a foreign country, particularly a witness in custody in that country. The Department contends that these barriers effectively limit how often such depositions are sought. The Department plans to give even greater force to these practical limitations by revising its internal guidance to require the approval of the Assistant Attorney General or designee in every case in which the United States seeks to depose a witness outside the country.

The advisory committee was mindful that the Supreme Court declined in 2002 to approve and transmit to Congress proposed amendments to Rule 26, which would have permitted the presentation of testimony at trial by two-way video when the court finds there are "exceptional circumstances," "appropriate safeguards" are used, and the witness is "unavailable" within the meaning of Evidence Rule 804(a). In a statement accompanying the transmission of the amendments to Congress, Justice Scalia concluded that the Rule 26 proposal was contrary to *Maryland v. Craig*, 497 U.S. 836 (1990), because it did not "limit the use of testimony via video transmission to instances where there has been a 'case specific finding' that it is 'necessary to

further an important public policy.'" The proposed amendments to Rule 15 address this concern.

They require the court to make case-specific findings that the deposition is necessary because the witness's presence in the United States cannot be obtained and that it "further[s] an important public policy" because it could provide substantial proof of a material fact in a felony prosecution, and that procedures will be used to allow the defendant's meaningful participation.

In addition, the Committee Note makes clear that the taking of the deposition under the rule is a discovery procedure and in no way forecloses a challenge to admission of the testimony at trial based on the Confrontation Clause or the Federal Rules of Evidence. For example, if the technology used to ensure the defendant's participation does not work well, the deposition would likely not be admitted. Similarly, if the situation changes so that it becomes possible for the witness to testify at trial, the deposition might not be admitted.

The advisory committee concluded that the Department of Justice made a strong case for the proposed amendments, that the deposition procedure would be used in limited circumstances in a limited number of cases, that the amendments required procedures to allow the defendant meaningfully to participate in the deposition, and that the Confrontation Clause concerns were addressed.

The proposed amendment to Rule 21(b) requires a court to consider the convenience of victims – as well as the convenience of the parties and witnesses and the interests of justice – in determining whether to transfer all or part of the proceedings to another district for trial. The amendment would apply only if a defendant moves to transfer the case for convenience; it does not apply to motions for transfer based on prejudice under Rule 21(a).

The proposed amendments to Rule 32.1 are designed to end the confusion over the applicability of 18 U.S.C. § 3143(a) – to which the current rule refers – to proceedings involving the release or detention of a person charged with violating a condition of probation or supervised release. The amendments make clear that only paragraph (a)(1) of § 3143, and not (a)(2), applies to the proceedings. The proposed amendments also clarify the burden of proof in such proceedings, which, under the case law, is to establish by *clear and convincing evidence* that the person will not flee or pose a danger to any other person or to the community.

The advisory committee decided not to proceed with proposed amendments to Rule 5 that were published for comment. The proposed amendments would have required a judge deciding whether to release or detain a defendant specifically to consider the right of a victim to be reasonably protected from the accused. The advisory committee concluded that the amendments were redundant of provisions in the Crime Victims' Rights Act (18 U.S.C. § 3771) and the Bail Reform Act (18 U.S.C. §§ 3141-3156).

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference —

Approve the proposed amendments to Criminal Rules 12.3, 15, 21, and 32.1 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to the Federal Rules of Criminal Procedure are in Appendix D, with an excerpt from the advisory committee report.

Rules Approved for Publication and Comment

The advisory committee submitted proposed amendments to Rules 1, 3, 4, 9, 32.1, 40, 41, 43, and 49, and new Rule 4.1, with a request that they be published for comment. The Committee approved the advisory committee's recommendation to publish the proposed

amendments for public comment. The proposed amendments are designed to facilitate the use of technology in criminal case proceedings. Under certain circumstances set out in the proposed amendments, a law enforcement officer may transmit information to the court by reliable electronic means, including emails, instead of appearing before a judicial officer, and an accused may participate in some specified proceedings by video teleconferencing. Allowing such uses of technology responds to needs that are most acute in districts that cover huge areas, reducing the delays, security risks, burdens, and costs of traveling long distances for proceedings that no longer require physical presence to be fairly and effectively handled.

The proposed amendments to Rule 1 expand the definition of "telephone" to include cell phone technology and calls over the internet.

The proposed amendments to Rules 3, 4, and 9 authorize a court to consider complaints and requests for the issuance of arrest warrants and summonses based on information submitted by reliable electronic means. These rules changes are complemented by the proposed amendments to Rule 41, which authorize the return of a search, arrest, or tracking-device warrant by reliable electronic means.

Proposed new Rule 4.1 brings together in a single rule the procedures for using phones or other reliable electronic means to apply for, approve, or issue warrants, summonses, and complaints. The procedures governing requests for search warrants "by telephonic or other reliable electronic means" under Rule 41(d)(3) and (e)(3) have been relocated to this rule, reordered for easier application, and extended to arrest warrants, complaints, and summonses.

The proposed amendments to Rule 32.1 and Rule 40 allow a defendant to request or consent to appear by video teleconference in certain proceedings to revoke or modify probation or supervised release or in a proceeding involving an arrest for failing to appear in another

district or for violating conditions of release set in another district. Conforming amendments are also proposed to Rule 43, which would otherwise require the defendant's physical presence at the proceedings.

The proposed amendments to Rule 49 permit a court to allow, by local rule, papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference.

Informational Items

The advisory committee withdrew its request to publish for comment proposed amendments to Rules 12 and 34. The amendments would require a defendant to raise the failure to state an offense before trial consistent with the Supreme Court decision in *United States v. Cotton*, 535 U.S. 625, 631 (2002), which held that a claim that an indictment failed to allege an essential element, raised for the first time after conviction, was forfeited and must meet "the plain-error test of Federal Rule of Criminal Procedure 52(b)." The advisory committee will continue to study the proposed amendments.

The advisory committee is also considering proposed amendments to Rule 32 to extend the rule's notice requirement to sentencing "variances" as well as sentencing "departures," and to provide the parties with the information given to and relied on by the probation officer writing the presentence report.

As part of its ongoing monitoring of the implementation of the Crime Victims' Rights Act, the advisory committee received a report from the Department of Justice about its biannual meetings with representatives of crime victims' organizations.

FEDERAL RULES OF EVIDENCE

Rule Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules submitted proposed amendments to Rule 804(b)(3) with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed changes were circulated to the bench and bar for comment in August 2008. The scheduled public hearings on the proposed changes were canceled because no one asked to testify.

The proposed amendments to Rule 804(b)(3) require the government to show corroborating circumstances as a condition for admission of an unavailable declarant's statement against penal interest. The current rule requires only the defendant to make such a showing. A number of courts have applied the corroborating-circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the rule does not so provide. A unitary approach to declarations against penal interest assures both the prosecution and the accused that the rule will not be abused and that only reliable hearsay statements will be admitted under the exception. The Department of Justice does not oppose the amendments.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference —

Approve the proposed amendments to Evidence Rule 804(b)(3) and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to the Federal Rules of Evidence are in Appendix E, with an excerpt from the advisory committee report.

Rules Approved for Publication and Comment

The Advisory Committee on Evidence Rules submitted proposed amendments to

Rules 801-1103 with a request that they be published for comment. The proposed amendments are the final part of the project to "restyle" the Evidence Rules to make them clearer and easier to read, without changing substantive meaning. The Evidence Rules "restyling" project follows the successful restyling of the Federal Rules of Appellate, Criminal, and Civil Procedure. The Committee approved the advisory committee's recommendation to publish the proposed amendments to Rules 801-1103, along with restyled Rules 101-706, which were approved earlier but deferred for publication so that all the proposed restyling amendments to the Evidence Rules could be published in a single package.

Informational Items

The advisory committee continues to monitor cases applying the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 34 (2004), which held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to cross-examine the declarant.

GUIDELINES FOR DISTINGUISHING BETWEEN LOCAL RULES AND STANDING ORDERS

At the request of several judges on circuit councils and in response to concerns expressed by lawyers, the Committee in early 2007 embarked on a study of the use of standing and general orders in district courts. In particular, the Committee was asked for guidance about the delineation between local rules and standing or general orders and about ways to improve access to standing or general orders on court web sites.

The Committee studied the general and standing orders and local rules in district courts posted on the courts' web sites and sent a survey to the chief district judge and chief bankruptcy judge of every district to obtain judges' views and suggestions. The Committee concluded that courts and judges have had difficulty in defining what subjects are appropriately addressed in standing or general orders on the one hand or in local rules on the other hand, primarily because

there are no national standards and very few local standards. Courts have also had difficulty in ensuring that standing or general orders are readily accessible to lawyers and litigants.

At its January 2009 meeting, the Committee considered a draft report and proposed voluntary guidelines — not rule changes that would impose requirements on courts — on standing and general orders. The report and guidelines were based on the results of the study and survey. The report describes the inconsistent uses of local rules, standing orders, administrative orders, and general orders, as well as problems in providing lawyers and litigants with adequate notice and access. The guidelines delineate matters appropriately addressed in standing or general orders and those appropriately addressed in local rules. In general, standing orders may be appropriate for internal administrative matters, emergency matters, transitory problems and issues, and rules of courtroom conduct that do not bear on substantive rules of practice. On the other hand, local rules are more appropriate to address filing, pretrial practice, motion practice, and other requirements imposed on litigants and lawyers. The guidelines also highlight ways to make standing and general orders on specific topics easier to find. The report and guidelines were revised in light of comments by members at the Committee meeting.

At its June 2009 meeting, the Committee unanimously agreed to forward the guidelines to the Judicial Conference with a recommendation that it adopt the guidelines and transmit them to the courts.

Recommendation: That the Judicial Conference —

> Approve the proposed *Guidelines for Distinguishing Between Matters Appropriate for Standing Orders and Matters Appropriate for Local Rules and for Posting Standing Orders on a Court's Web Site* and transmit them, along with an explanatory report, to the courts.

The proposed guidelines are in Appendix F, with an accompanying Committee report.

LONG-RANGE PLANNING

The Committee reviewed a draft report from the Ad Hoc Advisory Committee on Judiciary Planning on judiciary-wide strategic issues in light of its rulemaking responsibilities.

Respectfully submitted,

Lee H. Rosenthal

David J. Beck	John G. Kester
Douglas R. Cox	William J. Maledon
Ronald M. George	David Ogden
Marilyn L. Huff	Reena Raggi
Harris L Hartz	James A. Teilborg
	Diane P. Wood

Appendix A – Proposed Amendments to the Federal Rules of Appellate Procedure
Appendix B – Proposed Amendments to the Federal Rules of Bankruptcy Procedure
Appendix C – Proposed Amendments to the Federal Rules of Civil Procedure
Appendix D – Proposed Amendments to the Federal Rules of Criminal Procedure
Appendix E – Proposed Amendments to the Federal Rules of Evidence
Appendix F – Proposed Guidelines for Distinguishing Between Local Rules and Standing Orders

DATE: **May 8, 2009 (revised June 8, 2009)**

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

FROM: **Judge Carl E. Stewart, 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 16 and 17 in Kansas City, Missouri. The Committee gave final approval to proposed amendments to Appellate Rules 1 and 29 and Appellate Form 4[1].

* * * * *

Part II of this report discusses the proposals for which the Committee seeks final approval: proposed amendments to Rules 1 and 29 and to Form 4[2].

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[1]The Standing and Appellate Rules Committees by email ballot taken after the committees' meetings approved technical and conforming amendments to Appellate Rule 4(a)(7) to correct cross-references to Civil Rule 58(a), which had been renumbered as part of the restyling of the Civil Rules effective December 1, 2007.

[2]At the time this report was first written, the Appellate Rules Committee also planned to request final approval of a proposed amendment to Rule 40. However, prior to the Standing Committee's meeting on June 1-2, 2009, the determination was reached to recommend to the Standing Committee that it hold the Rule 40 proposal in abeyance rather than sending it forward for final approval. The Appellate Rules Committee was informed of this determination by email prior to the meeting and no member voiced disapproval. This is discussed further in Part II.C. of the report.

* * * * *

II. Action Items – for Final Approval

The Committee is seeking final approval of proposed amendments to Rules 1 and 29 and to Form 4[3].

A. Rule 1

Proposed new Rule 1(b) would define the term "state" for the purposes of the Appellate Rules. The proposal to define the term "state" grew out of the time-computation project's discussion of the definition of "legal holiday"; Rule 26(a)'s definition of "legal holiday" includes certain state holidays, and it was thought useful to define "state," for that purpose, to encompass the District of Columbia and federal territories, commonwealths and possessions.

As discussed below, the adoption of the proposed definition in Rule 1(b) permits the deletion of the reference to a "Territory, Commonwealth, or the District of Columbia" from Rule 29(a). The term "state" also appears in Rules 22, 44, and 46. The Committee does not believe that the adoption of proposed Rule 1(b) requires any changes in Rules 22, 44 or 46.

1. Text of Proposed Amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 1 as set out in the enclosure to this report.

2. Changes Made After Publication and Comment

No changes were made to the proposed amendment to Rule 1 after publication and comment.

The public comments on the proposed amendment are summarized in the enclosure to this report. The Committee discussed the suggestion by Daniel I.S.J. Rey-Bear that Rule 1(b)'s definition of "state" should also include federally recognized Indian tribes. Noting that this suggestion deserves careful consideration, the Committee placed the suggestion on its study agenda as a new item. Treating Mr. Rey-Bear's suggestion as a new study item will enable the Committee to consider the implications of that suggestion for the operation of Rules 22, 26, 29, 44 and 46, all of which use the term "state."

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[3]See supra note 2.

B. Rule 29

The proposed amendments would alter Rule 29(a) in the light of new Rule 1(b) and would add a new disclosure requirement to Rule 29(c).

Rule 29(a) currently provides that "[t]he United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing." Proposed Rule 1(b) will define "state" to include the District of Columbia and U.S. commonwealths or territories. Accordingly, the reference to a "Territory, Commonwealth, or the District of Columbia" should be deleted from Rule 29(a).

The proposed amendments would add a new disclosure requirement to Rule 29(c). The new provision, which is modeled on Supreme Court Rule 37.6, would require amicus briefs to indicate whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel contributed money that was intended to fund the preparation or submission of the brief, and to identify every person (other than the amicus, its members and its counsel) who contributed money that was intended to fund the brief's preparation or submission. The provision would exempt from the disclosure requirement amicus filings by various government entities.

1. Text of Proposed Amendment and Committee Note

The Committee recommends final approval of the proposed amendments to Rule 29 as set out in the enclosure to this report.

2. Changes Made After Publication and Comment

No changes were made to the proposed amendment to Rule 29(a). However, the Committee made a number of changes to Rule 29(c) in response to the comments.

One change concerns the third subdivision of the authorship and funding disclosure requirement. As published, that third subdivision would have directed the filer to "identif[y] every person — other than the amicus curiae, its members, or its counsel — who contributed money that was intended to fund preparing or submitting the brief." A commentator criticized this language as ambiguous, because the commentator argued that the provision as drafted did not make clear whether it is necessary for the brief to state that no such persons exist (if that is the case). The Committee accordingly revised this portion of the requirement to require a statement that indicates whether "a person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person."

Another set of changes concerns the placement of the disclosure requirement. As published, the Rule 29(c) proposal would have placed the new authorship and funding disclosure requirement in a new subdivision (c)(7) and would have moved the requirement of a corporate disclosure statement from the initial block of text in Rule 29(c) to a new subdivision (c)(6). New subdivision (c)(7) would have directed that the authorship and funding disclosure be made "in the first footnote on the first page." Commentators criticized this directive as ambiguous and suggested that a better approach would be to direct that the authorship and funding disclosure follow the statement currently required by existing Rule 29(c)(3). The Committee found merit in these suggestions and decided to move the authorship and funding disclosure provision up into Rule 29(c)(3). Having made that change, the Committee abandoned (as unnecessary) its proposal to move the corporate-disclosure provision to a new subdivision (c)(6). However, as described below, the proposed numbering of the subdivisions in Rule 29(c) was further changed in light of style guidance from Professor Kimble.

Subsequent to the Appellate Rules Committee's meeting, the language adopted by the advisory committee was circulated to Professor Kimble for style review. Professor Kimble argued that the authorship and funding disclosure provision should be placed in a separate subdivision rather than being placed in existing subdivision (c)(3). In the light of the Appellate Rules Committee's goal of listing the required components in the order in which they should appear in the brief, the decision was made to place the authorship and funding disclosure provision in a new subdivision following existing subdivision (c)(3). Though this will require renumbering the subparts of Rule 29(c), those subparts have only existed for about a decade (since the 1998 restyling) and citations to the specific subparts of Rule 29(c) do not appear in the caselaw. Given that this change entails renumbering some subparts of Rule 29(c), it also seems advisable to move the corporate disclosure provision into a new subdivision (c)(1) and to renumber the subsequent subdivisions accordingly. Professor Kimble also suggested two stylistic changes to the language of what will now become new subdivision (c)(5). First, instead of using the language "unless filed by an amicus curiae listed in the first sentence of Rule 29(a)," the provision now reads "unless the amicus curiae is one listed in the first sentence of Rule 29(a)." Second, the words "indicates whether" have been moved up into the introductory text in 29(c)(5) instead of being repeated at the outset of the three subsections (29(c)(5)(A), (B) and (C)). Also, a comma has been added to what will become Rule 29(c)(3).

Commentators made a number of other suggestions concerning the proposed authorship and funding disclosure requirement, and the Committee gave each of those suggestions careful consideration. A detailed record of the Committee's discussions can be found in the draft minutes.

C. Rule 40

Part II.C. of this report as originally drafted discussed a proposed amendment to Rule 40(a)(1). At the time this report was first written, the Committee planned to request final approval of that proposed amendment. But prior to the Standing Committee's June 1, 2009

meeting, the determination was reached to recommend to the Standing Committee that it hold the Rule 40 proposal in abeyance rather than sending it forward for final approval. The Appellate Rules Committee was informed of this determination by email prior to the meeting and no member voiced disapproval.

The proposed amendment to Rule 40(a)(1) would clarify the treatment of the time to seek rehearing in cases to which a United States officer or employee is a party. This proposal was published for comment in 2007 along with a proposal to make a similar clarifying amendment to Rule 4(a)(1)(B). However, the Committee subsequently noted that the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), raises questions concerning the advisability of pursuing the proposed amendment to Rule 4(a)(1)(B). That amendment would address 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. Accordingly, 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). A similar issue did not arise with respect to Rule 40(a)(1), because the deadlines for seeking rehearing are not set by statute. The Committee therefore determined to abandon the proposed amendment to Rule 4(a)(1)(B), but it voted without opposition to give final approval to the proposed amendment to Rule 40(a)(1). The Rule 40(a)(1) amendment would clarify the applicability of the extended (45-day) period for seeking rehearing, and it would render Rule 40(a)(1)'s language parallel to similar language in Civil Rule 12(a) concerning the time to serve an answer.

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). The question presented in *Eisenstein* read as follows: "Where the United States elects not to proceed with a qui tam action under the False Claims Act, and the relator instead conducts the action for the United States, must a notice of appeal be filed within the 60-day period provided for in Fed. R. App. P. 4(a)(1)(B), applicable when the United States is a 'party,' or the 30-day period provided for in Fed. R. App. P. 4(a)(1)(A)?" *Eisenstein* was argued on April 21, and as of the first writing of this report the case had not yet been decided. The decision in *Eisenstein* seemed likely to inform any future consideration by the Committee of the 30-day and 60-day periods in Rule 4(a)(1) and 28 U.S.C. § 2107.

When the Appellate Rules Committee met in April 2009, members discussed the grant of certiorari in *Eisenstein* and the advisability of affording the Department of Justice – as the original proponent of the Rule 4 and 40 proposals – the opportunity to consider whether it would prefer to seek coordinated amendments of both Rules 4 and 40. At the meeting, the Department of Justice representative undertook to consult with the Solicitor General and provide input on these questions prior to the Standing Committee meeting. The Committee determined by

consensus that, in the meantime, the Rule 40(a)(1) amendment would be placed on the Standing Committee's agenda for action at the June 2009 meeting.

Prior to the June 2009 meeting, the Department of Justice reported its intention to urge the Standing Committee to put the Rule 40 amendment on hold pending the Supreme Court's decision in *Eisenstein*. The Department suggested that the best course of action would be to await the *Eisenstein* decision and then to consider whether it is best to act on the Rule 40 issue alone or whether the Rule 40 issue should be linked to a possible change to Rule 4. In the light of this report, I decided to recommend to the Standing Committee that the Rule 40 proposal be held in abeyance for the present. I informed the Appellate Rules Committee members of this decision by email prior to the meeting and no members voiced dissent from this course of action.

Due to the decision not to recommend the Rule 40 proposal for final approval at the June 2009 meeting, Parts II.C.1. and II.C.2. of this report are omitted from this revised version of the report. Those parts addressed the text of the proposed Rule 40 amendment, its Note, and the changes made after publication and comment.

D. Form 4

The privacy rules that took effect December 1, 2007, require redaction of social security numbers (except for the last four digits) and provide that references to an individual known to be a minor should include only the minor's initials. New Criminal Rule 49.1(a)(5) also requires redaction of individuals' home addresses (so that only the city and state are shown). These rules require changes in Appellate Form 4, which concerns the information that must accompany a motion for permission to appeal in forma pauperis. The Administrative Office ("AO") has made interim changes to the version of Form 4 that is posted on the AO's website, but those interim changes do not remove the need to amend the official version of Form 4 to conform to the privacy requirements.

Moving forward, the Committee will also consider other changes to Form 4. For one thing, an effort is underway to restyle all the forms. More substantively, not all i.f.p. applications require the detail specified in current Form 4; for example, a much simpler form might be appropriate in the habeas context. In addition, the Committee will consider whether to revise Question 10, which requests the name of any attorney whom the litigant has paid (or will pay) for services in connection with the case, as well as the amount of such payments. The Committee has placed these matters on its study agenda, and plans to consult other Advisory Committees about them because Form 4 is often used in the district courts.

The Committee believes, however, that it is important to take immediate action to bring the official version of Form 4 into compliance with the new privacy requirements. Accordingly, the Committee seeks final approval of the proposed amendment.

1. Text of Proposed Amendment

The Committee recommends final approval of the proposed amendment to Form 4 as set out in the enclosure to this report.

2. Changes Made After Publication and Comment

No changes were made to the proposed amendment to Form 4 after publication and comment.

* * * * *

Enclosures

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 1. Scope of Rules; Definition; Title

(a) Scope of Rules.

(1) These rules govern procedure in the United States courts of appeals.

(2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

(b) ~~[Abrogated.]~~ **Definition.** In these rules, 'state' includes the District of Columbia and any United States commonwealth or territory.

(c) Title. These rules are to be known as the Federal Rules of Appellate Procedure.

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

Committee Note

Subdivision (b). New subdivision (b) defines the term "state" to include the District of Columbia and any commonwealth or territory of the United States. Thus, as used in these Rules, "state" includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made after publication and comment.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

* * * * *

(7) **Entry Defined.**

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a)~~(1)~~ does not require a separate document, when the judgment or order

is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a)~~(1)~~ requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by

Federal Rule of Civil Procedure 58(a)~~(1)~~ does not affect the validity of an appeal from that judgment or order.

* * * * *

Committee Note

Subdivision (a)(7). Subdivision (a)(7) is amended to reflect the renumbering of Civil Rule 58 as part of the 2007 restyling of the Civil Rules. References to Civil Rule "58(a)(1)" are revised to refer to Civil Rule "58(a)." No substantive change is intended.

The amendments are technical and conforming. In accordance with established Judicial Conference procedures they were not published for public comment.

Rule 29. Brief of an Amicus Curiae

(a) **When Permitted.** The United States or its officer or agency~~;~~ or a state ~~State, Territory, Commonwealth, or the District of Columbia~~ may file an amicus-curiae brief without the consent of the parties or leave of court. Any

other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

* * * * *

(c) Contents and Form. An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. ~~If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1.~~ An amicus brief need not comply with Rule 28, but must include the following:

(1) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

~~(1)~~(2) a table of contents, with page references;

~~(2)~~(3) a table of authorities — cases (alphabetically arranged), statutes, and other authorities —

with references to the pages of the brief where they are cited;

~~(3)~~(4) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(5) unless the amicus curiae is one listed in the first sentence of Rule 29(a), a statement that indicates whether:

(A) a party's counsel authored the brief in whole or in part;

(B) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(C) a person — other than the amicus curiae, its members, or its counsel — contributed money that was intended to fund preparing or

submitting the brief and, if so, identifies each such person;

~~(4)~~(6) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

~~(5)~~(7) a certificate of compliance, if required by Rule 32(a)(7).

* * * * *

Committee Note

Subdivision (a). New Rule 1(b) defines the term "state" to include "the District of Columbia and any United States commonwealth or territory." That definition renders subdivision (a)'s reference to a "Territory, Commonwealth, or the District of Columbia" redundant. Accordingly, subdivision (a) is amended to refer simply to "[t]he United States or its officer or agency or a state."

Subdivision (c). The subparts of subdivision (c) are renumbered due to the relocation of an existing provision in new subdivision (c)(1) and the addition of a new provision in new subdivision (c)(5). Existing subdivisions (c)(1) through (c)(5) are renumbered, respectively, (c)(2), (c)(3), (c)(4), (c)(6) and (c)(7). The

new ordering of the subdivisions tracks the order in which the items should appear in the brief.

Subdivision (c)(1). The requirement that corporate amici include a disclosure statement like that required of parties by Rule 26.1 was previously stated in the third sentence of subdivision (c). The requirement has been moved to new subdivision (c)(1) for ease of reference.

Subdivision (c)(5). New subdivision (c)(5) sets certain disclosure requirements concerning authorship and funding. Subdivision (c)(5) exempts from the authorship and funding disclosure requirements entities entitled under subdivision (a) to file an amicus brief without the consent of the parties or leave of court. Subdivision (c)(5) requires amicus briefs to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel contributed money with the intention of funding the preparation or submission of the brief. A party's or counsel's payment of general membership dues to an amicus need not be disclosed. Subdivision (c)(5) also requires amicus briefs to state whether any other "person" (other than the amicus, its members, or its counsel) contributed money with the intention of funding the brief's preparation or submission, and, if so, to identify all such persons. "Person," as used in subdivision (c)(5), includes artificial persons as well as natural persons.

The disclosure requirement, which is modeled on Supreme Court Rule 37.6, serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs. *See Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (noting the majority's suspicion "that amicus briefs are often used as a means of evading the page limitations on a party's briefs"). It also may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief.

It should be noted that coordination between the amicus and the party whose position the amicus supports is desirable, to the extent that it helps to avoid duplicative arguments. This was particularly true prior to the 1998 amendments, when deadlines for amici were the same as those for the party whose position they supported. Now that the filing deadlines are staggered, coordination may not always be essential in order to avoid duplication. In any event, mere coordination — in the sense of sharing drafts of briefs — need not be disclosed under subdivision (c)(5). *Cf.* Eugene Gressman et al., Supreme Court Practice 739 (9th ed. 2007) (Supreme Court Rule 37.6 does not "require disclosure of any coordination and discussion between party counsel and amici counsel regarding their respective arguments . . . .").

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made to the proposed amendment to Rule 29(a). However, the Committee made a number of changes to Rule 29(c).

One change concerns the third subdivision of the authorship and funding disclosure requirement. As published, that third subdivision would have directed the filer to "identif[y] every person — other than the amicus curiae, its members, or its counsel — who contributed money that was intended to fund preparing or submitting the brief." A commentator criticized this language as ambiguous, because the commentator argued that the provision as drafted did not make clear whether it is necessary for the brief to state that no such persons exist (if that is the case). The Committee revised this portion of the requirement to require a statement that indicates whether "a person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person."

Another set of changes concerns the placement of the disclosure requirement. As published, the Rule 29(c) proposal would have placed the new authorship and funding disclosure requirement in a new subdivision (c)(7) and would have moved the requirement of a corporate disclosure statement from the initial block of text in Rule 29(c) to a new subdivision (c)(6). New subdivision (c)(7) would have directed that the authorship and funding disclosure be made "in the first footnote on the first page." Commentators criticized this directive as ambiguous and suggested that a better approach would be to direct that the authorship and funding disclosure follow the statement currently required by existing Rule 29(c)(3). The Committee found merit in these suggestions and decided to add the authorship and funding disclosure provision to existing subdivision (c)(3). However, a further revision to the structure of subdivision (c) was later made in response to style guidance from Professor Kimble, as discussed below.

Subsequent to the Appellate Rules Committee's meeting, the language adopted by the advisory committee was circulated to Professor Kimble for style review. Professor Kimble argued that the authorship and funding disclosure provision should be placed in a separate subdivision rather than being placed in existing subdivision (c)(3). In the light of the Appellate Rules Committee's goal of listing the required components in the order in which they should appear in the brief, the decision was made to place the authorship and funding disclosure provision in a new subdivision following existing subdivision (c)(3). Though this requires renumbering the subparts of Rule 29(c), those subparts have only existed for about a decade (since the 1998 restyling) and citations to the specific subparts of Rule 29(c) do not appear in the caselaw. Given that this change entails renumbering some subparts of Rule 29(c), it also seems advisable to move the corporate disclosure provision into a new subdivision (c)(1) and to renumber the subsequent subdivisions accordingly. Professor Kimble also suggested two stylistic changes to the language of what

will now become new subdivision (c)(5). First, instead of using the language "unless filed by an amicus curiae listed in the first sentence of Rule 29(a)," the provision now reads "unless the amicus curiae is one listed in the first sentence of Rule 29(a)." Second, the words "indicates whether" have been moved up into the introductory text in 29(c)(5) instead of being repeated at the outset of the three subsections (29(c)(5)(A), (B) and (C)). Also, a comma has been added to what will become Rule 29(c)(3).

Form 4. Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis

* * * * *

7. *State the persons who rely on you or your spouse for support.*

Name [or, if under 18, initials only] Relationship Age

_____ _____ ____

* * * * *

13. *State the ~~address~~ city and state of your legal residence.*

_____

Your daytime phone number: (____) _____

Your age: _____ Your years of schooling: _____

~~Your~~ Last four digits of your social-security number: _____

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made after publication and comment.

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

DATE: **May 11, 2009**

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

I. Introduction

The Advisory Committee on Bankruptcy Rules met on March 26 and 27, 2009, in San Diego, California.

* * * * *

Among the matters before the Committee were the proposed amendments and new rules that were published for public comment in August 2008. Six written comments were submitted in response to the publication, and the Advisory Committee carefully considered them. Because no one requested to appear at the public hearings scheduled for January 23 and February 6, 2009, the hearings were canceled.

* * * * *

After careful consideration and discussion, 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 1007, 1014, 1015, 1018, 1019, 4004, 5009, 7001, 9001, and new Rule 5012;

(b) approval for transmission to the Judicial Conference without publication of amendments to Rule 4001 and Official Form 23[1];

* * * * *

II. Action Items

A. Items for Final Approval

1. Amendments and New Rule 5012 Published for Comment in August 2008. **The Advisory Committee recommends that the proposed amendments and new rule that are summarized below be approved and forwarded to the Judicial Conference.** With the exception of Rules 4004 and 7001, it is recommended that the rules be approved as published. The Advisory Committee recommends that Rules 4004 and 7001 be approved as revised subsequent to publication. The texts of the amended rules and new rule are set out in Appendix B.

Rule 1007 is amended in subdivision (a) to shorten the time from 15 to seven days for the debtor to file a list of creditors after the entry of an order for relief in an involuntary case. Subdivision (c) of the rule is amended to extend from 45 to 60 days the time for individual debtors in chapter 7 to file the statement of completion of a course in personal financial management. The latter amendment is proposed in conjunction with the proposed amendment to Rule 5009.

No comment was submitted on the proposed amendments, and no change was made after publication.

Rule 1014 is amended to include chapter 15 cases among those subject to the rule that authorizes the court to determine where cases should proceed when multiple petitions involving the same debtor are pending.

No comment was submitted on the proposed amendment, and no change was made after publication.

Rule 1015 is amended to include chapter 15 cases among those subject to the rule that authorizes the court to order the consolidation or joint administration of cases.

No comment was submitted on the proposed amendment, and no change was made after publication.

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[1]Following the Standing Committee's June 1-2, 2009, meeting, the Rules Committees approved by email ballot a technical and conforming amendment to Exhibit D to Official Form 1.

Rule 1018 is amended to reflect the enactment of chapter 15 of the Bankruptcy Code in 2005. The rule is also amended to clarify that, in specifying the applicability of certain Part VII rules, it applies to contests over involuntary petitions, but it does not apply to matters that are merely related to a contested involuntary petition.

No comment was submitted on the proposed amendments, and no change was made after publication.

Rule 1019 is amended by redesignating subdivision (2) as subdivision (2)(A) and adding a new subdivision (2)(B). Subdivision (2)(B) provides that a new time period to object to a claim of exemption arises when a case is converted to chapter 7 from chapter 11, 12, or 13. The new time period does not arise, however, if the conversion occurs more than one year after the first order confirming a plan, or if the case was previously pending under chapter 7 and the objection period had expired in the original chapter 7 case.

One comment was submitted on this amendment, **Comment 08-BK-005**. It expressed support for allowing a new objection period after a case is converted to chapter 7, but disagreed with creating an exception for cases converted more than a year after the plan in chapter 11, 12, or 13 was confirmed.

No change was made after publication. The Committee supported the one-year exception because a debtor in that situation may have made substantial payments to creditors under a plan and may also have made improvements on property or otherwise relied on its exempt status prior to conversion of the case.

Rule 4004 is amended to include a deadline in subdivision (a) for the filing of motions (rather than complaints) objecting to discharge under §§ 727(a)(8), (a)(9), and § 1328(f) of the Bankruptcy Code. Subdivision (c)(1) is amended to take account of the authority under subdivision (d) to raise objections to discharge under § 727(a)(8) and (a)(9) by motion. Subdivision (c)(4) is added to the rule. It directs the court in chapter 11 and 13 cases to withhold the entry of the discharge if the debtor has not filed with the court a statement of completion of a course concerning personal financial management as required by Rule 1007(b)(7). Finally, subdivision (d) is amended to provide that objections to discharge under §§ 727(a)(8), (a)(9), and 1328(f) are commenced by motion and are treated as contested matters rather than adversary proceedings.

Two comments were submitted on the originally proposed amendments to this rule and to Rule 7001, **Comments 08-BK-001 and 08-BK-003**. Both comments suggested that the authorization for raising objections to discharge under §§ 727(a)(8), (a)(9), and 1328(f) by motion should be located in Rule 4004, rather than in the proposed new subdivision (b) of Rule 7001. The Part VII rules address adversary proceedings, and the new motions will initiate contested matters. One of the comments also expressed concern that the treatment of only three of the grounds for objecting to discharge as contested matters, rather than as adversary proceedings, will create confusion.

Following publication, the Committee moved the content of Rule 7001(b) to Rule 4004(d). Rule 4004(a) and (c)(1) were also revised to change references to "motion under Rule 7001(b)" to "motion under § 727(a)(8) or (a)(9) of the Code." The Committee concluded that, by clarifying when an objection to discharge is raised by motion and when by complaint, the amendment should contribute to the uniformity of practice nationwide and reduce, not increase, confusion in individual courts.

Rule 5009 is amended to redesignate the former rule as new subdivision (a) and to add new subdivisions (b) and (c) to the rule. Subdivision (b) requires the clerk to provide notice to individual debtors in chapter 7 and chapter 13 cases that their case may be closed without the entry of a discharge if they fail to file a timely statement that they have completed a personal financial management course. Subdivision (c) requires a foreign representative in a chapter 15 case to file and give notice of the filing of a final report in the case.

Two comments were submitted on this amendment, **Comments 08-BK-003 and 08-BK-006**. One comment expressed concern that the requirement in new subdivision (b) places an unnecessary burden on the clerk's office and that it might appear to be overly solicitous of debtors. The other commented that the service list under subdivision (c) should be expanded to include all secured and major unsecured creditors both in the United States and abroad.

No change was made after publication. A survey of clerks revealed that many bankruptcy courts are already providing a notice of the type required by subdivision (b) and that a majority of the respondents did not believe that the requirement would impose an unreasonable burden on the clerk's office. The service list under subdivision (c) is consistent with the list of those who receive notice of the hearing on the chapter 15 petition under Rule 2002(q). Should the foreign representative commence a case under another chapter, notice would be given to all creditors.

Rule 5012 is new. It establishes the procedure in chapter 15 cases for obtaining court approval of an agreement or protocol regarding communications and the coordination of proceedings with cases involving the debtor pending in other countries.

The same suggestion regarding expansion of the service list that was made regarding Rule 5009(c) was made with respect to this rule (**Comment 08-BK-006**).

No change was made after publication.

Rule 7001 is amended in paragraph (4) to except from the listing of adversary proceedings objections to discharge under §§ 727(a)(8), (a)(9), and 1328(f).

As discussed above, two comments were submitted on the originally proposed amendments to this rule and to Rule 4004, **Comments 08-BK-001 and 08-BK-003**.

After publication, the Advisory Committee deleted proposed subdivision (b) and moved its content to Rule 4004(d). The redesignation of the existing rule as subdivision (a) was also deleted, and the exception in paragraph (4) of the rule was changed to refer to objections under §§ 727(a)(8), (a)(9), and 1328(f) of the Code.

Rule 9001 is amended to add § 1502 to the list of definitional provisions in the Bankruptcy Code that are applicable to the Bankruptcy Rules.

No comment was submitted on the proposed amendment, and no change was made after publication.

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 rule and form are set out in Appendix B.

Rule 4001 is amended to change two time periods that were inadvertently omitted from the time computation amendments package. Subdivision (d)(2) is amended to change the time period for filing objections to certain motions from 15 to 14 days of the mailing of notice. Subdivision (d)(3) is amended to change the length of notice required for certain hearings from five to seven days.

Official Form 23 is amended to conform to the amendment to Rule 1007(c), which is discussed above and for which final approval is also sought. The rule amendment changes the deadline for a chapter 7 debtor to file a statement of completion of a personal financial management course from 45 to 60 days after the first date set for the meeting of creditors. The form's statement of that deadline is amended to reflect the change. The Committee recommends that the effective date of the amendment of Form 23 be the same as the effective date of the amendment to Rule 1007(c) – December 1, 2010.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 1007. Lists, Schedules, Statements, and Other Documents; Time Limits**

(a) CORPORATE OWNERSHIP STATEMENT, LIST OF CREDITORS AND EQUITY SECURITY HOLDERS, AND OTHER LISTS.

* * * * *

(2) *Involuntary Case.* In an involuntary case, the debtor shall file, within ~~14~~ seven days after entry of the order for relief, a list containing the name and address of each entity included or to be included on Schedules D, E, F, G, and H as prescribed by the Official Forms.

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

**Incorporates amendments approved by the Supreme Court scheduled to take effect on December 1, 2009, if Congress takes no action to the contrary.

(c) TIME LIMITS. In a voluntary case, the schedules, statements, and other documents required by subdivision (b)(1), (4), (5), and (6) shall be filed with the petition or within 14 days thereafter, except as otherwise provided in subdivisions (d), (e), (f), and (h) of this rule. In an involuntary case, the list in subdivision (a)(2), and the schedules, statements, and other documents required by subdivision (b)(1) shall be filed by the debtor within 14 days of the entry of the order for relief. In a voluntary case, the documents required by paragraphs (A), (C), and (D) of subdivision (b)(3) shall be filed with the petition. Unless the court orders otherwise, a debtor who has filed a statement under subdivision (b)(3)(B), shall file the documents required by subdivision (b)(3)(A) within 14 days of the order for relief. In a chapter 7 case, the debtor shall file the statement required by subdivision (b)(7) within ~~45~~ 60 days after the first date set for the meeting of creditors under § 341 of the Code, and in

a chapter 11 or 13 case no later than the date when the last payment was made by the debtor as required by the plan or the filing of a motion for a discharge under § 1141(d)(5)(B) or § 1328(b) of the Code. The court may, at any time and in its discretion, enlarge the time to file the statement required by subdivision (b)(7). The debtor shall file the statement required by subdivision (b)(8) no earlier than the date of the last payment made under the plan or the date of the filing of a motion for a discharge under §§ 1141(d)(5)(B), 1228(b), or 1328(b) of the Code. Lists, schedules, statements, and other documents filed prior to the conversion of a case to another chapter shall be deemed filed in the converted case unless the court directs otherwise. Except as provided in § 1116(3), any extension of time to file schedules, statements, and other documents required under this rule may be granted only on motion for cause shown and on notice to the United States trustee, any committee elected under § 705 or appointed under

§ 1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

* * * * *

COMMITTEE NOTE

Subdivision (a)(2). Subdivision (a)(2) is amended to shorten the time for a debtor to file a list of the creditors included on the various schedules filed or to be filed in the case. This list provides the information necessary for the clerk to provide notice of the § 341 meeting of creditors in a timely manner.

Subdivision (c). Subdivision (c) is amended to provide additional time for individual debtors in chapter 7 to file the statement of completion of a course in personal financial management. This change is made in conjunction with an amendment to Rule 5009 requiring the clerk to provide notice to debtors of the consequences of not filing the statement in a timely manner.

Changes Made After Publication:

No changes since publication.

Rule 1014. Dismissal and Change of Venue

* * * * *

(b) PROCEDURE WHEN PETITIONS INVOLVING THE SAME DEBTOR OR RELATED DEBTORS ARE FILED IN DIFFERENT COURTS. If petitions commencing cases under the Code or seeking recognition under chapter 15 are filed in different districts by, regarding, or against (1) the same debtor, ~~or~~ (2) a partnership and one or more of its general partners, ~~or~~ (3) two or more general partners, or (4) a debtor and an affiliate, on motion filed in the district in which the petition filed first is pending and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, the court may determine, in the interest of justice or for the convenience of the parties, the district or districts in which the case or cases should proceed. Except as otherwise ordered by the court in the district in which the petition filed first is pending, the proceedings on

the other petitions shall be stayed by the courts in which they have been filed until the determination is made.

COMMITTEE NOTE

Subdivision (b). Subdivision (b) of the rule is amended to provide that petitions for recognition of a foreign proceeding are included among those that are governed by the procedure for determining where cases should go forward when multiple petitions involving the same debtor are filed. The amendment adds a specific reference to chapter 15 petitions and also provides that the rule governs proceedings regarding a debtor as well as those that are filed by or against a debtor.

Other changes are stylistic.

Changes Made After Publication:

No changes since publication.

Rule 1015. Consolidation or Joint Administration of Cases Pending in Same Court

(a) CASES INVOLVING SAME DEBTOR. If two or more petitions by, regarding, or against the same debtor are

pending in the same court ~~by or against the same debtor~~, the court may order consolidation of the cases.

* * * * *

COMMITTEE NOTE

Subdivision (a). By amending subdivision (a) to include cases regarding the same debtor, the rule explicitly recognizes that the court's authority to consolidate cases when more than one petition is filed includes the authority to consolidate cases when one or more of the petitions is filed under chapter 15. This amendment is made in conjunction with the amendment to Rule 1014(b), which also governs petitions filed under chapter 15 regarding the same debtor as well as those filed by or against the debtor.

Changes Made After Publication:

No changes since publication.

Rule 1018. Contested Involuntary Petitions; Contested Petitions Commencing ~~Ancillary~~ Chapter 15 Cases; Proceedings to Vacate Order for Relief; Applicability of Rules in Part VII Governing Adversary Proceedings

Unless the court otherwise directs and except as otherwise prescribed in Part I of these rules, the ~~The~~

following rules in Part VII apply to all proceedings ~~relating to a contested~~ contesting an involuntary ~~petition, to proceedings relating to a contested~~ petition or a chapter 15 petition for recognition ~~commencing a case ancillary to a foreign proceeding~~, and to all proceedings to vacate an order for relief: Rules 7005, 7008-7010, 7015, 7016, 7024-7026, 7028-7037, 7052, 7054, 7056, and 7062~~, except as otherwise provided in Part I of these rules and unless the court otherwise directs~~. The court may direct that other rules in Part VII shall also apply. For the purposes of this rule a reference in the Part VII rules to adversary proceedings shall be read as a reference to proceedings ~~relating to a contested~~ contesting an involuntary ~~petition, or contested ancillary~~ petition or a chapter 15 petition for recognition, or proceedings to vacate an order for relief. Reference in the Federal Rules of Civil Procedure to the complaint shall be read as a reference to the petition.

COMMITTEE NOTE

The rule is amended to reflect the enactment of chapter 15 of the Code in 2005. As to chapter 15 cases, the rule applies to contests over the petition for recognition and not to all matters that arise in the case. Thus, proceedings governed by § 1519(e) and § 1521(e) of the Code must comply with Rules 7001(7) and 7065, which provide that actions for injunctive relief are adversary proceedings governed by Part VII of the rules. The rule is also amended to clarify that it applies to contests over an involuntary petition, and not to matters merely "relating to" a contested involuntary petition. Matters that may arise in a chapter 15 case or an involuntary case, other than contests over the petition itself, are governed by the otherwise applicable rules.

Other changes are stylistic.

Changes Made After Publication:

No changes since publication.

Rule 1019. Conversion of a Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to a Chapter 7 Liquidation Case

When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case:

* * * * *

(2) *New Filing Periods.*

(A) A new time period for filing a motion under § 707(b) or (c), a claim, a complaint objecting to discharge, or a complaint to obtain a determination of dischargeability of any debt shall commence under Rules 1017, 3002, 4004, or 4007, but a new time period shall not commence if a chapter 7 case had been converted to a chapter 11, 12, or 13 case and thereafter reconverted to a chapter 7 case and the time for filing a motion under § 707(b) or (c), a claim, a complaint objecting to discharge, or a complaint to obtain a determination of the dischargeability of any debt, or any extension thereof, expired in the original chapter 7 case.

(B) A new time period for filing an objection to a claim of exemptions shall commence under Rule 4003(b) after conversion of a case to chapter 7 unless:

(i) the case was converted to chapter 7 more than one year after the entry of the first order confirming a plan under chapter 11, 12, or 13; or

(ii) the case was previously pending in chapter 7 and the time to object to a claimed exemption had expired in the original chapter 7 case.

* * * * *

COMMITTEE NOTE

Subdivision (2). Subdivision (2) is redesignated as subdivision (2)(A), and a new subdivision (2)(B) is added to the rule. Subdivision (2)(B) provides that a new time period to object to a claim of exemption arises when a case is converted to chapter 7 from chapter 11, 12, or 13. The new time period does not arise, however, if the conversion occurs more than one year after the first order confirming a plan, even if the plan was subsequently modified. A new objection period also does not arise if the case was previously pending under chapter 7 and the objection period had expired in the prior chapter 7 case.

Changes Made After Publication:

No changes since publication.

Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements

* * * * *

(d) AGREEMENT RELATING TO RELIEF FROM THE AUTOMATIC STAY, PROHIBITING OR CONDITIONING THE USE, SALE, OR LEASE OF PROPERTY, PROVIDING ADEQUATE PROTECTION, USE OF CASH COLLATERAL, AND OBTAINING CREDIT.

* * * * *

(2) *Objection.* Notice of the motion and the time within which objections may be filed and served on the debtor in possession or trustee shall be mailed to the parties on whom service is required by paragraph (1) of this subdivision and to such other entities as the court may direct. Unless the

court fixes a different time, objections may be filed within ~~15~~ 14 days of the mailing of the notice.

(3) *Disposition; Hearing.* If no objection is filed, the court may enter an order approving or disapproving the agreement without conducting a hearing. If an objection is filed or if the court determines a hearing is appropriate, the court shall hold a hearing on no less than ~~five~~ seven days' notice to the objector, the movant, the parties on whom service is required by paragraph (1) of this subdivision and such other entities as the court may direct.

* * * * *

COMMITTEE NOTE

Subdivision (d). Subdivision (d) is amended to implement changes in connection with the 2009 amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadlines in subdivision (d)(2) and (d)(3) are amended to substitute deadlines that are multiples of seven days. Throughout the rules, deadlines have been amended in the following manner:

- 5 day periods become 7 day periods
- 10 day periods become 14 day periods

- 15 day periods become 14 day periods
- 20 day periods become 21 day periods
- 25 day periods become 28 day periods

Final approval of the amendments to this rule is sought without publication.

Rule 4004. Grant or Denial of Discharge***

(a) TIME FOR ~~FILING COMPLAINT~~ OBJECTING TO DISCHARGE; NOTICE OF TIME FIXED. In a chapter 7 ~~liquidation~~ case, a complaint, or a motion under § 727(a)(8) or (a)(9) of the Code, objecting to the debtor's discharge ~~under § 727(a) of the Code~~ shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). In a chapter 11 ~~reorganization~~ case, the complaint shall be filed no later than the first date set for the hearing on

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*** Incorporates amendments approved by the Supreme Court scheduled to take effect on December 1, 2009, if Congress takes no action to the contrary.

confirmation. In a chapter 13 case, a motion objecting to the debtor's discharge under § 1328(f) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). At least 28 days' notice of the time so fixed shall be given to the United States trustee and all creditors as provided in Rule 2002(f) and (k) and to the trustee and the trustee's attorney.

* * * * *

(c) GRANT OF DISCHARGE.

(1) In a chapter 7 case, on expiration of the ~~time~~ times fixed for ~~filing a complaint~~ objecting to discharge and ~~the time fixed~~ for filing a motion to dismiss the case under Rule 1017(e), the court shall forthwith grant the discharge unless:

(A) the debtor is not an individual;

(B) a complaint, or a motion under § 727(a)(8) or (a)(9), objecting to the discharge has been filed and not decided in the debtor's favor;

* * * * *

(4) In a chapter 11 case in which the debtor is an individual, or a chapter 13 case, the court shall not grant a discharge if the debtor has not filed any statement required by Rule 1007(b)(7).

(d) APPLICABILITY OF RULES IN PART VII AND RULE 9014. An objection to discharge ~~A proceeding commenced by a complaint objecting to discharge~~ is governed by Part VII of these rules, except that an objection to discharge under §§ 727(a)(8), (a)(9), or 1328(f) is commenced by motion and governed by Rule 9014.

* * * * *

COMMITTEE NOTE

Subdivision (a). Subdivision (a) is amended to include a deadline for filing a motion objecting to a debtor's discharge under §§ 727(a)(8), (a)(9), or 1328(f) of the Code. These sections establish time limits on the issuance of discharges in successive bankruptcy cases by the same debtor.

Subdivision (c). Subdivision (c)(1) is amended because a corresponding amendment to subdivision (d) directs certain objections to discharge to be brought by motion rather than by complaint. Subparagraph (c)(1)(B) directs the court not to grant a discharge if a motion or complaint objecting to discharge has been filed unless the objection has been decided in the debtor's favor.

Subdivision (c)(4) is new. It directs the court in chapter 11 and 13 cases to withhold the entry of the discharge if an individual debtor has not filed a statement of completion of a course concerning personal financial management as required by Rule 1007(b)(7).

Subdivision (d). Subdivision (d) is amended to direct that objections to discharge under §§ 727(a)(8), (a)(9), and 1328(f) be commenced by motion rather than by complaint. Objections under the specified provisions are contested matters governed by Rule 9014. The title of the subdivision is also amended to reflect this change.

Changes Made After Publication:

Subdivision (d) was amended to provide that objections to discharge under §§ 727(a)(8), (a)(9), and 1328(f) are commenced by motion rather than by complaint and are governed by Rule 9014. Because of the relocation of this provision from the previously

proposed Rule 7001(b), subdivisions (a) and (c)(1) of this rule were revised to change references to "motion under Rule 7001(b)" to "motion under § 727(a)(8) or (a)(9)." Other stylistic changes were made to the rule, and the Committee Note was revised to reflect these changes.

Rule 5009. Closing Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, ~~and~~ Chapter 13 Individual's Debt Adjustment, and Chapter 15 Ancillary and Cross-Border Cases

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

(b) NOTICE OF FAILURE TO FILE RULE 1007(b)(7) STATEMENT. If an individual debtor in a chapter 7 or 13 case has not filed the statement required by

Rule 1007(b)(7) within 45 days after the first date set for the meeting of creditors under § 341(a) of the Code, the clerk shall promptly notify the debtor that the case will be closed without entry of a discharge unless the statement is filed within the applicable time limit under Rule 1007(c).

(c) CASES UNDER CHAPTER 15. A foreign representative in a proceeding recognized under § 1517 of the Code shall file a final report when the purpose of the representative's appearance in the court is completed. The report shall describe the nature and results of the representative's activities in the court. The foreign representative shall transmit the report to the United States trustee, and give notice of its filing to the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all parties to litigation pending in the United States in which the debtor was a party at the time of the filing of the petition, and such other entities as the court may direct. The

foreign representative shall file a certificate with the court that notice has been given. If no objection has been filed by the United States trustee or a party in interest within 30 days after the certificate is filed, there shall be a presumption that the case has been fully administered.

COMMITTEE NOTE

Subdivisions (a) and (b). The rule is amended to redesignate the former rule as subdivision (a) and to add new subdivisions (b) and (c) to the rule. Subdivision (b) requires the clerk to provide notice to an individual debtor in a chapter 7 or 13 case that the case may be closed without the entry of a discharge due to the failure of the debtor to file a timely statement of completion of a personal financial management course. The purpose of the notice is to provide the debtor with an opportunity to complete the course and file the appropriate document prior to the filing deadline. Timely filing of the document avoids the need for a motion to extend the time retroactively. It also avoids the potential for closing the case without discharge, and the possible need to pay an additional fee in connection with reopening. Timely filing also benefits the clerk's office by reducing the number of instances in which cases must be reopened.

Subdivision (c). Subdivision (c) requires a foreign representative in a chapter 15 case to file a final report setting out the foreign representative's actions and results obtained in the United States court. It also requires the foreign representative to give notice of the filing of the report, and provides interested parties with 30 days

to object to the report after the foreign representative has certified that notice has been given. In the absence of a timely objection, a presumption arises that the case is fully administered, and the case may be closed.

Changes Made After Publication:

No changes since publication.

Rule 5012. Agreements Concerning Coordination of Proceedings in Chapter 15 Cases

Approval of an agreement under § 1527(4) of the Code shall be sought by motion. The movant shall attach to the motion a copy of the proposed agreement or protocol and, unless the court directs otherwise, give at least 30 days' notice of any hearing on the motion by transmitting the motion to the United States trustee, and serving it on the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under § 1519, all parties to litigation pending in the

United States in which the debtor was a party at the time of the filing of the petition, and such other entities as the court may direct.

COMMITTEE NOTE

This rule is new. In chapter 15 cases, any party in interest may seek approval of an agreement, frequently referred to as a "protocol," that will assist with the conduct of the case. Because the needs of the courts and the parties may vary greatly from case to case, the rule does not attempt to limit the form or scope of a protocol. Rather, the rule simply requires that approval of a particular protocol be sought by motion, and designates the persons entitled to notice of the hearing on the motion. These agreements, or protocols, drafted entirely by parties in interest in the case, are intended to provide valuable assistance to the court in the management of the case. Interested parties may find guidelines published by organizations, such as the American Law Institute and the International Insolvency Institute, helpful in crafting agreements or protocols to apply in a particular case.

Changes Made After Publication:

No changes since publication

Rule 7001. Scope of Rules of Part VII

An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:

* * * * *

(4) a proceeding to object to or revoke a discharge, other than an objection to discharge under §§ 727(a)(8), (a)(9), or 1328(f);

* * * * *

COMMITTEE NOTE

Paragraph (4) of the rule is amended to create an exception for objections to discharge under §§ 727(a)(8), (a)(9), and 1328(f) of the Code. Because objections to discharge on these grounds typically present issues more easily resolved than other objections to discharge, the more formal procedures applicable to adversary proceedings, such as commencement by a complaint, are not required. Instead, objections on these three grounds are governed by Rule 4004(d). In an appropriate case, however, Rule 9014(c) allows the court to order that additional provisions of Part VII of the rules apply to these matters.

Changes Made After Publication:

The proposed addition of subsection (b) was deleted, and the content of that provision was moved to Rule 4004(d). The exception in paragraph (4) of the rule was revised to refer to objections to discharge under §§ 727(a)(8), (a)(9), and 1328(f) of the Code. The redesignation of the existing rule as subdivision (a) was also deleted. The Committee Note was revised to reflect these changes.

Rule 9001. General Definitions

The definitions of words and phrases in §§ 101, ~~§~~ 902, ~~and §~~ 1101, and 1502 of the Code, and the rules of construction in § 102, ~~of the Code~~ govern their use in these rules. In addition, the following words and phrases used in these rules have the meanings indicated:

* * * * *

COMMITTEE NOTE

The rule is amended to add § 1502 of the Code to the list of definitional provisions that are applicable to the Rules. That section was added to the Code by the 2005 amendments.

Changes Made After Publication:

No changes since publication.

Official Form 23. Debtor's Certification of Completion of Postpetion Instructional Course Concerning Personal Financial Management

The form, which follows on the next page, is amended as indicated to conform to the amendment of the filing deadline under Rule 1007(c). Final approval is sought without publication. The amendment to the form is to become effective upon the effective date of the amendment to Rule 1007(c) – December 1, 2010.

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

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

From: **Honorable Mark R. Kravitz, Chair, Advisory Committee on Federal Rules of Civil Procedure**

Date: **May 8, 2009 (Revised June 15, 2009)**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met in San Francisco on February 2 and 3, 2009, and in Chicago on April 20 and 21, 2009.

* * * * *

Proposed amendments of Civil Rules 26 and 56 were published for comment in August 2008. The first of three scheduled hearings on these proposals was held through the morning on November 17, before the Committee's November meeting began. The remaining hearings were held on January 14, 2009, following the Standing Committee meeting in San Antonio, and on February 2 in San Francisco.

Four action items are presented in this report. Part I A recommends approval of a recommendation to adopt the amendments to Rule 26, with revisions from the proposal as published. Part I B recommends approval of a recommendation to adopt the amendments to Rule 56, with revisions of the proposal as published. Part I C recommends approval of a recommendation to delete "discharge in bankruptcy" from the list of affirmative defenses in Rule 8(c) as published in August 2007.[1]

* * * * *

[1]Following the Standing Committee's meeting on June 1-2, 2009, the Rules Committees approved by email ballot conforming, technical amendments to Illustrative Civil Form 52.

I ACTION ITEMS FOR ADOPTION

A. Rule 26: Expert Trial Witnesses

The Committee recommends approval for adoption of the provisions for disclosure and discovery of expert trial witness testimony that were published last August. Small drafting changes are proposed, but the purpose and content carry on.

These proposals divide into two parts. Both stem from the aftermath of extensive changes adopted in 1993 to address disclosure and discovery with respect to trial-witness experts. One part creates a new requirement to disclose a summary of the facts and opinions to be addressed by an expert witness who is not required to provide a disclosure report under Rule 26(a)(2)(B). The other part extends work-product protection to drafts of the new disclosure and also to drafts of 26(a)(2)(B) reports. It also extends work-product protection to communications between attorney and trial-witness expert, but withholds that protection from three categories of communications. The work-product protection does not apply to communications that relate to compensation for the expert's study or testimony; identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

These two parts are described separately. Each applies only to experts who are expected to testify as trial witnesses. No change is made with respect to the provisions that severely limit discovery as to an expert employed only for trial preparation.

New Rule 26(a)(2)(C): Disclosure of "No-Report" Expert Witnesses

The 1993 overhaul of expert witness discovery distinguished between two categories of trial-witness experts. Rule 26(a)(2)(A) requires a party to disclose the identity of any witness it may use to present expert testimony at trial. Rule 26(a)(2)(B) requires that the witness must prepare and sign an extensive written report describing the expected opinions and the basis for them, but only "if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." It was hoped that the report might obviate the need to depose the expert, and in any event would improve conduct of the deposition. To protect these advantages, Rule 26(b)(4)(A) provides that an expert required to provide the report can be deposed "only after the report is provided."

The advantages hoped to be gained from Rule 26(a)(2)(B) reports so impressed several courts that they have ruled that experts not described in Rule 26(a)(2)(B) must provide (a)(2)(B) reports. The problem is that attorneys may find it difficult or impossible to obtain an (a)(2)(B) report from many of these experts, and there may be good reason for an expert's resistance. Common examples of experts in this category include treating physicians and government accident investigators. They are busy people whose careers are devoted to causes other than giving expert testimony. On the other hand, it is useful to have advance notice of the expert's testimony.

Proposed Rule 26(a)(2)(C) balances these competing concerns by requiring that if the expert witness is not required to provide a written report under (a)(2)(B), the (a)(2)(A) disclosure must state the subject matter on which the witness is expected to present evidence under Evidence Rule 702, 703, or 705, and "a summary of the facts and opinions to which the witness is expected to testify." It is intended that the summary of facts include only the facts that support the opinions; if the witness is expected to testify as a "hybrid" witness to other facts, those facts need not be summarized. The

sufficiency of this summary to prepare for deposition and trial has been accepted by practicing lawyers throughout the process of developing the proposal.

As noted below, drafts of the Rule 26(a)(2)(C) disclosure are protected by the work-product provisions of proposed Rule 26(b)(4)(B).

Rule 26(b)(4): Work-Product Protects Drafts and Communications

The Rule 26(a)(2)(B) expert witness report is to include "(ii) the data or other information considered by the witness in forming" the opinions to be expressed. The 1993 Committee Note notes this requirement and continues: "Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions — whether or not ultimately relied upon by the expert — are privileged or otherwise protected from disclosure when such persons are testifying or being deposed." Whatever may have been intended, this passage has influenced development of a widespread practice permitting discovery of all communications between attorney and expert witness, and of all drafts of the (a)(2)(B) report.

Discovery of attorney-expert communications and of draft disclosure reports can be defended by arguing that judge or jury need to know the extent to which the expert's opinions have been shaped to accommodate the lawyer's influence. This position has been advanced by a few practicing lawyers and by many academics during the development of the present proposal to curtail such discovery.

The argument for extending work-product protection to some attorney-expert communications and to all drafts of Rule 26(a)(2) disclosures or reports is profoundly practical. It begins with the shared experience that attempted discovery on these subjects almost never reveals useful information about the development of the expert's opinions. Draft reports somehow do not exist. Communications with the attorney are conducted in ways that do not yield discoverable events. Despite this experience, most attorneys agree that so long as the attempt is permitted, much time is wasted by making the attempt in expert depositions, reducing the time available for more useful discovery inquiries. Many experienced attorneys recognize the costs and stipulate at the outset that they will not engage in such discovery.

The losses incurred by present discovery practices are not limited to the waste of futile inquiry. The fear of discovery inhibits robust communications between attorney and expert trial witness, jeopardizing the quality of the expert's opinion. This disadvantage may be offset, when the party can afford it, by retaining consulting experts who, because they will not be offered as trial witnesses, are virtually immune from discovery. A party who cannot afford this expense may be put at a disadvantage.

Proposed Rules 26(a)(4)(B) and (C) address these problems by extending work-product protection to drafts of (a)(2)(B) and (C) disclosures or reports and to many forms of attorney-expert communications. The proposed amendment of Rule 26(a)(2)(B)(ii) complements these provisions by amending the reference to "information" that has supported broad interpretation of the 1993 Committee Note: the expert's report is to include "the facts or data ~~or other information~~ considered by the witness" in forming the opinions. The proposals rest not on high theory but on the realities of actual experience with present discovery practices. The American Bar Association Litigation Section took an active role in proposing these protections, drawing in part from the success of similar protections adopted in New Jersey. The published proposals drew support from a wide array of organized bar groups, including The American Bar Association, the Council of the ABA Litigation

Section, The American Association for Justice, The American College of Trial Lawyers Federal Rules Committee, the American Institute of Certified Public Accountants, the Association of the Federal Bar of New Jersey Rules Committee, the Defense Research Institute, the Federal Bar Council of the Second Circuit, the Federal Magistrate Judges' Association, the Federation of Defense & Corporate Counsel, the International Association of Defense Counsel, the Lawyers for Civil Justice, the State Bar of Michigan U.S. Courts Committee, and the United States Department of Justice.

Support for these proposals has been so broad and deep that discussion can focus on just two proposed changes, one made and one not made. Otherwise it suffices to recall the three categories of attorney-expert communications excepted from the work-product protection: those that

> **(i)** relate to compensation for the expert's study or testimony;
> **(ii)** identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
> **(iii)** identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.
> The change made adds a few words to the published text of Rule 26(b)(4)(B):
> **(B)** * * * Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a), regardless of the form <u>in which</u> ~~of~~ the draft <u>is recorded</u>.

The published Committee Note elaborated the "regardless of form" language by stating that protection extends to a draft "whether oral, written, electronic, or otherwise." Comments and testimony expressed uncertainty as to the meaning of an "oral draft." The comments and testimony also reflected the drafting dilemma that has confronted this provision from the beginning. Rule 26(b)(3) by itself extends work-product protection only to "documents and tangible things." Information that does not qualify as a document or tangible thing is remitted to the common-law work-product protection stemming from Hickman v. Taylor. As amended to reflect discovery of electronically stored information, moreover, Rule 34(a)(1) may be ambiguous on the question whether electronically stored information qualifies as a "document" in a rule — such as Rule 26(b)(3) — that does not also refer to electronically stored information. Responding to these concerns, the Discovery Subcommittee recommended that the "regardless of form" language be deleted, substituting "protect written or electronic drafts" of the report or disclosure. Lengthy discussion by the Committee, however, concluded that it is better to retain the open-ended "regardless of form" formula, but also to emphasize the requirement that the draft be "recorded." The Committee Note has been changed accordingly.

The change not made would have expanded the range of experts included in the protection for communications with the attorney. The invitation for comment pointed out that proposed Rule 26(b)(4)(C) protects communications only when the expert is required to provide a disclosure report under Rule 26(a)(2)(B). Communications with an expert who is not required to give a report fall outside this protection. (The Committee Note observes that Rule 26(b)(4)(C) "does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.") The invitation asked whether the protection should be extended further. Responding to this invitation, several comments suggested that the rule text either should protect attorney communications with any expert witness disclosed under Rule 26(a)(2)(A), or — and this was the dominant mode — should protect attorney communications with an expert who is an employee of a party whose duties do not regularly involve giving expert testimony. These comments argued that communications with these employee experts involve the same problems as communications with other experts.

Both the Subcommittee and the Committee concluded that the time has not come to extend the protection for attorney-expert communications beyond experts required to give an (a)(2)(B) report. The potential need for such protection was not raised in the extensive discussions and meetings held before the invitation for public comment on this question. There are reasonable grounds to believe that broad discovery may be appropriate as to some "no-report" experts, such as treating physicians who are readily available to one side but not the other. Drafting an extension that applies only to expert employees of a party might be tricky, and might seem to favor parties large enough to have on the regular payroll experts qualified to give testimony. Still more troubling, employee experts often will also be "fact" witnesses by virtue of involvement in the events giving rise to the litigation. An employee expert, for example, may have participated in designing the product now claimed to embody a design defect. Discovery limited to attorney-expert communications falling within the enumerated exceptions might not be adequate to show the ways in which the expert's fact testimony may have been influenced.

Three aspects of the Committee Note deserve attention. An explicit but carefully limited sentence has been added to state that these discovery changes "do not affect the gatekeeping functions called for by Daubert v. Merrell Dow Pharmaceuticals, Inc. * * *." The next-to-last paragraph, which expressed an expectation that "the same limitations will ordinarily be honored at trial," has been deleted as the result of discussions in the Advisory Committee, in this Committee, and with the Evidence Rules Committee. And the Note has been significantly compressed without sacrificing its utility in directing future application of the new rules.

* * * * *

B. Rule 56

The Advisory Committee recommends approval for adoption, with changes, of the proposal to revise Rule 56 that was published last August. This proposal has been considered extensively by this Committee in January and June 2008 and again in January 2009. As requested by this Committee, the invitation for public comment was more detailed than the usual invitation. Pointed questions were addressed not only to broad aspects of the proposal but also to fine details. This strategy worked well. The written comments and testimony at three hearings were sharply focused and responded well to the questions that had been presented. Substantial changes were made in response to this complex and often conflicting advice. The result is a leaner and stronger summary-judgment procedure. Everything that remains in the proposed rule was included in the published proposal. Everything that was deleted or modified was addressed by the invitation for comments. The Advisory Committee agreed unanimously that there is no need to republish the proposal for another round of comments addressed to the issues that were so successfully raised and addressed in the first round.

The two issues that figured most prominently in the comments and testimony will be discussed first. The first is restoration of "shall," replacing the Style Project's "should" as the direction to grant summary judgment when there is no genuine dispute as to any material fact. The second is deletion of the "point-counterpoint" procedure that figured prominently in subdivision (c). Other significant changes will be discussed by summarizing each subdivision.

"Shall" Restored

The conventions adopted by the Style Project prohibited any use of "shall" because it is inherently ambiguous. The permitted alternatives were "must," "should," and — although infrequently — "may." Faced with these choices, the Style Project adopted "should." The Committee Note cited a Supreme Court decision and a well-known treatise for the proposition that "should" better reflects the trial court's seldom-exercised discretion to deny summary judgment even when there is no genuine dispute as to any material fact and the movant seems entitled to judgment as a matter of law. This change drew virtually no reaction during the extended comment period provided for the Style Project. But it drew extensive comment during the present project.

Studying these comments persuaded the Committee that "shall" must be restored as a matter of substance. From the beginning and throughout, the Rule 56 project was shaped by the premise that it would be a mistake to attempt to revise the summary-judgment standard that has evolved through case-law interpretations. There is a great risk — indeed a virtual certainty — that adoption of either "must" or "should" will gradually cause the summary-judgment standard to evolve in directions different from those that have been charted under the "shall" direction. The Style Project convention must yield here, even if nowhere else in any of the Enabling Act rules.

The divisions between the comments favoring "should" and those favoring "must" are described at length in the summary of comments and testimony. The comments favoring "must" rely at times on the language of opinions and on the Rule 56 standard that summary judgment is directed when the movant is "entitled" to judgment as a matter of law. More functionally, they emphasize the importance of summary judgment as a protection against the burdens imposed by unnecessary trial, and also against the shift of settlement bargaining that follows denial of summary judgment. The comments favoring "should" focus on decisions that recognize discretion to deny summary judgment even when there appears to be no genuine dispute as to any material fact. They also focus on the functional observation that a trial-court judge may have good grounds for suspecting that a

trial will test the evidence in ways not possible on a paper record, showing there is, after all, a genuine dispute. And trial-court judges point out that a trial may consume much less court time than would be needed to determine whether summary judgment can be granted — time that is pure waste if summary judgment is denied, or if it is granted and then reversed on appeal. Still more elaborate arguments also have been advanced for continuing with "should."

Faced with these comments, and an extensive study of case law undertaken by Andrea Kuperman, the Committee became convinced that neither "must" nor "should" is acceptable. Either substitute for "shall" will redirect the summary-judgment standard from the course that has developed under "shall." Restoring "shall" is consistent with two strategies often followed during the Style Project. The objection to "shall" is that it is inherently ambiguous. But time and again ambiguous expressions were deliberately carried forward in the Style Project precisely because substitution of a clear statement threatened to work a change in substantive meaning. And time and again the Style Project accepted "sacred phrases," no matter how antique they might seem. The flood of comments, and the case law they invoke, demonstrate that "shall" had become too sacred to be sacrificed.

The proposed Committee Note includes a relatively brief explanation of the reasons for restoring "shall," including quotations from Supreme Court opinions that seem to look in different directions.

"Point-Counterpoint" Eliminated

The published proposal included as subdivision (c)(2) a detailed provision establishing a 3-part procedure for a summary-judgment motion. The movant must file a motion identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought; a separate statement of material facts identified in separately numbered paragraphs; and a brief. This was the "point." The opposing party must file a correspondingly numbered response to each fact, and might identify additional material facts. This was the initial "counterpoint." The movant then could reply to any additional fact stated by the nonmovant. There was no provision for a surreply by the nonmovant. This procedure was based on local rules in some 20 districts, and was closely modeled on similar provisions in the proposed Rule 56 recommended by this Committee to the Judicial Conference in 1992.

The Committee, after considering the public comments and testimony, has concluded that although the point-counterpoint procedure is worthy, and often works well, the time has not come to mandate it as a presumptively uniform procedure for most cases. The comments and testimony showed the perils of misuse and suggested that there is less desire for national uniformity than might have been expected.

This part of the proposal provoked a near avalanche of comments. Many comments were favorable, urging that a point-counterpoint procedure focuses the parties and the motion in a disciplined and helpful way. But many of the comments were adverse. Perhaps the most negative comments from practicing lawyers came from those who represent plaintiffs in employment-discrimination cases. They protested that time and again the point-counterpoint procedure fractures consideration of the case, focusing only on "undisputed" "historic" "facts" that are the subject of direct testimony, diverting attention from the need to consider the inferences that a jury might draw from both undisputed facts and disputed facts. Defendants, moreover, have taken to stating hundreds of facts even in simple cases. A plaintiff is hard-put to undertake the work of responding to so many facts, most of them irrelevant and many of them simply wrong. In addition, they protested that Rule

56 procedure stands trial procedure upside-down. At trial the plaintiff opens and closes. On summary judgment the defendant opens and — if there is no opportunity to surreply — also closes. Some complained that defendant employers seem to deliberately manipulate this inversion, making a motion in vague general terms and withholding a clear articulation of their positions until a reply, without the right to file a surreply without leave of court.

Beyond the division in the trial bar, comments came from an unusually high number of district judges. Most of these comments urged that even if the point-counterpoint procedure works well in some cases, and even if it works well in most cases in some districts, the time has not come to adopt it as a presumptively uniform national procedure, even if coupled with permission to opt out by order in any specific case. These comments were backed by extensive experience both with motions presented by point-counterpoint procedure and with motions presented in other forms.

Individual judges with experience in both procedures included two judges from Alaska, which does not have a point-counterpoint procedure, who for many years have accepted regular and hefty assignments of cases in Arizona, which does have a point-counterpoint procedure. Judges John W. Sedwick and H. Russel Holland reported that the point-counterpoint procedure takes longer and is less satisfactory than their own procedure. The District Judges in Arizona have been so impressed by this testimony that they are reconsidering their own procedure.

Courts that have had and abandoned point-counterpoint local rules provide a broader-based perspective. Two illustrations suffice. Judge Claudia Wilken explored the experience in the Northern District of California. See 08-CV-090, and the summary of testimony on February 2. California state courts adopted a point-counterpoint procedure in 1984. From 1988 to 2002 the Northern District had a parallel local rule. The rule was abandoned. It made more work and required more time to decide a motion. It was inefficient and created extra expense. The facts set out in the separate statements were repeated in the supporting memoranda; the separate statements "were supernumerary, lengthy, and formalistic." Responses often included "objections," and often included statements of purportedly undisputed facts that were repeated in the supporting memoranda. The objections often were no more than semantic disputes. And matters became really complicated in the face of cross-motions. "[T]he statement of undisputed material facts is a format that particularly lends itself to abuse by the game-playing attorneys and by the less competent attorneys." In addition, this format does not lend itself to coherent consideration of fact inferences. Narrative statements are better. "You need to know facts that are not material to understand what happened."

Judge David Hamilton recounted the experience in the Southern District of Indiana, which had a point-counterpoint local rule from 1998 to 2002. See 08-CV-142, and the summary of testimony on February 2. Motions often asserted hundreds of facts, and "became the focus of lengthy debates over relevance and admissibility." There was an exponential increase in motions to strike. The separate documents "provided a new arena for unnecessary controversy. We began seeing huge, unwieldy and especially expensive presentations of many hundreds of factual assertions with paragraphs of debate about each one of these." In one case with a routine motion "the defendant tried to dispute 582 of the plaintiff's 675 assertions of undisputed material facts." But the system can work if the statement of undisputed facts is required as part of the brief; the page limits on briefs force appropriate concision and focus. It remains possible to deal with fact inference in this setting, to establish "a convincing mosaic of circumstantial evidence," by a response that says "See my whole brief. It's all my evidence. It's circumstantial."

The recommendation to abandon the point-counterpoint procedure simplifies proposed subdivision (c). As a matter of drafting, it eliminates the need to refer to "motion, response, and

reply." It facilitates reorganization of the remaining subdivisions. More importantly, it averts any need to determine whether a right to surreply should be added. The arguments in favor of a surreply seem compelling, but a right to surreply could easily degenerate to a proliferation of useless papers in many cases.

Abandoning the point-counterpoint procedure does not mean abandoning the "pinpoint" citation requirement published as proposed subdivision (c)(4)(A) and now promoted to become subdivision (c)(1)(A). The requirement of specific record citations is so elemental that a reminder might seem unnecessary. Regular experience shows that the reminder is in fact useful.

Subdivision (a)

Identifying claim or defense: As published, proposed subdivision (c)(2)(A)(i) required that the motion identify each claim or defense — or the part of each claim or defense — on which summary judgment is sought. This encouragement to clarity has been incorporated in subdivision (a).

"Shall": The decision to restore "shall" is explained above.

"If the movant shows": From the beginning in 1938, Rule 56 has directed that summary judgment be granted if the summary-judgment materials "show" there is no genuine issue of material fact. "Show" is carried forward for continuity, and because it serves as an important reminder of the Supreme Court's statement in the *Celotex* opinion that a party who does not have the burden of production at trial can win summary judgment by "showing" that the nonmovant does not have evidence to carry the burden.

Stating reasons to grant or deny: The public comments addressed matters that were considered in framing the published proposal. No change seems indicated.

Subdivision (b)

Time to respond and reply: As published, subdivision (b) included times to respond and to reply. The Committee recommends that these provisions be deleted. Elimination of the point-counterpoint procedure from subdivision (c) leaves the proposed rule without any formal identification of response or reply. It would be possible nonetheless to carry forward the times to respond or reply. The concepts seem easily understood. But the decision to honor local autonomy on the underlying procedure suggests that the national rule should not suggest presumptive time limits. The published proposal recognized that different times could be set by local rule. Whatever measure of uniformity might result from default of local rules — or adoption of the national rule times in local rules — seems relatively unimportant.

The Committee considered at length the particular concern arising from the decision in the Time Project to incorporate the proposed times to respond and reply in Rule 56 as the Supreme Court transmitted it Congress last March. It may seem awkward to adopt time provisions in 2009 and then abandon them in a rule proposed to take effect in 2010. This concern was overcome by deeper considerations. It seems likely that the proposed Rule 56, if adopted, will not be considered for amendment any time soon. It is better to adopt the best rule that can be devised. And the appearance of abrupt about-face is not likely to stir uneasiness about the process. The time provisions in the 2009 Time Project version are set out in Rule 56(a) and (c). The 2010 rule is completely rewritten, with the only time provision in Rule 56(b). The appearance is not so much one of indecisiveness as one of complete overhaul into a new organic whole.

The published proposal set times "[u]nless a different time is set by local rule or the court orders otherwise in the case." The emphasis on a case-specific order was designed to emphasize the intention that general standing orders should not be used. "[I]n the case" has been removed at the suggestion of the Style Consultant, Professor Kimble, who observes that use of this phrase in one rule may generate confusion in all the other rules that refer to court orders without limitation. The risk posed by a general standing order setting a different time is alleviated by Rule 83(b), which prohibits any sanction or other disadvantage for noncompliance with any requirement not in the Civil Rules or a local rule "unless the alleged violator has been furnished in the particular case with actual notice of the requirement."

Subdivision (c)

Point-Counterpoint: The major change in subdivision (c) is elimination of the point-counterpoint provisions of (c)(2), as explained above. The other subdivisions have been rearranged to reflect this change. No comment objected to this provision, and many judges specifically supported it.

"Pinpoint" citations: The Committee readily concluded that deletion of the point-counterpoint provisions does not detract from the utility of requiring citations to the parts of the record that support summary-judgment positions. This provision has been moved to the front of the subdivision, becoming (c)(1). Paragraph (1) also carries forward the provisions recognizing that a party can respond that another party's record citations do not establish its positions, and recognizing the Celotex "no-evidence" motion.

Admissibility of supporting evidence: As published, proposed subdivision (c)(5) recognized the right to assert that material cited to support or dispute a fact "is not admissible in evidence." This provision has become subdivision (c)(2), and is modified to recognize an assertion that the material "cannot be presented in a form that would be admissible in evidence." The change makes this provision parallel to proposed subdivision (c)(4), which carries forward from present Rule 56(e)(1) the requirement that an affidavit set out facts that would be admissible in evidence. More importantly, the change reflects the fact that summary judgment may be sought and opposed by presenting materials that are not themselves admissible in evidence. The most familiar examples are affidavits or declarations, and depositions that may not be admissible at trial.

Materials not cited: As published, the proposal provided that the court need consider only materials called to its attention by the parties, but recognized that the court may consider other materials in the record. Notice under proposed Rule 56(f) was required before granting summary judgment on the basis of materials not cited by the parties, but not before denying summary judgment on the basis of such materials. This provision, published as subdivision (c)(4)(B) and carried forward as (c)(3), has been revised to delete the notice requirement. Some of the comments had urged that notice should be required before either granting or denying summary judgment on the basis of record materials not cited by the parties. Consideration of these comments led to the conclusion that there are circumstances in which it is proper to grant summary judgment without additional notice. A party, for example, may file a complete deposition transcript and cite only to part of it. The uncited parts may justify summary judgment. Notice is required under subdivision (f), however, if the court acts to grant summary judgment on "grounds" not raised by the parties.

Accept for purposes of motion only: Subdivision (c)(3) of the published proposal provided that "A party may accept or dispute a fact either generally or for purposes of the motion only." This provision is withdrawn. It was added primarily out of concern for early reports that point-

counterpoint procedure may elicit inappropriately long statements of undisputed facts. A party facing such a statement might conclude that many of the stated facts are not material and that it is more efficient and less expensive simply to accept them for purposes of the motion rather than undertake the labor of attacking the materials said to support the facts and combing the record for counterpoint citations. Elimination of the point-counterpoint proposal removes the primary reason for including this provision. The provision, moreover, creates a tension with subdivision (g). Subdivision (g) provides that if the court does not grant all the relief requested by the motion, it may order that a material fact is not genuinely disputed and is established in the case. Several comments expressed fear that no matter how carefully hedged, an acceptance for purposes of the motion might become the basis for an order that there is no genuine dispute as to a fact accepted "for purposes of the motion." The advantages of recognizing in rule text the value of accepting a fact for purposes of the motion only do not seem equal to the difficulties of drafting to meet this risk. The Committee Note to Subdivision (g) addresses the issue.

Affidavits or declarations: Proposed subdivision (c)(4) carries forward from present Rule 56(e)(1), with only minor drafting changes. It did not provoke any public comment.

Subdivision (d)

Subdivision (d) addresses the situation of a nonmovant who cannot present facts essential to justify its opposition. It carries forward present Rule 56(f) with only minor changes. A few comments urged that explicit provision should be made for an alternative response: "Summary judgment should be denied on the present record, but if the court would grant summary judgment I should be allowed time to obtain affidavits or declarations or to take discovery." This suggestion was rejected for reasons summarized in one pithy response: "No one wants seriatim Rule 56 motions." The Committee Note addresses a related problem by noting that a party who moves for relief under Rule 56(d) may seek an order deferring the time to respond to the motion.

Subdivision (e)

Subdivision (e) was published in a form integrated with the point-counterpoint procedure. It has been revised to reflect withdrawal of the point-counterpoint procedure. It fits with courts that adopt point-counterpoint procedure on their own, particularly by recognizing the power to "consider [a] fact undisputed for purposes of the motion." This power corresponds to local rules that a fact may be "deemed admitted" if there is no proper response. But paragraph (3) emphasizes that summary judgment cannot be granted merely because of procedural default — the court must be satisfied that the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to judgment. Subdivision (e) also fits with procedures that do not include point-counterpoint. In its revised form, it also applies to a defective motion, recognizing authority to afford an opportunity to properly support a fact or to issue another appropriate order that may include denying the motion.

Subdivision (f)

Subdivision (f) expresses authority to grant summary judgment outside a motion for summary judgment. It reflects procedures that have developed in the decisions without any explicit anchor in the text of present Rule 56. After giving notice and a reasonable opportunity to respond, the court may grant summary judgment for a nonmovant, grant the motion on grounds not raised by the parties, or consider summary judgment on its own. The proposal drew relatively few comments.

As published, subdivision (f) required notice and a reasonable opportunity to respond before a court can deny summary judgment on a ground not raised by the parties. This provision caused second thoughts in the Committee. The Committee concluded that notice should not be required before denying a motion on what might be termed "procedural" grounds — the motion is filed after the time set by rule or scheduling order, the motion is "ridiculously overlong," and the like. It does not seem feasible to draft a clear distinction that would require notice before denying a motion on "merits" grounds not raised by the parties and denying a motion on "procedural" grounds not raised by the parties. The Committee proposes that subdivision (f) be revised by deleting "deny" from paragraph (2): "(2) grant ~~or deny~~ the motion on grounds not raised by the parties * * *."

Subdivision (g)

Subdivision (g) carries forward present Rule 56(d), providing in clearer terms that if the court does not grant all the relief requested by the motion it may enter an order stating that any material fact is not genuinely in dispute and treating the fact as established in the case. It drew few comments. The Committee recommends it for adoption as published.

The Committee Note has been amended to address the concern that a party who accepts a fact for purposes of the motion only should not fear that this limited acceptance will support a subdivision (g) order that the fact is not genuinely disputed and is established in the case.

Subdivision (h)

Subdivision (h) carries forward present Rule 56(g)'s sanctions for submitting affidavits or declarations in bad faith. As published it made two changes — it made sanctions discretionary, not mandatory, and it required notice and a reasonable time to respond. It is recommended for adoption with one change, the addition of words recognizing authority to impose other appropriate sanctions in addition to expenses and attorney fees or contempt.

Several comments suggested that subdivision (h) be expanded to establish cost-shifting when a motion or response is objectively unreasonable. The standard would go beyond Rule 11 standards. The Committee concluded that cost-shifting should not be adopted.

* * * * *

C. Rule 8(c): Discharge in Bankruptcy

The Committee recommends approval for adoption of the proposal to delete "discharge in bankruptcy" from the list of affirmative defenses in Rule 8(c)(1). The proposal was published in August 2007. The proposal was suggested by bankruptcy judges and approved by other experts, who argued that statutory changes had superseded the former status of discharge as an affirmative defense. The Department of Justice provided the only arguments resisting this proposal. Because the question was important to the Department, this issue was withheld when the other August 2007 proposals were recommended and accepted for adoption. Continuing discussions failed to persuade the Department to withdraw from its position. Advice was sought from the Bankruptcy Rules Committee, which voted — over the Department's sole dissent — to approve adoption of the recommendation.

The statutory basis for deleting the description of discharge in bankruptcy as an affirmative defense is set out in the attached memorandum that Judge Wedoff prepared for the Bankruptcy Rules Committee. The Minutes of the Civil Rules Committee discussion that was guided by Judge Wedoff also are helpful. The decisions cited in the memorandum make two important points. First, every court that has considered the impact of 11 U.S.C. § 524(a) on Rule 8(c) has concluded that discharge in bankruptcy can no longer be characterized as an affirmative defense. Second, courts that have looked only to Rule 8(c) without considering the statute have concluded — not surprisingly — that discharge is an affirmative defense. This confusion shows that there is no point in further delay. It is time to decide whether to make the change.

The Department of Justice remains concerned that the effects of discharging a debt arise only if the debt in fact was discharged. A general discharge does not always discharge all outstanding debts. A creditor should be able both to secure a determination whether a particular debt has been discharged, and to collect a debt that was not discharged. These concerns are explored in the attached memorandum from Acting Assistant Attorney General Hertz. They may warrant adding a few sentences to the Committee Note as a brief reminder of the procedures for seeking to determine the creditor's rights. These sentences are enclosed by brackets to prompt discussion of the recurring need to define the value of offering advice that goes beyond explaining the immediate purpose of the rule text.

The Department of Justice would like to include some additional advice in the final sentence of the bracketed material in the Committee Note. The full sentence would read: "The issue whether a claim was excepted from discharge may be determined either in the court that entered the discharge or — in most instances — in another court with jurisdiction over the creditor's claim, and in such a proceeding the debtor may be required to respond." The Committee believes that whatever value there may be in providing the advice in the bracketed sentences, the additional advice suggested by the Department is both unnecessary and beyond the appropriate scope of a Civil Rule Note.

The Committee recommends approval for adoption of this amendment of Rule 8(c)(1), and approval of the Committee Note.

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 8. General Rules of Pleading

* * * * *

(c) Affirmative Defenses.

(1) ***In General.*** In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- ~~discharge in bankruptcy;~~
- duress;
- estoppel;
- failure of consideration;
- fraud;

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

- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

* * * * *

Committee Note

Subdivision (c)(1). "[D]ischarge in bankruptcy" is deleted from the list of affirmative defenses. Under 11 U.S.C. § 524(a)(1) and (2) a discharge voids a judgment to the extent that it determines a personal liability of the debtor with respect to a discharged debt. The discharge also operates as an injunction against commencement or continuation of an action to collect, recover, or offset a discharged debt. For these reasons it is confusing to describe discharge as an affirmative defense. But § 524(a) applies only to a claim that was actually discharged. Several categories of debt set out in 11 U.S.C.

§ 523(a) are excepted from discharge. The issue whether a claim was excepted from discharge may be determined either in the court that entered the discharge or — in most instances — in another court with jurisdiction over the creditor's claim.

Changes Made After Publication and Comment

No changes were made in the rule text.

The Committee Note was revised to delete statements that were over-simplified. New material was added to provide a reminder of the means to determine whether a debt was in fact discharged.

COMMITTEE NOTE SHOWING REVISIONS

"[D]ischarge in bankruptcy" is deleted from the list of affirmative defenses. Under 11 U.S.C. § 524(a)(1) and (2) a discharge voids a judgment to the extent that it determines a personal liability of the debtor with respect to a discharged debt. The discharge also operates as an injunction against commencement or continuation of an action to collect, recover, or offset a discharged debt. ~~These consequences of a discharge cannot be waived. If a claimant persists in an action on a discharged claim, the effect of the discharge ordinarily is determined by the bankruptcy court that entered the discharge, not the court in the action on the claim.~~ For these reasons it is confusing to describe discharge as an affirmative defense. But § 524(a) applies only to a claim that was actually discharged. Several categories of debt set out in 11 U.S.C. § 523(a) are excepted from discharge. The issue whether a claim was excepted from discharge may be determined either in the court that entered the discharge or — in most instances — in another court with jurisdiction over the creditor's claim.

Rule 26. Duty to Disclose; General Provisions Governing Discovery[**]

(a) Required Disclosures.

* * * * *

(2) ***Disclosure of Expert Testimony.***

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be

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[**] In the Rule, material added after the public comment period is indicated by double underlining, and material deleted after the public comment period is indicated by underlining and overstriking. In the Note, new material is indicated by underlining and deleted material by overstriking.

accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data ~~or other information~~ considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this ~~the~~ ~~Rule 26(a)(2)(A)~~ disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under

Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D~~C~~) *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C),

within 30 days after the other party's disclosure.

(E~~D~~) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

* * * * *

(b) Discovery Scope and Limits.

* * * * *

(3) ***Trial Preparation: Materials.***

(A) *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to

Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement.* Any party or other person may, on request and without the

required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording — or a transcription of it — that recites substantially verbatim the person's oral statement.

(4) ***Trial Preparation: Experts.***

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been

identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which ~~of~~ the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B),

regardless of the form of the communications, except to the extent that the communications:

(i) rRelate to compensation for the expert's study or testimony;

(ii) iIdentify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) iIdentify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

(DB) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held

by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E~~C~~) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D~~B~~); and

(ii) for discovery under (D~~B~~), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

* * * * *

Committee Note

Rule 26. Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than "data or other information," as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and — with three specific exceptions — communications between expert witnesses and counsel.

In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including — for many experts — an extensive report. Many courts read the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports. The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts — one for purposes of consultation and another

to testify at trial — because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

Subdivision (a)(2)(B). Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all "facts or data considered by the witness in forming" the opinions to be offered, rather than the "data or other information" disclosure prescribed in 1993. This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications.

The refocus of disclosure on "facts or data" is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that "facts or data" be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data "considered" by the expert in forming the opinions to be expressed, not only those relied upon by the expert.

Subdivision (a)(2)(C). Rule 26(a)(2)(C) is added to mandate summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions. This disclosure is considerably less extensive than the report required by Rule

26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report is required only from an expert described in (a)(2)(B).

A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705. Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)(2)(A) and provide the disclosure required under Rule 26(a)(2)(C). The (a)(2)(C) disclosure obligation does not include facts unrelated to the expert opinions the witness will present.

Subdivision (a)(2)(D). This provision (formerly Rule 26(a)(2)(C)) is amended slightly to specify that the time limits for disclosure of contradictory or rebuttal evidence apply with regard to disclosures under new Rule 26(a)(2)(C), just as they do with regard to reports under Rule 26(a)(2)(B).

Subdivision (b)(4). Rule 26(b)(4)(B) is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise. It also

applies to drafts of any supplementation under Rule 26(e); *see* Rule 26(a)(2)(E).

Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery. The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any "preliminary" expert opinions. Protected "communications" include those between the party's attorney and assistants of the expert witness. The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

The most frequent method for discovering the work of expert witnesses is by deposition, but Rules 26(b)(4)(B) and (C) apply to all forms of discovery.

Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they

are testifying, whether or not the expert considered them in forming the opinions expressed. These discovery changes therefore do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and related cases.

The protection for communications between the retained expert and "the party's attorney" should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm. For example, a party may be involved in a number of suits about a given product or service, and may retain a particular expert witness to testify on that party's behalf in several of the cases. In such a situation, the protection applies to communications between the expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action. Other situations may also justify a pragmatic application of the "party's attorney" concept.

Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. But the discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.

First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert's study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not

limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work done by a person or organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias.

Second, under Rule 26(b)(4)(C)(ii) discovery is permitted to identify facts or data the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed. The exception applies only to communications "identifying" the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.

Third, under Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. For example, the party's attorney may tell the expert to assume the truth of certain testimony or evidence, or the correctness of another expert's conclusions. This exception is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.

Under the amended rule, discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii) — that the party has a substantial need for the

discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. A party's failure to provide required disclosure or discovery does not show the need and hardship required by Rule 26(b)(3)(A); remedies are provided by Rule 37.

In the rare case in which a party does make this showing, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this protection does not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial.

Former Rules 26(b)(4)(B) and (C) have been renumbered (D) and (E), and a slight revision has been made in (E) to take account of the renumbering of former (B).

Changes Made After Publication and Comment

Small changes to rule language were made to conform to style conventions. In addition, the protection for draft expert disclosures or reports in proposed Rule 26(b)(4)(B) was changed to read "regardless of the form in which the draft is recorded." Small changes were also made to the Committee Note to recognize this change to rule language and to address specific issues raised during the public comment period.

~~**Rule 56. Summary Judgment**~~

~~**(a) By a Claiming Party.** A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after:~~

~~**(1)** 20 days have passed from commencement of the action; or~~

~~**(2)** the opposing party serves a motion for summary judgment.~~

~~**(b) By a Defending Party.** A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.~~

~~**(c) Serving the Motion; Proceedings.** The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day. The judgment sought should be~~

~~rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.~~

~~**(d) Case Not Fully Adjudicated on the Motion.**~~

~~(1) ***Establishing Facts.*** If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts — including items of damages or other relief — are not genuinely at issue. The facts so specified must be treated as established in the action.~~

~~(2) *Establishing Liability.* An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.~~

~~**(e) Affidavits; Further Testimony.**~~

~~(1) *In General.* A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.~~

~~(2) *Opposing Party's Obligation to Respond.* When a motion for summary judgment is properly made~~

and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must — by affidavits or as otherwise provided in this rule — set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

(f) When Affidavits Are Unavailable. If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) deny the motion;

(2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or

(3) issue any other just order.

~~**(g) Affidavit Submitted in Bad Faith.** If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.~~

Rule 56. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as

a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) **Time to File a Motion.** Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) **Procedures.**

(1) ***Supporting Factual Positions.*** A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) ***Objection That a Fact Is Not Supported by Admissible Evidence.*** A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) ***Materials Not Cited.*** The court need consider only the cited materials, but it may consider other materials in the record.

(4) ***Affidavits or Declarations.*** An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show

that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) **Judgment Independent of the Motion.** After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) **Failing to Grant All the Requested Relief.** If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) **Affidavit or Declaration Submitted in Bad Faith.** If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

Committee Note

Rule 56 is revised to improve the procedures for presenting and deciding summary-judgment motions and to make the procedures more consistent with those already used in many courts. The standard for granting summary judgment remains unchanged. The language of subdivision (a) continues to require that there be no genuine dispute as to any material fact and that the movant be entitled to judgment as a matter of law. The amendments will not affect continuing development of the decisional law construing and applying these phrases.

Subdivision (a). Subdivision (a) carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word — genuine "issue" becomes genuine "dispute." "Dispute" better reflects the focus of a summary-judgment determination. As explained below, "shall" also is restored to the place it held from 1938 to 2007.

The first sentence is added to make clear at the beginning that summary judgment may be requested not only as to an entire case but also as to a claim, defense, or part of a claim or defense. The subdivision caption adopts the common phrase "partial summary judgment" to describe disposition of less than the whole action, whether or not the order grants all the relief requested by the motion.

"Shall" is restored to express the direction to grant summary judgment. The word "shall" in Rule 56 acquired significance over many decades of use. Rule 56 was amended in 2007 to replace "shall" with "should" as part of the Style Project, acting under a convention that prohibited any use of "shall." Comments on proposals to amend Rule 56, as published in 2008, have shown that neither of the choices available under the Style Project conventions

— "must" or "should" — is suitable in light of the case law on whether a district court has discretion to deny summary judgment when there appears to be no genuine dispute as to any material fact. Compare *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)("Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case in which there is reason to believe that the better course would be to proceed to a full trial. *Kennedy v. Silas Mason Co.*, 334 U.S. 249 * * * (1948))," with *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)("In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."). Eliminating "shall" created an unacceptable risk of changing the summary-judgment standard. Restoring "shall" avoids the unintended consequences of any other word.

Subdivision (a) also adds a new direction that the court should state on the record the reasons for granting or denying the motion. Most courts recognize this practice. Among other advantages, a statement of reasons can facilitate an appeal or subsequent trial-court proceedings. It is particularly important to state the reasons for granting summary judgment. The form and detail of the statement of reasons are left to the court's discretion.

The statement on denying summary judgment need not address every available reason. But identification of central issues may help the parties to focus further proceedings.

Subdivision (b). The timing provisions in former subdivisions (a) and (c) are superseded. Although the rule allows a motion for

summary judgment to be filed at the commencement of an action, in many cases the motion will be premature until the nonmovant has had time to file a responsive pleading or other pretrial proceedings have been had. Scheduling orders or other pretrial orders can regulate timing to fit the needs of the case.

Subdivision (c). Subdivision (c) is new. It establishes a common procedure for several aspects of summary-judgment motions synthesized from similar elements developed in the cases or found in many local rules.

Subdivision (c)(1) addresses the ways to support an assertion that a fact can or cannot be genuinely disputed. It does not address the form for providing the required support. Different courts and judges have adopted different forms including, for example, directions that the support be included in the motion, made part of a separate statement of facts, interpolated in the body of a brief or memorandum, or provided in a separate statement of facts included in a brief or memorandum.

Subdivision (c)(1)(A) describes the familiar record materials commonly relied upon and requires that the movant cite the particular parts of the materials that support its fact positions. Materials that are not yet in the record — including materials referred to in an affidavit or declaration — must be placed in the record. Once materials are in the record, the court may, by order in the case, direct that the materials be gathered in an appendix, a party may voluntarily submit an appendix, or the parties may submit a joint appendix. The appendix procedure also may be established by local rule. Pointing to a specific location in an appendix satisfies the citation requirement. So too it may be convenient to direct that a party assist the court in locating materials buried in a voluminous record.

Subdivision (c)(1)(B) recognizes that a party need not always point to specific record materials. One party, without citing any other materials, may respond or reply that materials cited to dispute or support a fact do not establish the absence or presence of a genuine dispute. And a party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact.

Subdivision (c)(2) provides that a party may object that material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence. The objection functions much as an objection at trial, adjusted for the pretrial setting. The burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated. There is no need to make a separate motion to strike. If the case goes to trial, failure to challenge admissibility at the summary-judgment stage does not forfeit the right to challenge admissibility at trial.

Subdivision (c)(3) reflects judicial opinions and local rules provisions stating that the court may decide a motion for summary judgment without undertaking an independent search of the record. Nonetheless, the rule also recognizes that a court may consider record materials not called to its attention by the parties.

Subdivision (c)(4) carries forward some of the provisions of former subdivision (e)(1). Other provisions are relocated or omitted. The requirement that a sworn or certified copy of a paper referred to in an affidavit or declaration be attached to the affidavit or declaration is omitted as unnecessary given the requirement in subdivision (c)(1)(A) that a statement or dispute of fact be supported by materials in the record.

A formal affidavit is no longer required. 28 U.S.C. § 1746 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit.

Subdivision (d). Subdivision (d) carries forward without substantial change the provisions of former subdivision (f).

A party who seeks relief under subdivision (d) may seek an order deferring the time to respond to the summary-judgment motion.

Subdivision (e). Subdivision (e) addresses questions that arise when a party fails to support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c). As explained below, summary judgment cannot be granted by default even if there is a complete failure to respond to the motion, much less when an attempted response fails to comply with Rule 56(c) requirements. Nor should it be denied by default even if the movant completely fails to reply to a nonmovant's response. Before deciding on other possible action, subdivision (e)(1) recognizes that the court may afford an opportunity to properly support or address the fact. In many circumstances this opportunity will be the court's preferred first step.

Subdivision (e)(2) authorizes the court to consider a fact as undisputed for purposes of the motion when response or reply requirements are not satisfied. This approach reflects the "deemed admitted" provisions in many local rules. The fact is considered undisputed only for purposes of the motion; if summary judgment is denied, a party who failed to make a proper Rule 56 response or reply remains free to contest the fact in further proceedings. And the court may choose not to consider the fact as undisputed, particularly if the

court knows of record materials that show grounds for genuine dispute.

Subdivision (e)(3) recognizes that the court may grant summary judgment only if the motion and supporting materials — including the facts considered undisputed under subdivision (e)(2) — show that the movant is entitled to it. Considering some facts undisputed does not of itself allow summary judgment. If there is a proper response or reply as to some facts, the court cannot grant summary judgment without determining whether those facts can be genuinely disputed. Once the court has determined the set of facts — both those it has chosen to consider undisputed for want of a proper response or reply and any that cannot be genuinely disputed despite a procedurally proper response or reply — it must determine the legal consequences of these facts and permissible inferences from them.

Subdivision (e)(4) recognizes that still other orders may be appropriate. The choice among possible orders should be designed to encourage proper presentation of the record. Many courts take extra care with pro se litigants, advising them of the need to respond and the risk of losing by summary judgment if an adequate response is not filed. And the court may seek to reassure itself by some examination of the record before granting summary judgment against a pro se litigant.

Subdivision (f). Subdivision (f) brings into Rule 56 text a number of related procedures that have grown up in practice. After giving notice and a reasonable time to respond the court may grant summary judgment for the nonmoving party; grant a motion on legal or factual grounds not raised by the parties; or consider summary judgment on its own. In many cases it may prove useful first to invite a motion; the invited motion will automatically trigger the regular procedure of subdivision (c).

Subdivision (g). Subdivision (g) applies when the court does not grant all the relief requested by a motion for summary judgment. It becomes relevant only after the court has applied the summary-judgment standard carried forward in subdivision (a) to each claim, defense, or part of a claim or defense, identified by the motion. Once that duty is discharged, the court may decide whether to apply the summary-judgment standard to dispose of a material fact that is not genuinely in dispute. The court must take care that this determination does not interfere with a party's ability to accept a fact for purposes of the motion only. A nonmovant, for example, may feel confident that a genuine dispute as to one or a few facts will defeat the motion, and prefer to avoid the cost of detailed response to all facts stated by the movant. This position should be available without running the risk that the fact will be taken as established under subdivision (g) or otherwise found to have been accepted for other purposes.

If it is readily apparent that the court cannot grant all the relief requested by the motion, it may properly decide that the cost of determining whether some potential fact disputes may be eliminated by summary disposition is greater than the cost of resolving those disputes by other means, including trial. Even if the court believes that a fact is not genuinely in dispute it may refrain from ordering that the fact be treated as established. The court may conclude that it is better to leave open for trial facts and issues that may be better illuminated by the trial of related facts that must be tried in any event.

Subdivision (h). Subdivision (h) carries forward former subdivision (g) with three changes. Sanctions are made discretionary, not mandatory, reflecting the experience that courts seldom invoke the independent Rule 56 authority to impose sanctions. *See* Cecil & Cort, Federal Judicial Center Memorandum on Federal Rule of Civil Procedure 56(g) Motions for Sanctions (April 2, 2007). In addition, the rule text is expanded to recognize the need to provide notice and

a reasonable time to respond. Finally, authority to impose other appropriate sanctions also is recognized.

Changes Made After Publication and Comment

Subdivision (a): "[S]hould grant" was changed to "shall grant."

If "the movant shows that" was added.

Language about identifying the claim or defense was moved up from subdivision (c)(1) as published.

Subdivision (b): The specifications of times to respond and to reply were deleted.

Words referring to an order "in the case" were deleted.

Subdivision (c): The detailed "point-counterpoint" provisions published as subdivision (c)(1) and (2) were deleted.

The requirement that the court give notice before granting summary judgment on the basis of record materials not cited by the parties was deleted.

The provision that a party may accept or dispute a fact for purposes of the motion only was deleted.

Subdivision (e): The language was revised to reflect elimination of the point-counterpoint procedure from subdivision (c). The new language reaches failure to properly support an assertion of fact in a motion.

Subdivision (f): The provision requiring notice before denying summary judgment on grounds not raised by a party was deleted.

Subdivision (h): Recognition of the authority to impose other appropriate sanctions was added.

Other changes: Many style changes were made to express more clearly the intended meaning of the published proposal.

Form 52. Report of the Parties' Planning Meeting.

(Caption — See Form 1.)

1. The following persons participated in a Rule 26(f) conference on _date_ by _state the method of conferring_:

2. Initial Disclosures. The parties [have completed] [will complete by _date_] the initial disclosures required by Rule 26(a)(1).

3. Discovery Plan. The parties propose this discovery plan:

(*Use separate paragraphs or subparagraphs if the parties disagree.*)

(a) Discovery will be needed on these subjects: (*describe*)
(b) Disclosure or discovery of electronically stored information should be handled as follows: (*briefly describe the parties' proposals, including the form or forms for production.*)
(c) The parties have agreed to an order regarding claims of privilege or of protection as trial-preparation material asserted after production, as follows: (*briefly describe the provisions of the proposed order.*)
(db) (Dates for commencing and completing discovery, including discovery to be commenced or completed before other discovery.)
(ec) (Maximum number of interrogatories by each party to another party, along with dates the answers are due.)
(fd) (Maximum number of requests for admission, along with the dates responses are due.)
(ge) (Maximum number of depositions for each party.)
(hf) (Limits on the length of depositions, in hours.)
(ig) (Dates for exchanging reports of expert witnesses.)
(jh) (Dates for supplementations under Rule 26(e).)

4. Other Items:

* * * * *

To: **Hon. Lee H. Rosenthal, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Hon. Richard C. Tallman, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

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

Date: **May 11, 2009 (revised June 2009)**

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure ("the Committee") met on April 6-7, 2009 in Washington, D.C., and took action on a number of proposed amendments to the Rules of Criminal Procedure.

* * * * *

This report presents a number of action items:

(1) approval to transmit to the Judicial Conference published amendments to two rules pertaining to victims, Rules 12.3 and 21;

(2) approval to transmit to the Judicial Conference published amendments to Rules 15 and 32.1; and

* * * * *

II. Action Items—Recommendations to Forward Amendments to the Judicial Conference

A. Rules Pertaining to Victims

The first amendments the Committee recommends for transmission to the Judicial Conference pertain to victims. The Committee recommends that two of the three published amendments be transmitted to the Judicial Conference. It does not recommend transmittal of the proposed amendment to Rule 5.

The Committee received written comments and heard testimony from witnesses who opposed all of the amendments.

Some of the arguments were applicable to all of the amendments. The Committee was urged to remain consistent with its own policy of incorporating, but not going beyond, the requirements of the Crime Victims' Rights Act (CVRA) and leaving other issues to case-by-case development that may provide a basis for later rule making. The Committee's first victim-related rules have just gone into effect, and the Committee was urged by some groups to observe the experience under these rules before making further changes. Since the recent comprehensive review of the implementation of the CVRA by the Government Accountability Office (GAO) found no problems with the judicial implementation of the Act, opponents characterized the proposed amendments as premature. Although this argument applies to some degree to all three of the rules, it has the greatest bite in connection with the proposed amendment to Rule 12.3, which parallels an amendment to Rule 12.1 that went into effect December 1, 2008.

Some opponents of the amendments also expressed concern that the promulgation of rules not necessary to implement the CVRA might provide the basis for the proliferation of mandamus actions that would tie up the courts. Alternatively, the proposed rules might cause district courts to bend over backwards to avoid rulings that could generate mandamus actions, and by so doing prejudice the rights of defendants, the government, or witnesses in ways not amendable to appellate correction.

Comments pertaining to specific amendments are addressed below.

1. ACTION ITEM—Rule 12.3 (Notice of Public Authority Defense)

The proposed amendment parallels the amendment to Rule 12.1 (Notice of Alibi Defense) that is scheduled to go into effect on December 1, 2009. Both are intended to implement the CVRA, which states that victims have the right to be reasonably protected from the accused and to be treated with respect for their dignity and privacy. *See* 18 U.S.C. § 3771(a)(1) & (8). The proposed amendment provides that a victim's address and telephone number should not automatically be provided to the defense when a public authority defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense but also protects the victim's interests. The same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (b).

Rule 12.3. Notice of a Public-Authority Defense

(a) Notice of the Defense and Disclosure of Witnesses.

* * * * *

(4) ***Disclosing Witnesses.***

* * * * *

(C) *Government's Reply.* Within 7 days after receiving the defendant's statement, an attorney for the government must serve on the defendant or the defendant's attorney a written statement of the name~~, address, and telephone number~~ of each witness — and the address and telephone number of each witness other than a victim — that the government intends to rely on to oppose the defendant's public-authority defense.

(D) *Victim's Address and Telephone Number.* If the government intends to rely on a victim's testimony to oppose the defendant's public-authority defense and the defendant establishes a need for the victim's address and telephone number, the court may:

(i) order the government to provide the information in writing to the defendant or the defendant's attorney; or

(ii) fashion a reasonable procedure that allows for preparing the defense and also protects the victim's interests.

* * * * *

(b) Continuing Duty to Disclose.

(1) ***In General.*** Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of any additional witness — and the~~;~~ address, and telephone number of any additional witness other than a victim — if:

(~~1~~ A) the disclosing party learns of the witness before or during trial; and

(~~2~~ B) the witness should have been disclosed under Rule 12.3(a)(4) if the disclosing party had known of the witness earlier.

(2) ***Address and Telephone Number of an Additional Victim-Witness.*** The address and telephone number of an additional victim-witness must not

be disclosed except as provided in Rule 12.3(a)(4)(D).

* * * * *

COMMITTEE NOTE

Subdivisions (a) and (b). The amendment implements the Crime Victims' Rights Act, which states that victims have the right to be reasonably protected from the accused, and to be treated with respect for the victim's dignity and privacy. *See* 18 U.S.C. § 3771(a)(1) & (8). The rule provides that a victim's address and telephone number should not automatically be provided to the defense when a public-authority defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense, but also protects the victim's interests.

In the case of victims who will testify concerning a public-authority claim, the same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (b).

The Federal Magistrate Judges Association endorsed the proposal, which was opposed by the Federal Defenders and the National Association of Criminal Defense Lawyers (NACDL). The comments of Federal Defenders and NACDL parallel the arguments made in opposition to the amendment to Rule 12.1. The central concern is that the amendment requires the defendant to disclose the names and addresses of the witnesses who will support his public authority defense without any guarantee of reciprocal discovery of all of the government's rebuttal witnesses. The opponents argue that the amendment would violate due process under *Wardius v. Oregon*, 412 U.S. 470 (1973), which requires discovery to be a two-way street. Moreover, they urge that amendment has the same constitutional defect as restrictions on cross examining a government witness concerning his real name and address. Finally, they argue that the proposed amendment makes two unwarranted assumptions: that defendants generally pose a threat to victims who would testify concerning the defendant's claim of a public authority defense, and that defense counsel also pose a threat.

Although these arguments were presented very effectively in the written statements and testimony, they were, in effect, considered and rejected when Rule 12.1 was approved. One witness urged that Rule 12.3 is distinguishable from Rule 12.1 because victims would not be witnesses in cases raising a public authority defense. The Committee was not persuaded by this argument. Although there are not likely to be a large number of situations where the rule would apply, a

Committee member provided an illustration of a case in which the proposed amendment would have been applicable.

Following the precedent of Rule 12.1, the Advisory Committee voted unanimously to recommend that Rule 12.3 be approved as published and forwarded to the Standing Committee.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 12.3 be approved as published and forwarded to the Judicial Conference.

2. ACTION ITEM—Rule 21

Rule 21

The proposed amendment as published provides:

Rule 21. Transfer for Trial

* * * * *

(b) For Convenience. Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties, any victim, and the witnesses, and in the interest of justice.

* * * * *

Committee Note

Subdivision (b). This amendment requires the court to consider the convenience of victims — as well as the convenience of the parties and witnesses and the interests of justice — in determining whether to transfer all or part of the proceeding to another district for trial. The Committee recognizes that the court has substantial discretion to balance any competing interests.

This amendment requires the court to consider the convenience of victims – as well as the convenience of the parties and witnesses and the interests of justice – in determining whether to transfer all or part of the proceeding to another district for trial under Rule 21(b). It does not apply to Rule 21(a), which governs transfers for prejudice.

Although the Federal Magistrate Judges Association endorses the proposal, the remaining comments by the Federal Defenders, the National Association of Criminal Defense Lawyers (NACDL), and Mr. Alex Zipperer oppose the amendment. The comments opposing the amendment correctly observe that nothing in the CVRA compels the adoption of the amendment. Although the CVRA restricts the court's authority to exclude victims who are otherwise able to attend proceedings, the Act neither gives non-testifying victims a right to have the proceedings held at a place convenient for them nor requires the government to transport victims to the place of the trial.

NACDL argued that the proposed amendment in effect creates such a substantive right, and in so doing exceeds the authority of the Rules Enabling Act as well as the policy judgment expressed in the enactment of the CVRA. Opponents of the amendment also expressed concern that the proposed amendment improperly equates the convenience of the non-testifying victims with the convenience of the defendant, the prosecution, and the witnesses. This could result in holding the trial in a location that requires substantial travel, or imposes other significant costs on the parties and witnesses who are required to attend. In order to avoid a time-consuming mandamus challenge, the district court might actually give greater weight to the convenience of those who claim the status of non-testifying victims than to the interests of the defendant, the government, or the witnesses, because they do not have the ability to seek mandamus to enforce their preferences.

The Committee did not find these arguments persuasive. The rule comes into play if and only if a defendant moves to transfer the case. At that point the court "may" transfer the case, which makes the court's discretion clear. This point is further emphasized in the Committee Note, which states that "[t]he court has substantial discretion to balance any competing interests." This emphasis on the court's discretion was intended to allay any fear that mandamus would be a realistic concern. (Indeed, it was unclear how mandamus could be properly be employed to enforce a provision of the Federal Rules, when the statutory right to mandamus applies to the rights afforded by the CVRA. *See* 18 U.S.C. § 3771(d)(3).) Finally, Committee members noted that the rule already allows the court to consider "the interest of justice," which might in some cases be thought to include the interest of victims.

The Committee voted, with two dissents, to forward the proposed amendment to the Standing Committee.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 21 be approved as published and forwarded to the Judicial Conference.

After considering written comments and testimony opposing the proposed amendment to Rule 5, the Committee concluded that the amendment should be withdrawn. As published, the amendment provided:

Rule 5. Initial Appearance

* * * * *

(d) Procedure in a Felony Case.

* * * * *

(3) ***Detention or Release.*** The judge must detain or release the defendant as provided by statute or these rules. In making that decision, the judge must consider the right of any victim to be reasonably protected from the defendant.

* * * * *

COMMITTEE NOTE

Subdivision (d)(3). This amendment draws attention to a factor that the courts are required to consider under both the Bail Reform Act and the Crime Victims' Rights Act. In determining whether a defendant can be released on personal recognizance, unsecured bond, or conditions, the Bail Reform Act requires the court to consider "the safety of any other person or the community." *See* 18 U.S.C. § 3142(b) & (c). In considering proposed conditions of release, 18 U.S.C. § 3142(g)(4), requires the court to consider "the nature and seriousness of the danger to any person in the community that would be posed by the person's release." In addition, the Crime Victims' Rights Act, 18 U.S.C. § 3771(a)(1), states that victims have the "right to be reasonably protected from the accused."

In general the public comments urged (1) the amendment is unnecessary and (2) it is undesirable to single out only one of the many factors that courts must consider under the Bail Reform Act. The comments also expressed concern that the amendment could be read to change the standard for detention or release, creating a conflict with the carefully circumscribed limits Congress placed on preventive detention in the Bail Reform Act. The Bail Reform Act allows preventive detention only when necessary to satisfy a compelling need to protect individuals or the community from a particularly dangerous class of defendants. The court must find that "no condition or combination of conditions . . . will reasonably assure the appearance of the person required and the safety of any other person and the community." 18 U.S.C. § 3143(e) & (f). The proposed amendment, however, does not reflect those limitations. If it were interpreted as changing the

standard to be applied, it would create a new substantive right and thus run afoul of the Rules Enabling Act. It might also run afoul of the Eighth Amendment.

Members of the Committee discussed whether there was a need for the amendment and the constitutional and statutory arguments raised by opponents. The current text — which requires the decision to detain or release be made "as provided by statute or these rules" — clearly requires the courts to consider the requirements of the CVRA as well as the Bail Reform Act. Thus the proposed amendment is not necessary. There is, moreover, some force to the argument that in this context singling out the right of a victim to be protected from the defendant might be read as altering a constitutionally based substantive standard. This would exceed the authority conferred by the Rules Enabling Act.

The Committee voted not to forward the proposed amendment, rejecting by a vote of 9 to 3 a motion to resolve the issues raised in the comment period by adding a reference to the Bail Reform Act.

B. Other Published Rules

1. ACTION ITEM—Rule 15

The Committee voted with three dissents to approve and forward to the Standing Committee the proposed amendment Rule 15, which incorporates several changes made after publication.

The proposed amendment (reproduced below) provides for depositions at which the defendant is not physically present if the court finds that a series of stringent criteria are met. The amendment, which applies only to depositions taken outside the United States, addresses the growing frequency of cases in which important witnesses — both government and defense witnesses — live in, or have fled to, countries where they cannot be reached by the court's subpoena power. Although Rule 15 authorizes depositions of witnesses in certain circumstances, the Rule to date has not addressed instances where an important witness is not in the United States, there is a substantial likelihood the witness's attendance at trial cannot be obtained, and it would not be possible to securely transport the defendant or a co-defendant to the witness's location for a deposition. The proposed amendment is intended to fill that gap by allowing such depositions to be taken in a small group of cases that meet stringent criteria.

Four comments were received in response to the publication of the proposed amendment, and one witness representing the Federal Defenders testified concerning the amendment. The Magistrate Judges Association endorses the proposal. The General Counsel of the Drug Enforcement Administration raised some issues concerning the drafting of the rule. The Federal Defenders and the National Association of Criminal Defense Lawyers opposed the rule and urged that it be withdrawn, or, at a minimum, substantially redrafted.

The principal arguments in the lengthy submissions from the Federal Defenders and NACDL concern the effect of the proposed amendment on the defendant's rights under the Confrontation Clause of the Sixth Amendment. They argue that *Crawford v. Washington*, 541 U.S. 36 (2004), interprets the Confrontation Clause as providing an unqualified right to face-to-face confrontation that would preclude the admission of testimony preserved by a deposition taken under the proposed rule. There is no indication that the Supreme Court will continue to allow any exception to the right of face-to-face confrontation even when this would serve an important public policy interest and there are guarantees of trustworthiness. Moreover, the proposed amendment may not be confined to a small number of exceptional cases. The amendment in its current form is not, in the opponents' view, limited to cases where an interest as significant as national security is at issue, nor does it guarantee the level of participation by the defendant that was provided in *United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 2009 WL 425086 (Feb. 23, 2009) (two-way live video feed, one defense lawyer with defendant and another at the deposition, frequent opportunities for private conversations between defendant and counsel at the deposition, and split screen display at trial allowing jury to see reactions of both defendant and witness during deposition).

Specifically, as published the amendment (1) was not limited to transnational cases, (2) was not limited to felonies, (3) did not require a showing that the evidence sought is "necessary" to the government's case, and (4) imposed no obligation on the government to secure the witness's presence.

NACDL argues that the real significance of the amendment is not the taking of the depositions per se, but rather that it would enable the prosecution to present evidence at trial that has not been subject to confrontation. They argue that the amendment would in effect create a right to introduce the resulting deposition at trial, and as such exceed the authority of the Rules Enabling Act. It would also be a back door means of achieving the goals of the failed 2002 attempt to amend Rule 26. Rather than create inevitable constitutional challenges, they urge the Committee to await either legislation or further clarification from the case law. They also urge that the safeguards and limits in the proposed amendment are insufficient to restrict its scope and to guarantee the defendant's participation. In their view, "meaningfully participate ... through reasonable means" creates only a vague and subjective test that offers little real protection. Similarly, the showing required would encompass every witness beyond the court's subpoena power. Finally, they note there is reason to doubt the credibility and reliability of the testimony of the potential witnesses who are willing to be deposed, but not travel to the United States to testify. These will include, for example, persons who have fled justice in this country and know that their oath taken abroad will have no practical significance.

The Committee also heard testimony stressing the frequency with which the technology is inadequate or fails, as well as other problems that defense attorneys experience
in taking foreign depositions, such as the requirement in some countries that only local counsel can question witnesses.

The Committee adopted several amendments intended to address some of the issues raised during the comment period. It explicitly limited the amendment to felonies. After discussion, the Committee declined to adopt a requirement that the Attorney General or his designee certify or

determine that the case serves an important public interest. Although there was support for a mechanism that would guarantee that requests under the new rule would be rigorously reviewed within DOJ and made only infrequently, members were concerned that adding a provision in the rules requiring the action by the Attorney General might raise separation of powers issues. Instead, the Committee sought to address this concern by adding language requiring the attorney for the government to establish that the prosecution advances an important public interest. At the Standing Committee meeting this language was deleted on the assurance of the Department of Justice that it would require approval of subpoenas under the new provision at the level of the Assistant Attorney General, given that Department approval is already required before foreign evidence may be sought through mutual legal assistance treaties.

The Committee also incorporated several minor changes suggested during the comment period and by the style consultant to improve the clarity of the proposed amendment.

The Committee did not adopt three other suggestions. First, it declined to limit the rule to government witnesses, though it recognized that there will be only a small number of cases in which a defendant will wish to use this procedure.[1] Second, the Committee declined to require the government to show that the deposition would produce evidence "necessary" to its case, viewing that standard as unrealistic when the government is still assembling its case. Third, the Committee declined to add a requirement that the government show it had made diligent efforts to secure the witness's testimony in the United States. In the Committee's view, this might actually water down the requirement in the rule as published that the witness's presence "cannot be obtained."

The Committee discussed the Confrontation Clause issues at length. Members emphasized that when the government (or a codefendant) seeks to introduce deposition testimony, the court must still rule on admissibility under the Rules of Evidence as well as the Sixth Amendment. Members stressed that providing a procedure to take a deposition did not guarantee its later admission, which could turn on a number of factors. For example, if the technology does not work well enough to allow the defendant to participate or to create a high quality recording, the deposition would likely not be admitted. Similarly, the situation might change so that it would be possible for the witness to testify at the trial. The decision to allow the taking of the deposition in no way forecloses a subsequent Confrontation Clause challenge to admission or one based on the Rules of Evidence. The Committee Note was amended to make this point clear.

Issues concerning the propriety of allowing depositions for witnesses outside the United States and the procedures under which such depositions may be taken have arisen, and will continue to arise, in the lower courts in cases such as *United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 2009 WL 425086 (Feb. 23, 2009). In *Ali* the district court adopted procedures similar to

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[1]In cases involving a single defendant, Rule 15 would pose no difficulties if the defendant consented not to be present at the deposition of his witness, and there would be no Confrontation Clause barrier to the introduction of the deposition. However, in a case involving multiple defendants, one defendant might wish to depose a witness overseas, and another defendant who could not be present at the deposition might object to the admission of the evidence.

those outlined in the proposed amendment, and the Fourth Circuit held that the Confrontation Clause did not prohibit the introduction of deposition testimony taken under those procedures. In the Committee's view, it is now appropriate to distill the analysis in cases such as *Ali* and use it to set forth a procedural framework in the Federal Rules of Criminal Procedure. The proposed amendment is intended to meet the criteria developed in the lower court decisions, as well as the Supreme Court's Confrontation Clause decisions. Although there will undoubtably be issues arising from the use of technology, members felt that the district courts have ample authority and experience to handle those issues on a case by case basis.

The Committee voted, with three dissents, to approve the proposed amendment to Rule 15, as revised, and to send it to the Standing Committee. As revised, the amendment provides:

Rule 15. Depositions

* * * * *

(c) Defendant's Presence.

(1) ***Defendant in Custody.*** Except as authorized by Rule 15(c)(3), the ~~The~~ officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant:

(A) waives in writing the right to be present; or

(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

(2) ***Defendant Not in Custody.*** Except as authorized by Rule 15(c)(3), a ~~A~~ defendant who is not in custody has the right upon request to be present at

the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant — absent good cause — waives both the right to appear and any objection to the taking and use of the deposition based on that right.

(3) ***Taking Depositions Outside the United States Without the Defendant's Presence.*** The deposition of a witness who is outside the United States may be taken without the defendant's presence if the court makes case-specific findings of all the following:

(A) the witness's testimony could provide substantial proof of a material fact in a felony prosecution;

(B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;

(C) the witness's presence for a deposition in the United States cannot be obtained;

(D) the defendant cannot be present because:

(i) the country where the witness is located will not permit the defendant to attend the deposition;

(ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or

(iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and

(E) the defendant can meaningfully participate in the deposition through reasonable means.

* * * * *

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 15 be approved as amended following publication and forwarded to the Judicial Conference.

2. ACTION ITEM—Rule 32.1

This amendment is designed to end confusion regarding the applicability of 18 U.S.C. § 3143(a) — to which the current Rule refers — to release or detention decisions involving persons on probation or supervised release, and to clarify the burden of proof in such proceedings. Confusion arose because several subsections of § 3143(a) are ill-suited to proceedings involving the revocation of probation or supervised release. *See United States v. Mincey*, 482 F. Supp. 2d 161 (D. Mass. 2007). The amendment makes clear that only subsection 3143(a)(1) is applicable in this context.

The current rule also provides that the person seeking release must bear the burden of establishing that he or she will not flee or pose a danger, but does not specify the standard of proof

that must be met. The amendment incorporates into the rule the standard of clear and convincing evidence, which has been established by the case law.

The proposed amendment provides:

Rule 32.1. Revoking or Modifying Probation or Supervised Release

(a) Initial Appearance.

* * * * *

(6) ***Release or Detention.*** The magistrate judge may release or detain the person under 18 U.S.C. § 3143(a)(1) pending further proceedings. The burden of establishing by clear and convincing evidence that the person will not flee or pose a danger to any other person or to the community rests with the person.

* * * * *

Committee Note

This amendment is designed to end confusion regarding the applicability of 18 U.S.C. § 3143(a) to release or detention decisions involving persons on probation or supervised release, and to clarify the burden of proof in such proceedings. Confusion regarding the applicability of § 3143(a) arose because several subsections of the statute are ill-suited to proceedings involving the revocation of probation or supervised release. *See United States v. Mincey*, 482 F. Supp. 2d 161 (D. Mass. 2007). The amendment makes clear that only subsection 3143(a)(1) is applicable in this context.

The current rule provides that the person seeking release must bear the burden of establishing that he or she will not flee or pose a danger but does not specify the standard of proof that must be met. The amendment incorporates into the rule the standard of clear and convincing evidence, which has been established by the case law.

See, e.g., *United States v. Loya*, 23 F.3d 1529, 1530 (9th Cir. 1994); *United States v. Giannetta*, 695 F. Supp. 1254, 1256 (D. Me. 1988).[2]

Four comments were received in response to the publication of the proposed amendment, and one witness representing the Federal Defenders testified concerning the amendment. The Magistrate Judges Association endorses the proposal, but the other three comments were critical. Although one comment criticized the standard of clear and convincing evidence as "impossibly high," this standard is mandated by statute. The current rule requires the court to follow 18 U.S.C. § 3143(a), subsection (1) of which requires detention unless "the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released ...."

The Federal Public Defenders (whose views were also endorsed by the National Association of Criminal Defense Lawyers) did not challenge the clear and convincing evidence standard, but they opposed the rule as drafted and sought two significant changes:

(1) a preliminary requirement that the court find probable cause before detaining an individual under this provision, and

(2) a requirement that the government bear the burden of proof in cases in which the Sentencing Commission's policy statements provide for modification of the term or conditions of supervised release (rather than imprisonment).

The Committee rejected the proposal to add a preliminary requirement that the court find probable cause. The present rule was intended to satisfy due process by requiring a finding of probable cause at a preliminary hearing which must be held "promptly," and Rule 32.1(a)(1)-(6) sets forth a procedure for an initial appearance that would occur before – and not duplicate the function of – the preliminary hearing. Rule 32.1 was amended in 2002 to add the provisions concerning the initial appearance. The 2002 Committee Note indicates the Committee's awareness that some districts were not conducting an initial appearance. The Note states that under the new language an initial appearance is required, although a court may combine the initial appearance with the preliminary hearing if that can be done within the accelerated time requirement of Rule 32(a)(1) ("without unnecessary delay"). The purpose of the initial appearance is to provide the defendant with the advice required in Rule 32.1(a)(3), and to make an initial decision on release or retention under Rule 32.1(a)(6). As noted below, under Rule 32.1(a)(6) the person has the burden of establishing that he is not a flight risk or a danger to any other person or the community. Unless an individual court chooses to combine the initial appearance with the preliminary hearing, they serve distinct purposes.

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[2]The Standing Committee determined that these cases should be deleted from the note to conform to the pertinent style conventions.

Additionally, 18 U.S.C. § 3606 provides another important safeguard that occurs even earlier in the process. This section provides the authority for the arrest of a probationer or person on supervised release if there is probable cause to believe that he or she has violated a condition of the probation or release. Where the arrest of a person on probation or supervised release is made pursuant to a warrant, a judicial officer will necessarily have made a finding of probable cause pursuant to § 3606 (and the Fourth Amendment) before the arrest is made.

The Committee also declined to add a provision to the amendment that would shift the burden of proof in cases in which the applicable Guideline policy statement would not provide for imprisonment. The text of 18 U.S.C. § 3143(a)(1) places the burden of proof on the defendant except in cases when no imprisonment is provided for in the applicable "guideline" promulgated by the Sentencing Commission. The Commission has not promulgated any guidelines concerning supervised release, though it has promulgated policy statements. The Commission determined that policy statements rather than guidelines "provided greater flexibility to both the Commission and the courts." U.S.S.G. Ch. 7, Pt.A.3 (a). The court in *United States v. Mincey*, 482 F. Supp. 2d 161 (D. Mass. 2007), found that the language of § 3143(a)(1) was not applicable in the absence of a guideline.

In this context there is a significant difference between guidelines — to which 18 U.S.C. § 3143(a)(1) refers — and the policy statements concerning revocation. At least seven circuits have held that the Commission intended the policy statements of Chapter Seven to be only recommendations that are not binding on the courts. *See, e.g. United States v. O'Neill*, 11 F.3d 292, 301 n.11 (1st Cir. 1993) (noting that the policy statements of Chapter 7 "are prefaced by a special discussion making manifest their tentative nature" and "join[ing] six other circuits in recognizing Chapter 7 policy statements as advisory rather than mandatory"); *United States v. Hooker*, 993 F.2d 898, 901 (D.C. Cir. 1993) (stating "it seems contrary to the Commission's purpose to treat Chapter VII policy statements, which were adopted to preserve the courts' flexibility, as binding."). Courts have employed their discretion to order imprisonment for lower grade offenders even when the policy statements would provide only for lesser alternatives. *See, e.g., United States v. Redcap, 505* F.3d 1321 (10th Cir. 2007) (supervised release revoked for violation of drinking alcohol, and sentence imposed exceeded that recommended in the policy statement); *United States v. Moulden,* 478 F. 3d 652 (4th Cir. 2007) (probation revoked for defendant who argued that his violations were "technical" and "only" Grade C violations); *United States v. Crudup,* 461 F.3d 433 (4th Cir. 2006) (supervised release revoked and maximum sentence imposed for Grade C violations). Accordingly, the Committee determined that it would not be appropriate to rely upon the policy statement in Chapter 7 to define a class of cases in which the government would have to bear the burden of proving risk of flight or danger under Rule 32.1(a)(6).

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 32.1 be approved as published and forwarded to the Judicial Conference.

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 12.3. Notice of a Public-Authority Defense**

(a) Notice of the Defense and Disclosure of Witnesses.

* * * * *

(4) ***Disclosing Witnesses.***

* * * * *

(C) *Government's Reply*. Within 14 days after receiving the defendant's statement, an attorney for the government must serve on the defendant or the defendant's attorney a written statement of the name~~, address, and telephone number~~ of each witness — and the address and telephone number of each witness other than a victim — that the

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

**Incorporates amendments approved by the Supreme Court scheduled to take effect on December 1, 2009, if Congress takes no action to the contrary.

government intends to rely on to oppose the defendant's public-authority defense.

(D) *Victim's Address and Telephone Number.* If the government intends to rely on a victim's testimony to oppose the defendant's public-authority defense and the defendant establishes a need for the victim's address and telephone number, the court may:

(i) order the government to provide the information in writing to the defendant or the defendant's attorney; or

(ii) fashion a reasonable procedure that allows for preparing the defense and also protects the victim's interests.

* * * * *

(b) Continuing Duty to Disclose.

(1) ***In General.*** Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of any additional witness — and the; address, and telephone number of any additional witness other than a victim — if:

(~~1~~ A) the disclosing party learns of the witness before or during trial; and

(~~2~~ B) the witness should have been disclosed under Rule 12.3(a)(4) if the disclosing party had known of the witness earlier.

(2) ***Address and Telephone Number of an Additional Victim-Witness.*** The address and telephone number of an additional victim-witness must not be disclosed except as provided in Rule 12.3(a)(4)(D).

* * * * *

COMMITTEE NOTE

Subdivisions (a) and (b). The amendment implements the Crime Victims' Rights Act, which states that victims have the right to be reasonably protected from the accused, and to be treated with respect for the victim's dignity and privacy. *See* 18 U.S.C. § 3771(a)(1) & (8). The rule provides that a victim's address and telephone number should not automatically be provided to the defense when a public-authority defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense, but also protects the victim's interests.

In the case of victims who will testify concerning a public-authority claim, the same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (b).

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made after the amendment was released for public comment.

Rule 15. Depositions

* * * * *

(c) Defendant's Presence.

(1) ***Defendant in Custody.*** Except as authorized by Rule 15(c)(3), the ~~The~~ officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant:

(A) waives in writing the right to be present; or

(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

(2) ***Defendant Not in Custody.*** Except as authorized by Rule 15(c)(3), a ~~A~~ defendant who is not in custody has the right upon request to be present at

the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant — absent good cause — waives both the right to appear and any objection to the taking and use of the deposition based on that right.

(3) ***Taking Depositions Outside the United States Without the Defendant's Presence.*** The deposition of a witness who is outside the United States may be taken without the defendant's presence if the court makes case-specific findings of all the following:

(A) the witness's testimony could provide substantial proof of a material fact in a felony prosecution;

(B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;

(C) the witness's presence for a deposition in the United States cannot be obtained;

(D) the defendant cannot be present because:

(i) the country where the witness is located will not permit the defendant to attend the deposition;

(ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or

(iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing;

(E) the defendant can meaningfully participate in the deposition through reasonable means; and

(F) for the deposition of a government witness, the attorney for the government has established that the prosecution advances an important public interest.

* * * * *

COMMITTEE NOTE

Subdivision (c). This amendment addresses the growing frequency of cases in which important witnesses — government and defense witnesses both — live in, or have fled to, countries where they cannot be reached by the court's subpoena power. Although Rule 15 authorizes depositions of witnesses in certain circumstances, the Rule to date has not addressed instances where an important witness is not in the United States, there is a substantial likelihood the witness's attendance at trial cannot be obtained, and it would not be possible to securely transport the defendant or a co-defendant to the witness's location for a deposition.

Recognizing that important witness confrontation principles and vital law enforcement and other public interests are involved in these instances, the amended Rule authorizes a deposition outside a defendant's physical presence only in very limited circumstances where case-specific findings are made by the trial court. New Rule 15(c) delineates these circumstances and the specific findings a trial

court must make before permitting parties to depose a witness outside the defendant's presence.

The party requesting the deposition shoulders the burden of proof — by a preponderance of the evidence — as to the elements that must be shown. Courts have long held that when a criminal defendant raises a constitutional challenge to proffered evidence, the government must generally show, by a preponderance of the evidence, that the evidence is constitutionally admissible. *See, e.g.*, *Lego v. Twomey*, 404 U.S. 477, 489 (1972). Here too, the party requesting the deposition, whether it be the government or a defendant requesting a deposition outside the physical presence of a co-defendant, bears the burden of proof. Moreover, if the witness's presence for a deposition in the United States can be secured, thus allowing defendants to be physically present for the taking of the testimony, this would be the preferred course over taking the deposition overseas and requiring the defendants to participate in the deposition by other means.

Finally, this amendment does not supersede the relevant provisions of 18 U.S.C. § 3509, authorizing depositions outside the defendant's physical presence in certain cases involving child victims and witnesses, or any other provision of law.

The Committee recognizes that authorizing a deposition under Rule 15(c)(3) does not determine the admissibility of the deposition itself, in part or in whole, at trial. Questions of admissibility of the evidence taken by means of these depositions are left to resolution by the courts applying the Federal Rules of Evidence and the Constitution.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The limiting phrase "in the United States" was deleted from Rule 15(c)(1) and (2) and replaced with the phrase "Except as authorized by Rule 15(c)(3)." The revised language makes clear that foreign depositions under the authority of (c)(3) are exceptions to the provisions requiring the defendant's presence, but other depositions outside the United States remain subject to the general requirements of (c)(1) and (2). For example, a defendant may waive his right to be present at a foreign deposition, and a defendant who attends a foreign deposition may be removed from such a deposition if he is disruptive.

In subdivision (c)(3)(D) the introductory phrase was revised to the simpler "because."

In order to restrict foreign depositions outside of the defendant's presence, the limiting phrase "in a felony prosecution" was added to subdivision (c)(3)(A).

The Committee Note was revised in several respects. In conformity with the style conventions governing the rules, citations to cases were deleted. Other changes were made to improve clarity.

Rule 21. Transfer for Trial

* * * * *

(b) For Convenience. Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties, any victim, and the witnesses, and in the interest of justice.

* * * * *

COMMITTEE NOTE

Subdivision (b). This amendment requires the court to consider the convenience of victims — as well as the convenience of the parties and witnesses and the interests of justice — in determining whether to transfer all or part of the proceeding to another district for trial. The Committee recognizes that the court has substantial discretion to balance any competing interests.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made after the amendment was released for public comment.

Rule 32.1. Revoking or Modifying Probation or Supervised Release

(a) Initial Appearance.

* * * * *

(6) ***Release or Detention.*** The magistrate judge may release or detain the person under 18 U.S.C. § 3143(a)(1) pending further proceedings. The burden of establishing by clear and convincing evidence that the person will not flee or pose a danger to any other person or to the community rests with the person.

* * * * *

COMMITTEE NOTE

Subdivision (a)(6). This amendment is designed to end confusion regarding the applicability of 18 U.S.C. § 3143(a) to release or detention decisions involving persons on probation or supervised release, and to clarify the burden of proof in such proceedings. Confusion regarding the applicability of § 3143(a) arose because several subsections of the statute are ill suited to proceedings involving the revocation of probation or supervised

release. *See United States v. Mincey*, 482 F. Supp. 2d 161 (D. Mass. 2007). The amendment makes clear that only subsection 3143(a)(1) is applicable in this context.

The current rule provides that the person seeking release must bear the burden of establishing that he or she will not flee or pose a danger but does not specify the standard of proof that must be met. The amendment incorporates into the rule the standard of clear and convincing evidence.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made after the amendment was released for public comment.

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

FROM: **Robert L. Hinkle, Chair**
Advisory Committee on Evidence Rules

DATE: **May 6, 2009**

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

Introduction

The Advisory Committee on Evidence Rules met on April 23-24 in Washington, D.C. The meeting produced two action items for Standing Committee consideration at the June 2009 meeting.

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The second action item involves Rule 804(b)(3), the hearsay exception for an unavailable declarant's statement against interest. As the Standing Committee will recall, a year ago the Advisory Committee proposed, and the Standing Committee approved, releasing for public comment a proposed amendment to this rule. The current rule requires a criminal-case defendant — but not the government — to show corroborating circumstances as a condition to admission of an unavailable declarant's statement against penal interest. The amendment would extend the corroborating-circumstances requirement to the government, as some courts have done anyway. The Justice Department does not oppose the amendment. The proposed amendment makes no change for civil cases or for statements against pecuniary interest.

At the April 2009 meeting, the Advisory Committee considered the few public comments received on the proposal. The comments were generally favorable. The Advisory Committee made no changes of substance to the proposal as released for public comment, but the Committee made stylistic changes consistent with some of the public comments and with the ongoing restyling project. The Advisory Committee now asks the Standing Committee to approve the proposed amendment to Rule 804(b)(3) for submission to the Judicial Conference. The text of the proposed rule in black-line form and a summary of the public comments are attached to this Report as Appendix B.

A complete discussion of these items is in the draft minutes attached to this Report as Appendix C.

* * * * *

II. Action Item — Proposed Amendment to Evidence Rule 804(b)(3)

As noted above in the introduction to this report, Rule 804(b)(3) now provides that in a criminal case, the defendant — but not the government — must show corroborating circumstances as a condition for admitting an unavailable declarant's statement against penal interest. The proposed amendment would extend the corroborating-circumstances requirement to the government, as some courts have done anyway.

Nobody asked to speak at the scheduled public hearings on the proposed amendment. The hearings were canceled. A small number of written public comments were filed. They are summarized at the end of Appendix B to this report. No comment opposed requiring the government to show corroborating circumstances. Two comments suggested that although the government should be required to show corroborating circumstances, the defendant should not. The Advisory Committee rejected that suggestion. One comment suggested the rule should be amended further to overturn a controlling Supreme Court decision on another aspect of the rule. The Advisory Committee rejected that suggestion. Finally, several comments proposed stylistic changes. The Advisory Committee implemented those suggestions and sought to avoid successive changes by restyling the proposed Rule 804(b)(3) as will occur anyway as part of the restyling process. The Committee revised the proposed Committee Note to reflect this decision and in response to a further comment on the Note.

Appendix B to this report sets out the proposed amendment in black-line form. The appendix also includes the proposed Committee Note and summarizes the public comments.

Recommendation: The Advisory Committee on Evidence Rules recommends that the Standing Committee approve the proposed amendment to Rule 804(b)(3) for submission to the Judicial Conference.

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PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE*

Rule 804. Hearsay Exceptions; Declarant Unavailable

* * * * *

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * * * *

(3) **Statement against interest.** A statement ~~which~~ 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

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

invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability ~~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.~~ ; and

(B) ~~A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless~~ is supported by

corroborating circumstances that clearly indicate ~~the~~ its trustworthiness ~~of the statement~~, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

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Committee Note

Subdivision (b)(3). Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. A number of courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. *See, e.g., United States v. Alvarez,* 584 F.2d 694, 701 (5th Cir. 1978) ("by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)"); *United States v. Shukri,* 207 F.3d 412 (7th Cir. 2000) (requiring corroborating circumstances for against-penal-interest statements offered by the government). A unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.

All other changes to the structure and wording of the Rule are intended to be stylistic only. There is no intent to change any other result in any ruling on evidence admissibility.

The Committee found no need to address the relationship between Rule 804(b)(3) and the Confrontation Clause, because the requirements of this exception assure that declarations admissible under it will not be testimonial.

The amendment does not address the use of the corroborating circumstances for declarations against penal interest offered in civil cases.

In assessing whether corroborating circumstances exist, some courts have focused on the credibility of the witness who relates the hearsay statement in court. But the credibility of the witness who relates the statement is not a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

The rule, as submitted for public comment, was restyled in accordance with the style conventions of the Style Subcommittee of the Committee on Rules of Practice and Procedure. As restyled, the proposed amendment addresses the style suggestions made in public comments.

The proposed Committee Note was amended to add a short discussion on applying the corroborating circumstances requirement.

What follows is the proposed amendment in "clean" form:

(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.

GUIDELINES FOR DISTINGUISHING BETWEEN MATTERS APPROPRIATE FOR STANDING ORDERS AND MATTERS APPROPRIATE FOR LOCAL RULES AND FOR POSTING STANDING ORDERS ON A COURT'S WEB SITE

I. Guidelines for Using Standing Orders

1. Standing Orders May Be Used for Internal Administration.

Standing orders are most useful and appropriate to address matters of internal administration. For such matters, notice and public comment are not necessary and in some cases not justified. Examples of matters of internal administration properly covered by standing orders include the following:

- Court security[1]
- Planning for emergencies[2]
- Using nonappropriated funds[3]
- General procedures for funds in court registry[4]
- Directives to court personnel[5]
- Division of workload[6]
- Referral to magistrate judges[7]
- Using resources[8]
- Juror wheels[9]
- Setting dates for naturalization hearings[10]
- Court implementation of judicial resources for initial appearances[11]
- General scheduling of motions, such as on a particular day of the week[12]
- Appointments, such as to Criminal Justice Act Panel[13]
- PACER fee exemptions[14]
- Closing or staffing courts on or after holidays[15]

2. Standing Orders Are Appropriate to Address Problems and Issues That Are Unlikely to Exist Beyond the Time Necessary to Implement a Local Rule.

Because of the procedural requirements for local rulemaking, a standing order may be necessary to address a problem that is anticipated to be of such short duration that it will be resolved by the time a local rule can be implemented. For example, some courts briefly suspended sentencing proceedings until the impact of *Blakely v. Washington* could be

analyzed, which was completed before a local rule suspending proceedings could have been implemented.[16]

3. Standing Orders Are Appropriate to Address Emergencies, During the Time Necessary to Implement a Local Rule.

A third appropriate use for a standing order as opposed to a local rule is to address what amounts to an emergency. For example, some district courts entered a standing order adopting the Interim Rules to Implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Other courts have used standing orders to deal with unanticipated issues arising from particular kinds of cases, such as cases involving terrorism charges. If, however, the matter addressed is a continuing rather than a temporary one — and it affects members of the public — then a local rule should be developed to address it.[17]

4. Standing Orders May Be Appropriate to Address Rules of Courtroom Conduct as Opposed to Substantive Rules of Practice.

There are many standing orders that concern conduct in the courtroom. These can be district- or division-wide standing orders or individual-judge standing orders. Standing orders often set rules for "purely" courtroom conduct, such as eating and drinking in the courtroom, courtroom hours, whether lawyers should question witnesses from a podium or from counsel table, and whether lawyers must deliver courtesy copies to chambers.

Each judge of course has the authority to control his or her courtroom in the way that works best for that judge. Individual-judge standing orders may be appropriate if the judge has courtroom-conduct requirements that the local rules do not cover and the requirements govern purely courtroom conduct as opposed to more substantive matters. These Guidelines do not address a judge responding to case-management problems presented in a specific case by issuing orders in that case as opposed to issuing a standing order that applies generally.

An individual-judge standing order should not repeat the provisions of the local rules or district- or division-wide standing orders. To avoid confusion, where an individual-judge standing order does deviate from district- or division-wide standing orders or local rules that generally apply, the judge's standing order should clearly identify the deviation and what different approach is required.

Any standing order should be easy to find. The fact that many of the same topics or matters are inconsistently addressed — in local rules in some courts, in district- or division-wide standing orders in other courts, in individual-judge orders in yet other courts, or repeated with variations in some or all of these categories in some courts — adds to the

difficulty lawyers face in figuring out what standards apply and where to look for those standards.

The case law makes one outer limit clear. Whether issued by a district, a division, or an individual judge, a standing order that is inflexible or idiosyncratic may be found improper by an appellate court, particularly if there is a question as to adequate notice of the order. For example, in *In re Contempt Order of Petersen*, 441 F.3d 1266 (10th Cir. 2006), the magistrate judge entered an order of criminal contempt against a government lawyer who was five minutes late to a pretrial detention hearing. The lawyer had violated the judge's "standing policy" that any lateness would be sanctioned in the amount of $50, payable to the court — no excuses permitted. The court of appeals vacated the order, reasoning that it failed to take account of the circumstances of a particular case. It noted that the lawyer was in time to argue the motion, and that the judge made no effort to inquire into the reasons for the lawyer's tardiness. Moreover, the court was concerned that the lawyer had no notice of the "standing policy."

5. Rules on Filing, Pretrial Practice, Motion Practice, and Other Matters That Litigants Must Comply with Should Be Placed in Local Rules.

There are many standing orders — both district- and division-wide and individual-judge orders — that control such matters as electronic filing; special pleading requirements (such as in civil RICO cases); sealing criteria and procedures; electronic discovery protocols; filing and litigating motions, including summary judgment motions; limits on counsels' questions during voir dire; time limits on opening statements; transcribing audio recordings entered as evidence; applications for attorney fees; and filing memoranda of law. Many of these orders differ from local or national rules and some are in tension with or even contradict those rules. Issues relating to such matters as filing pleadings and motions, litigating motions, and developing criteria for sealing documents, are so important to the practicing bar that notice and public comment are essential.

With respect to electronic filing, the argument is sometimes made that technology develops so quickly that by the time a local rule can be implemented, it is outmoded and a new local rule is needed. But the prospect of technological development does not justify the placement of all electronic filing rules in standing orders. The model local rules developed by the Judicial Conference are flexible enough to accommodate technological change. It is notable that a number of districts have mandated electronic filing by standing order rather than local rule; but a standing order on such an important (and unchanging) matter is difficult to justify as necessary to accommodate constant changes in electronic filing. Filing requirements have a significant impact on lawyers and litigants and the local-rules comment process is important to developing workable and effective procedures. It is true, of course,

that the details of implementation of electronic filing may need fairly frequent updating, but that can be done by promulgating general local rules that cross reference a user's manual on the court's web site, as is the practice in many districts.

6. Rules for Mediation and Other Forms of ADR, Sentencing, and Related Proceedings Should Be Placed in Local Rules.

Some districts have standing orders that essentially provide a complete set of rules for such proceedings as ADR (including arbitration and mediation), sentencing (especially standards for probation and supervised release), and attorney disciplinary proceedings. Most districts have implemented such procedures in local rules, showing that standing orders are not necessary for these kinds of proceedings. It is recommended that courts operating under such district-wide standing orders consider transferring these procedures to their local rules. Placing these subject matters in local rules would provide the lawyers and litigants participating in these proceedings an opportunity to comment on them before they are promulgated.

7. Standing Orders Should Not Duplicate a National or Local Rule.

Under Civil Rule 83, Criminal Rule 57, and Bankruptcy Rule 9029, standing orders are not supposed to duplicate a national rule. Duplication must be distinguished from simply referring to a national rule, which is of course permissible. But if a standing order actually duplicates a national rule, it is both unnecessary and improper.

There is no similar prohibition on a standing order duplicating a local rule, but such duplication is problematic. Including the same subject matter in both a local rule and in a standing order is in itself confusing. The potential for confusion increases if one changes and the other does not, or if the standing order is close but not identical to the local rule. Minor variations, poor paraphrasing, or selective duplication will introduce even more confusion. It could be argued that duplicating some local rules in standing orders might increase the likelihood that the lawyers know of the requirements; but the risks of "incomplete" duplication, or a change in one rule but not the other, caution strongly against attempting to duplicate the terms of a local rule in a standing order.

8. Standing Orders Must Not Abrogate or Modify a Local Rule.

Some district courts have abrogated or modified a local rule by issuing a standing order, even without the justification of an emergency. Under Civil Rule 83, Criminal Rule 57, and Bankruptcy Rule 9029, a court may only regulate practice in a manner consistent with the district's local rules. The use of standing orders to abrogate or modify a local rule

is problematic, moreover, because it requires the practitioner to master both the local rule and the standing order and then to determine how they interact. The transaction costs outweigh whatever benefit might be argued to exist from changing a local rule by way of standing order.

II. Guidelines for Posting and Providing Access to Standing Orders

Given the lack of notice and public comment before standing orders are entered, it is critical that members of the public have a ready way to find and access them. Under current practice, members of the public can find this difficult because there is no consistent, predictable approach to posting standing orders on court web sites, and most courts do not have indexing or search functions that allow members of the public readily or reliably to find what they are looking for among all the posted standing orders.

In posting standing orders on court web sites, the following guidelines should be followed:

1. The home page for each court's web site should have a link entitled "Standing Orders."
2. The link should direct the user to a page with a further link to the court's general standing orders, and individual links for the standing orders of each judge on the court.
3. Notice of a new standing order, or a change to a standing order, should be on the court's web site for a reasonable period.
4. The posted standing orders for the court and for each individual judge should contain an index and a word-search function that allows the user to locate and access orders on particular topics or subjects and ensure that all relevant orders have been found.

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1. *See* Southern District of Texas, Order 2001-05, In Re: Weapon Possession in Court Facilities (limits individuals who can possess a firearm in courthouses).

2. *See* Northern District of Oklahoma, General Order 01-05 (adopting Occupant Emergency Plan for occupants of the courthouse).

3. *See* Southern District of Texas, Order 1995-13, In the Matter of Operations Without Appropriations for Fiscal Year 1996.

4. *See* Southern District of Texas, Order 1992-10, Authorizing Withdrawal of Excess Securities.

5. *See* Southern District of Texas, Order 1992-22, Order for Docketing Priority (directive to court personnel re importance of prompt docketing).

6. *See* Southern District of Texas, Order 2006-1, In the Matter of the Division of Work Calendar Year 2006.

7. *See* Northern District of Florida, Order dated 5/31/2000, Referral of Civil Cases to Full-time Magistrate Judges (ordering that all new social security cases be randomly assigned, on a rotating basis, to the division's full-time magistrate judges).

8. *See* Northern District of Florida, Order dated 10/2/2006, Authorization for In-District Travel for Clerk of Court and Chief Probation Officer (also authorizing agency-financed travel to FJC or AO training sessions).

9. *See* Southern District of Texas, Order 2005-09, In Re: Refilling the Master Jury Wheels.

10. *See* Southern District of Texas, Order 1990-44, Order Setting Naturalization Hearing Date.

11. *See* Southern District of Texas Order 1991-26, In the Matter of Guidelines for Coordination of Criminal Procedures (guidelines for coordinating criminal procedures in Houston Division to ensure that an apprehended defendant is brought before a magistrate judge as quickly as possible).

12. *See* District of South Carolina, Order of Judge Anderson (providing that civil motions are heard on Mondays at 1:30 p.m., and if Monday is a holiday, the next motion day is the following Monday).

13. *See* Northern District of Florida, Order dated 12/14/2006, Criminal Justice Act Panel (appointing a new member).

14. *See* Northern District of Florida, Order dated 4/7/2006, Exemption from Fees to PACER (authorizing fee exemption for academic researcher).

15. *See* Northern District of Oklahoma, General Order 06-19 (announcing closing of court on Friday, November 24, 2006).

16. *See* Northern District of Oklahoma, General Order 04-07 (stating that it was considering a moratorium on sentencing proceedings until it could study *Blakely*, and directing the U.S. Attorney to identify any case in which a delay might violate the Speedy Trial Act).

17. It could be argued that any "emergency" should be handled by an interim local rule rather than a standing order. *See* 28 U.S.C. § 2071(e) ("If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment."). But so long as there is ultimately a local (or national) rule implemented within a reasonably short time period to deal with the problem on a permanent basis, there is no real distinction between a standing order and an interim local rule — because both are implemented without a period for public comment.