COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Cambridge, MA
January 3-4, 2013

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January 3-4, 2013

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CHAIRS and REPORTERS

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Committee on Rules of Practice and Procedure

To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

Members	Position	District/Circuit	Start Date	End Date
Jeffrey S. Sutton Chair	C	Sixth Circuit	2012	2015
James Cole*	DOJ	Washington, DC	----	Open
Dean C. Colson	ESQ	Florida	2009	2015
Roy T. Englert, Jr.	ESQ	Washington, DC	2010	2013
Gregory G. Garre	ESQ	Washington, DC	2011	2014
Neil M. Gorsuch	C	Tenth Circuit	2010	2013
Marilyn L. Huff	D	California (Southern)	2007	2013
Wallace B. Jefferson	CJUST	Texas	2010	2013
David F. Levi	ACAD	North Carolina	2009	2015
Patrick J. Schiltz	D	Minnesota	2010	2013
Larry A. Thompson	ESQ	Georgia	2011	2014
Richard C. Wesley	C	Second Circuit	2011	2014
Diane P. Wood	C	Seventh Circuit	2007	2013
Daniel Coquillette Reporter	ACAD	Massachusetts	1985	Open
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Liaison for the Advisory Committee on Bankruptcy Rules		***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Diane P. Wood**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Marilyn L. Huff**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Judith H. Wizmur**	***(Bankruptcy)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Paul S. Diamond**	***(Civil)***
Liaison for the Advisory Committee on Evidence Rules	**Judge John F. Keenan**	***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

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Meeting of June 11-12, 2012
Washington, D.C.
Draft Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C., on Monday and Tuesday, June 11 and 12, 2012. The following members were present:

Judge Mark R. Kravitz, Chair
Dean C. Colson, Esquire
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Marilyn L. Huff
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Judge James A. Teilborg
Larry D. Thompson, Esquire
Judge Richard C. Wesley
Judge Diane P. Wood

Deputy Attorney General James M. Cole was unable to attend. The Department of Justice was represented throughout the meeting by Elizabeth J. Shapiro, Esquire, and at various points by Kathleen A. Felton, Esquire; H. Thomas Byron III, Esquire; Jonathan J. Wroblewski, Esquire; Ted Hirt, Esquire; and J. Christopher Kohn, Esquire.

Judge Jeremy D. Fogel, Director of the Federal Judicial Center, participated in the meeting, as did the committee's consultants – Professor Geoffrey C. Hazard, Jr.; Professor R. Joseph Kimble; and Joseph F. Spaniol, Jr., Esquire.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
Jonathan C. Rose	Chief, Rules Committee Support Office
Benjamin J. Robinson	Deputy Chief, Rules Committee Support Office
Julie Wilson	Attorney, Rules Committee Support Office
Andrea L. Kuperman	Rules law clerk to Judge Kravitz
Joe Cecil	Research Division, Federal Judicial Center

Also attending were Administrative Office attorneys James H. Wannamaker III, Bridget M. Healy, and Holly T. Sellers, and the judiciary's Supreme Court fellows.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Jeffrey S. Sutton, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Eugene R. Wedoff, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Troy A. McKenzie, Associate Reporter
Advisory Committee on Civil Rules —
Judge David G. Campbell, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter
Advisory Committee on Criminal Rules —
Judge Reena Raggi, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Kravitz reported that he would retire as committee chair on September 30, 2012, and the Chief Justice had nominated Judge Sutton to succeed him. He congratulated Judge Sutton and thanked the Chief Justice for making an excellent selection.

Judge Kravitz reported that the Supreme Court in April 2012 had adopted the proposed amendments to the bankruptcy and criminal rules recommended by the Conference at its September 2011 session. The changes will take effect by operation of law on December 1, 2011, unless Congress acts to reject, modify, or defer them.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Robinson reported that there had been no further significant legislative action related to electronic discovery since the committee's January 2012 meeting.

He said that the House Judiciary Committee had held a hearing on the Class Action Fairness Act, at which no calls were made either for an overhaul of FED. R. CIV. P. 23 (class actions) or for dramatic changes to the rule. One witness, though, criticized the continuing reliance on cy près in class actions.

Mr. Robinson said that there had been no recent action on legislation addressing sunshine in regulatory decrees and settlements. He suggested that legislative attention now seemed to focus more on the criminal rules. A hearing, he reported, had been held before the Senate Judiciary Committee in June 2012 addressing the obligations of prosecutors to disclose exculpatory materials to the defense. At the hearing Senator Murkowski summarized her legislation on the subject, introduced in the wake of the prosecution of the late Senator Stevens and the ultimate dismissal of the criminal case.

Mr. Robinson reported that Judge Raggi had submitted a letter in connection with the hearing, in which she set out in broad terms the extensive work of the Advisory Committee on Criminal Rules over the last decade on FED. R. CRIM. P. 16 (discovery and inspection in criminal cases). The letter, he said, had a 909-page attachment describing that work in detail. In addition, Carol Brook, the federal defender for the Northern District of Illinois and a member of the advisory committee, testified at the hearing. He added that the legislators and witnesses appeared to agree that there were problems with non-disclosure of *Brady* materials that should be addressed, but most concluded that the pending legislation did not offer the right solution to the problems.

He reported that Senator Leahy had introduced legislation underscoring the nation's obligations under article 36 of the Vienna Convention to provide consular notification when foreign nationals are arrested. The legislation, he said, had been added to a State Department appropriations bill. He pointed out that language had been removed from the bill that would have duplicated the substance of proposed amendments to FED. R. CRIM. P. 5 and 58. The committee report accompanying the bill, moreover, encouraged the ongoing work of the rules committees and the Uniform Law Commission in facilitating compliance with the Vienna Convention by federal, state, and local law-enforcement officials. Mr. Robinson thanked the Judicial Conference's Federal-State Jurisdiction Committee for monitoring the legislation and informing the Senate of the activities of the rules committees.

He reported that the House Judiciary Committee had favorably reported out legislation to require bankruptcy asbestos trusts to report claimant filing information to the bankruptcy courts on a quarterly basis. The substance of the legislation, he noted, had previously been proposed as an amendment to the bankruptcy rules, but was not adopted by the Advisory Committee on Bankruptcy Rules. He added that the legislation would continue to be monitored.

Mr. Robinson noted that Magistrate Judge Paul W. Grimm, a member of the Advisory Committee on Civil Rules, had testified at the Senate hearing on his nomination to a district judgeship on the U.S. District Court for the District of Maryland. In addition, a Senate vote was expected shortly to confirm the nomination of Justice Andrew D. Hurwitz, a recent alumnus of the Advisory Committee on Evidence Rules, to a judgeship on the U.S. Court of Appeals for the Ninth Circuit.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on January 5 and 6, 2012.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of May 8, 2012 (Agenda Item 7).

Amendments for Final Approval

FED. R. APP. P. 13, 14, 24(b)

Judge Sutton reported that 26 U.S.C. § 7482(a)(2), enacted in 1986, authorizes permissive interlocutory appeals from the United States Tax Court to the courts of appeals. The Federal Rules of Appellate Procedure, however, were never amended to reflect this avenue for appellate review.

The proposed changes to FED. R. APP. P. 13 (review of a Tax Court decision) and FED. R. APP. P. 14 (applicability of other appellate rules to review of a Tax Court decision) would remedy this omission. The proposed change to FED. R. APP. P. 24(b) (leave to proceed in forma pauperis) would clarify the rule by recognizing that the Tax Court is not an administrative agency.

Judge Sutton reported that the advisory committee had consulted closely with the Tax Court and the Tax Division of the Department of Justice in developing the proposals. He added that no public comments had been received and no changes made in the proposals following publication.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FED. R. APP. P. 28 and 28.1(c)

Judge Sutton explained that the proposed change to FED. R. APP. P. 28(a) (appellant's brief) would revise the list of the required contents of an appellant's brief by combining paragraphs 28(a)(6) and 28(a)(7). Paragraph (a)(6) now requires a statement of the case, and (a)(7) a statement of the facts. The new, combined provision, numbered Rule 28(a)(6), would require "a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e))." Conforming changes would be made in Rule 28(b), governing appellees' briefs, and Rule 28.1(c), governing briefs in cross-appeals.

Judge Sutton pointed out that most lawyers will choose to present the factual and procedural history of a case chronologically. The revised rule, though, gives them the flexibility to follow a different order. In addition, the committee note specifies that a statement of the case may include subheadings, particularly to highlight the rulings presented for review.

He reported that the proposed amendments had attracted six public comments, four of them favorable. Some comments expressed concern that deleting the current rule's reference to "the nature of the case, the course of proceedings, and the disposition below" might lead some to conclude that the procedural history of a case may no longer be included in the statement of the case. Therefore, after publication, the committee inserted into proposed Rule 28(a)(6)'s statement of the case the phrase "describing the relevant procedural history." The committee note was also modified to reflect the addition. He noted, too, that the Supreme Court's rule – which similarly requires a single, combined statement – appears to have worked well.

A member noted that a prominent judge had argued in favor of maintaining separate statements of the case and of the facts, predicting that combined statements will require judges to comb through a great deal of detail to find the key procedural steps in a case – the pertinent rulings made by the lower court. She suggested that the judge's concern might be addressed by requiring that the combined statement begin with the ruling below.

Judge Sutton said that the committee note contemplates that approach, emphasizing that lawyers are given flexibility in presenting their statements. Most, he said, will state the facts first and then the issues for review. He suggested that the judge would have been pleased with simply reversing the order of current paragraphs (a)(6) and (a)(7) to set out the statement of facts first, followed by the statement of the case. Professor Struve added that a circuit could have a local rule that specifies a particular order of subheadings.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FORM 4

Judge Sutton explained that Questions 10 and 11 on the current version of Form 4 (affidavit accompanying a motion for permission to appeal in forma pauperis) require an IFP applicant to provide the details of all payments made to an attorney or other person for services in connection with the case. The questions, he said, ask for more information than needed to make an IFP determination. In addition, some have argued that the form's disclosures implicate the attorney-client privilege. But, he said, research shows that the payment information is very unlikely to be subject to the privilege. Sometimes, though, it might constitute protected work product.

The proposed amendments, he pointed out, combine the two questions into one. The new question asks broadly whether the applicant has spent, or will spend, any money for expenses or attorney fees in connection with the lawsuit – and if so, how much. Only

one public comment was received, which proposed an additional modification to the form to deal with the Prison Litigation Reform Act. The committee, he said, decided not to incorporate the suggestion into the current amendment, but to add the matter to its study agenda as a separate item.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Amendments for Publication

FED. R. APP. P. 6

Professor Struve noted that the advisory committee was proposing several amendments to FED. R. APP. P. 6 (appeals in bankruptcy cases from a district court or bankruptcy appellate panel to a court of appeals). The modifications dovetail with the simultaneous amendments being proposed to Part VIII of the Federal Rules of Bankruptcy Procedure, which govern appeals from a bankruptcy court to a district court or bankruptcy appellate panel.

Revised FED. R. APP. P. 6 would update the rule's cross-references to the new, renumbered Part VIII bankruptcy rules. New subdivision 6(c) will govern permissive direct appeals from a bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2), enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. It specifies that the record on a direct appeal from a bankruptcy court will be governed by FED. R. BANKR. P. 8009 (record on appeal and sealed documents) and FED. R. BANKR. P. 8010 (completing and transmitting the record). New Rule 6(c) takes a different approach from Rule 6(b), where the record on appeal from a district court or bankruptcy appellate panel is essentially based upon the record in the mid-level appeal to the district court or panel.

She noted that proposed new Bankruptcy Rule 8010(b) deals with transmitting the record from the bankruptcy court. It specifies that the bankruptcy clerk must transmit to the clerk of the court where an appeal is pending "either the record or a notice that the record is available electronically."

In the proposed amendments to FED. R. APP. P. 6(b)(2)(C), she said, the clerk of the district court or bankruptcy appellate panel must number the documents constituting the record and "promptly make it available." The amended appellate rule, she said, is very flexible and works well with the revised Part VIII bankruptcy rules. It allows the clerk to make the record available either in paper form or electronically.

The committee without objection by voice vote approved the proposed amendments for publication.

Informational Items

Judge Sutton reported that he had sent a letter to each chief circuit judge explaining that the advisory committee had decided to take no action at the present time to amend FED. R. APP. P. 29 (amicus briefs) to treat federally recognized Native American tribes the same as states. The proposal would allow tribes to file amicus briefs as of right and exempt them from the rule's authorship-and-funding disclosure requirement. The committee, he said, had informed the chief judges that the issue warrants serious consideration, will be maintained on the committee's agenda, and will be revisited in five years.

He noted that the advisory committee had removed from its agenda an item providing for introductions in briefs. Many of the best practitioners, he said, currently include introductions in their briefs to lay out the key themes of their argument. The committee's proposed amendment to FED. R. APP. P. 28(a)(6), he said, was sufficiently flexible to permit inclusion of an introduction as part of a brief's statement of the case. Moreover, it would be difficult to specify how an introduction differs from the statement of the issues presented for review in FED. R. APP. P. 28(a)(5).

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professor Gibson presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum and attachments of May 14, 2012 (Agenda Item 5).

Judge Wedoff noted that the advisory committee had 14 action items to present, six of them for final approval by the Judicial Conference and eight for publication. He suggested that the most important were the amendments dealing with the Supreme Court's decision in *Stern v. Marshall*, the revision of the Part VIII bankruptcy appellate rules, and the modernization of the bankruptcy forms.

Amendments for Final Approval

FED. R. BANKR. P. 1007(b)(7) and 5009(b) and 4004(c)(1)

Judge Wedoff explained that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 has required virtually all individual debtors to complete a personal course in financial management as a pre-condition for receiving a discharge. He noted that FED. R. BANKR. P. 1007(b)(7) (required schedules and statements) and 5009(b) (case closing) implement the statute by requiring individual debtors to file an official form

(Official Form 23) certifying that they completed the course before filing their petition. FED. R. BANKR. P. 1007(c) imposes deadlines for filing the certification. In Chapter 7 cases, for example, the debtor must file it within 60 days after the first date set for the meeting of creditors under 11 U.S.C. § 341.

If the debtor has not filed the form within 45 days after the first meeting of creditors, FED. R. BANKR. P. 5009(b) instructs the bankruptcy clerk to warn the debtor that the case will be closed without a discharge unless the certification is filed within Rule 1007's time limits. FED. R. BANKR. P. 4004(c) then specifies that the court may not grant a discharge if the debtor has not filed the certificate.

Judge Wedoff reported that the advisory committee recommended amending FED. R. BANKR. P. 1007(b) to allow the provider of the financial-management course to notify the court directly that the debtor has completed the course. This action would relieve the debtor of the obligation to file Official Form 23. FED. R. BANKR. P. 5009(b) would be amended to require the bankruptcy clerk to send the warning notice only if: (1) the debtor has not filed the certification; and (2) the course provider has not notified the court that the debtor has completed the course.

A conforming amendment to FED. R. BANKR. P. 4004(c)(1) (grant of discharge) specifies that the court does not have to deny a discharge if the debtor has been relieved of the duty to file the certification. In addition, language improvements would be made in the rule. Paragraph (c)(1) currently instructs a court to grant a discharge promptly unless certain acts have occurred. The amendment reformulates the text to instruct the court affirmatively not to grant a discharge if those acts have occurred.

Section 524(m) of the Bankruptcy Code, added in 2005, specifies that when a debtor files a reaffirmation agreement, the court must determine whether the statutory presumption that the agreement is an undue hardship for the debtor has been rebutted, *i.e.,* by finding that the debtor is apparently able to make payments under the agreement. A judge needs to make that determination before a discharge is granted. Therefore, FED. R. BANKR. P. 4004(c)(1)(K) tells the court to delay the discharge until the judge considers the debtor's ability to make the payments.

The proposed amendment to FED. R. BANKR. P. 4004(c)(1)(K) would make it clear that the rule's prohibition on entering a discharge due to a presumption of undue hardship ends when the presumption expires or the court concludes a hearing on the presumption. As a result, there would be no delay if the judge has already ruled on the matter.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference. The proposed amendments to FED. R. BANKR. P. 4004(c)(1) were approved without publication.

FED. R. BANKR. P. 9006(d), 9013, and 9014

Judge Wedoff noted that FED. R. BANKR. P. 9006 is entitled "computing and extending time," but it also specifies the default time for filing motions and affidavits in response to motions. Unlike FED. R. CIV. P. 6 (computing and extending time; time for motion papers), the civil rules counterpart on which it is based, FED. R. BANKR. P. 9006 does not indicate by its title that it also addresses time periods for motions. Nor is it followed immediately by another rule that addresses the form of motions, as the civil rules do. FED. R. CIV. P. 7 (pleadings, motions, and other papers) specifies the pleadings allowed and the form of motions and other papers.

The advisory committee, he said, was proposing amendments to highlight Rule 9006(d). First, the rule's title would be expanded to add a reference to "time for motion papers." Second, cross-references to Rule 9006(d) would be added to both FED. R. BANKR. P. 9013 (form and service of motions) and FED. R. BANKR. P. 9014 (contested matters) to specify that motions must be filed "within the time determined under FED. R. BANKR. P. 9006(d)."

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

OFFICIAL FORM 7

Judge Wedoff explained that Official Form 7 (statement of financial affairs) is a lengthy form that details many of the debtor's financial transactions. It makes frequent references to "insiders." The current definition of "insider" on the form refers to any owner of 5% of more of the voting or equity securities of a corporate debtor. That definition, though, has no basis in law, and it is not clear why it was adopted. The advisory committee would replace it with the Bankruptcy Code's definition of "insider," which includes any "person in control" of a corporate debtor.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Amendments for Final Approval Without Publication

OFFICIAL FORMS 9A-I and 21

Professor McKenzie noted that there are several variations of Official Form 9 (notice of a bankruptcy filing, meeting of creditor, and deadlines), based on the nature of the debtor and the chapter of the Bankruptcy Code under which a case is filed. Form 9 is directed at creditors, notifying them that a bankruptcy case has been filed and informing

them of upcoming case events and what steps they need to take. The form includes identifying information about the debtor that allows recipients of the notice to determine whether they are in fact a creditor of the debtor. In the case of individual debtors, the identifying information includes the debtor's social security number.

Debtors are required to provide their social security numbers to the bankruptcy clerk on Official Form 21 (statement of social security number). That form is submitted separately and not included in the court's public electronic records. The social security number is revealed to creditors on their personal copies of Form 9 purely for identification purposes, but only a redacted version of Form 9 is included in the case file.

The Court Administration and Case Management Committee expressed concern that bankruptcy forms may be mistakenly filed with the courts in ways that publicly reveal debtors' private identifying information. In some cases, creditors may file a copy of their unredacted Form 9 with their proofs of claim without redacting the debtor's social security number. Debtors, moreover, may file Form 21 with other case papers, rather than submit it to the clerk separately.

Professor McKenzie explained that the advisory committee would add prominent warnings on both Form 9 and Form 21 alerting users that the forms should not be filed with the court in a way that makes them publicly available. He pointed out that the advisory committee had made two minor changes in the language of Form 21's warning after the agenda book had been distributed. A corrected version was circulated to the members.

Judge Wedoff reported that the Court Administration and Case Management Committee had suggested that the debtor's full social security number be eliminated entirely from the forms to prevent any problems of inadvertent disclosure. But, he said, the advisory committee was convinced that social security numbers are still needed for some creditors to be able to identify the debtors. The full number, for example, is essential for the Internal Revenue Service. He added, though, that the committee will revisit the matter if the situation changes in the future.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference without publication.

OFFICIAL FORM 10

Professor McKenzie pointed out that the current version of Official Form 10 (proof of claim) contains a requirement at odds with FED. R. BANKR. P. 9010(c) (power of attorney). The form instructs an authorized agent of a creditor filing a proof of claim to attach to the claim a copy of its power of attorney. Rule 9010(c) generally requires an

agent to give evidence of its authority to act on behalf of a creditor in a bankruptcy case by providing a power of attorney. But it does not apply when an agent files a proof of claim.

In addition, Form 10 would be amended to require additional documentation in certain cases. For claims based on an open-end or revolving consumer-credit agreement, the filer of the proof of claim will have to attach the information required by FED. R. BANKR. P. 3001(c)(3)(A) (proof of claim based on open-end or revolving consumer credit agreement), scheduled to take effect on December 1, 2012. If a claim is secured by the debtor's principal residence, the filer will have to attach the Mortgage Proof of Claim Attachment (Official Form 10, Attachment A), required as of December 1, 2011.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference without publication.

Amendments for Publication

FED. R. BANKR. P. 1014(b)

Professor McKenzie explained that Rule 1004(b) (dismissal and change of venue) deals with the procedure when petitions involving the same debtor or related debtors are filed in different districts. The current rule specifies that, upon motion, the court in which the petition is filed first may determine the district or districts in which the cases will proceed. All other courts must stay proceedings in later-filed cases until the first court makes its venue determination, unless the first court orders otherwise. As a result, later cases are stayed by default while the venue question is pending before the first court.

The rule, he said, has been the subject of game playing because it allows an attorney who wants to stay all further proceedings to do so by filing a motion, or threatening to file a motion, in the first case. Therefore, the advisory committee proposal would change the default requirement to state that proceedings in later-filed cases are stayed only on express order of the first court. The change, he said, will prevent disruption of the other cases unless the judge in the first court determines affirmatively that a stay of a related case is needed while he or she makes the venue determination. In addition, the advisory committee made style changes in the rule.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 7004(e)

Professor McKenzie reported that the proposed amendment to FED. R. BANKR. P. 7004(e) would reduce the amount of time that a summons remains valid after it is issued. Currently, a summons must be served within 14 days after issuance. The proposed amendment to Rule 7004(e) would reduce that time to seven days.

Under the civil rules, a defendant's time to respond to a summons and complaint (30 days) begins when the summons and complaint are actually served. Under the bankruptcy rules, however, the defendant's response time is calculated from the date that the summons is issued.

He noted that concern had been expressed that seven days may be too short a period to effect service. Nevertheless, he said, the advisory committee believed that the time is sufficient and will encourage prompt service after issuance of a summons. He added that bankruptcy service is relatively easy and may be effected anywhere in the United States by first-class mail. Moreover, the necessary paperwork is usually generated by computer.

He added that the bankruptcy system has a strong objective in favor of moving cases quickly. In addition, calculating the time for service from the date of issuance, rather than service, provides clarity because issuance is noted on the court's docket. Finally, he explained that the time for service had traditionally been 10 days in the bankruptcy rules, but was increased to 14 days as a result of the omnibus 2009 time-computation amendments.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 7008, 7012(b), 7016, 9027, and 9033(a)

Professor McKenzie reported that the advisory committee was recommending publishing proposed amendments to five bankruptcy rules to deal with the recent Supreme Court decision in *Stern v. Marshall,* 564 U.S. ___, 131 S.Ct. 2594 (2011). In *Stern,* the Court held that a non-Article III bankruptcy judge could not enter final judgment on a debtor's state common-law counterclaim against a creditor of the bankruptcy estate. Even though the governing statute, 28 U.S.C. § 157(b), specifies that the counterclaim is a "core proceeding" that a bankruptcy judge may hear and determine with finality, the Court held that it was unconstitutional for Congress to assign final adjudicatory authority over the matter to a bankruptcy judge.

Professor McKenzie noted that the Federal Rules of Bankruptcy Procedure incorporate the statutory distinction between "core" and "non-core" proceedings and recognize that a bankruptcy judge's authority is much more limited in non-core proceedings than in core proceedings. Under the current rules, a party filing a motion has to state whether the proceeding is core or non-core, and a response must do the same.

Since *Stern,* however, a core proceeding under the statute may not be a core proceeding under the Constitution. Therefore, the advisory committee, he said, decided that it was necessary to remove the words "core" and "non-core" from the rules entirely.

Instead, the advisory committee would amend FED. R. BANKR. P. 7016 (pretrial procedures and formulating issues) to make clear that a bankruptcy judge must consider his or her authority to enter final orders and judgment in all adversary proceedings. The judge's decision, moreover, will be informed by the allegations of the parties as to whether the judge has that authority. This broad approach, he said, will allow the law to continue to develop without having to change the rules again in the future.

Judge Wedoff reported that it is unclear since *Stern* whether a bankruptcy judge may enter a final judgment in a preference action or avoidance action. He pointed out that under the proposed amendments, however, there will be no need to distinguish between core and non-core proceedings. Rather, the parties will only have to decide whether they consent to entry of final orders or judgment by the bankruptcy judge. The judge will then decide whether to: (1) hear and determine the proceeding; (2) hear it and issue proposed findings of fact and conclusions of law; or (3) take some other action.

A member commended the advisory committee for an elegant solution to a difficult problem. He suggested that the revised heading to revised Rule 7016 ("procedure") may be too limited.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 8001-8028

Judge Wedoff explained that the advisory committee's thorough revision of Part VIII of the Federal Rules of Bankruptcy Procedure – the bankruptcy appellate rules – was the result of a multi-year project to bring the rules into closer alignment with the Federal Rules of Appellate Procedure, to make the rules simpler and clearer, and to recognize that bankruptcy documents today are normally filed, served, and transmitted electronically, rather than in paper form.

He thanked Professor Gibson, emphasizing that she deserved enormous credit for having coordinated the huge forms project. He noted that she had immersed herself in all the details of appellate practice, had conducted considerable research, and had drafted a great many documents for the committee. He also thanked James Wannamaker and Bridget Healy, attorneys in the Bankruptcy Judges Division of the Administrative Office, for their dedication and professional assistance to the project. In addition, he expressed the committee's appreciation to Professor Struve, Professor Kimble, and Mr. Spaniol for their incisive and important contributions to the project, often made on very short notice.

He and Professor Gibson proceeded to describe each Part VIII rule not previously presented to the Standing Committee (Rules 8013-8028) and some additional changes made in the rules presented at the January 2012 meeting (Rules 8001-8012).

Fed. R. Bankr. P. 8001

Professor Gibson reported that since the January 2012 Standing Committee meeting, the advisory committee had made two additional changes in Rule 8001 (scope of Part VIII, definition of "BAP," and method of transmitting documents). The draft rule presented in January had included a general definition of the term "appellate court" to mean either the district court or the bankruptcy appellate panel – the court in which the first-level bankruptcy appeal is pending or will be taken. It did not, though, include the court of appeals.

It was suggested at the last meeting that the term is misleading because "appellate court" in common parlance generally refers to the court of appeals. As a result, she said, the advisory committee had eliminated the general definition. Each of the revised rules now refers specifically to the district court or the "BAP." Despite the objections of the style consultants, she added, the advisory committee decided to use the universally recognized abbreviation for a bankruptcy appellate panel and to define BAP in Rule 8001(b).

She said that there was a need to highlight a strong presumption in the revised rule in favor of electronic transmission of documents. Accordingly, revised Rule 8001(c) states specifically that a document must be sent electronically under the Part VIII rules, unless: (1) it is being sent by or to a pro se individual; or (2) a local court's rule permits or requires mailing or other means of delivery. She added that the advisory committee was comfortable with using the term "transmitting."

Fed. R. Bankr. P. 8007

Professor Gibson stated that Rule 8007 (stay pending appeal, bonds, and suspension of proceedings) had been restyled and subheadings added. In addition, the

advisory committee corrected the omission of a reference to the court of appeals in subdivision (c).

A member pointed out that under proposed Rule 8007(b), the showing required for making a motion for relief in the appellate court deals with two situations: (1) where moving first in the bankruptcy court would be impracticable; and (2) where the bankruptcy court has already ruled. But, he said, the Federal Rules of Appellate Procedure cover a third possibility – where a motion was filed below but not ruled on.

Judge Wedoff agreed to revise Rule 8007(b)(2)(B) to require the moving party to state whether the bankruptcy court has ruled on the motion, and, if so, what the reasons were for the ruling.

Fed. R. Bankr. P. 8009

Professor Gibson noted that proposed Rule 8009 (record on appeal and sealed documents) was incorporated by reference in the proposed new FED. R. APP. P. 6(c), which will govern permissive direct appeals from a bankruptcy court to a court of appeals.

Fed. R. Bankr. P. 8010

Professor Gibson reported that the advisory committee had made several changes in Rule 8010 (completing and transmitting the record) since the January 2012 meeting after conferring with clerks of the bankruptcy courts, the clerk of a bankruptcy appellate panel, and Administrative Office staff. She noted that bankruptcy courts generally use recording devices to take the record. If a transcript of a proceeding is ordered, it is produced for the court from the electronic record, usually by a contract service provider.

The rule requires the "reporter" to prepare and file the transcript with the bankruptcy clerk, but there is some question as to the identity of the reporter when a recording device is used. The advisory committee, she said, decided that the "reporter" should be defined in Rule 8010(a) as the person or service that the bankruptcy court designates to transcribe the recording.

In addition, the rule requires reporters to file all documents with the bankruptcy clerk. In the Federal Rules of Appellate Procedure, by contrast, reporters file certain documents in the appellate court and others in the district court. The reporter in a bankruptcy case, though, may not know where an appeal is pending.

Fed. R. Bankr. P. 8011

Professor Gibson reported that a minor typographical error had been corrected in Rule 8011 (filing, service, and signature) since the last Standing Committee meeting.

With regard to proof of service, a member questioned whether affidavits of service still serve a useful purpose in light of the universal use of CM/ECF in the federal courts. He noted that service in virtually all his civil cases is accomplished through CM/ECF, and there is no need to make the parties file an affidavit of service. He suggested that the Advisory Committee on Civil Rules consider removing the requirement of a certificate of service in the future.

Fed. R. Bankr. P. 8013

Professor Gibson noted that proposed Rule 8013 (motions and intervention) would change current bankruptcy practice. Currently, a person filing a motion or response may file a separate brief. The new rule, however, would not permit briefs to be filed in support of or in response to motions. Instead, it adopts the practice in FED. R. APP. P. 27 (motions), requiring that legal arguments be included in the motion or response.

She reported that proposed FED. R. BANKR. P. 8013(g) is a new provision for the bankruptcy rules. It is also not included in the Federal Rules of Appellate Procedure. It will authorize motions for intervention in an appeal pending in a district court or bankruptcy appellate panel. The party seeking to intervene must state in its motion why it did not intervene below.

Fed. R. Bankr. P. 8014

Professor Gibson explained that Rule 8014 (briefs) largely tracks the Federal Rules of Appellate Procedure and incorporates the proposed amendment to FED. R. APP. P. 28(a)(6) (briefs), which combines the statements of the case and of the facts into a single statement. (See pages 5 and 6 of these minutes.) In a change from current bankruptcy practice, revised Rule 8014 follows the Federal Rules of Appellate Procedure and requires inclusion of a summary of argument in the briefs. New Rule 8014(f) adopts the provision of FED. R. APP. P. 28(j) regarding the submission of supplemental authorities. Unlike the appellate rule, the proposed Rule 8014(f) proposes a definite time limit of seven days for any response, unless the court orders otherwise.

She emphasized that the advisory committee was attempting to make the bankruptcy rules as similar as practicable to the Federal Rules of Appellate Procedure to

make it easier for the bar to handle double appeals, *i.e.,* an appeal first to a district court or bankruptcy appellate panel, and then to the court of appeals.

Fed. R. Bankr. P. 8015

Professor Gibson noted that Rule 8015 (form and length of briefs, appendices, and other papers) was modeled on FED. R. APP. P. 32 (form and length of briefs, appendices, and other papers). The new bankruptcy rule adopts the provisions of the appellate rule governing the length of briefs, but not those prescribing the colors for brief covers. She added that the change is likely to attract comments during the publication period because new Rule 8015(a)(7) reduces the length of principal and reply briefs currently permitted in the bankruptcy rules. To achieve consistency with FED. R. APP. P. 32(a)(7), it reduces the page limits for a principal brief from 50 pages to 30, and those for a reply brief from 25 to 15.

Fed. R. Bankr. P. 8016

Professor Gibson reported that Rule 8016 (cross-appeals) was new to bankruptcy and modeled on FED. R. APP. P. 28.1 (cross-appeals). A member noted, though, that proposed Rule 8016(e) does not exactly parallel the appellate rule. Moreover, it does not include a provision, similar to that in Rule 8018(a), allowing a district court or bankruptcy appellate panel by local rule or order to modify the rule's time limits.

Judge Wedoff suggested that it would be possible to incorporate the Rule 8018 language on local court modifications into Rule 8016. He added that Rules 8016 and 8018 should be internally consistent, even though there may be some differences between them and the counterpart appellate rules. A participant recommended making both the bankruptcy and appellate rules internally consistent and consistent with each other. The same provisions should apply in both sets of rules.

Another participant recommended not including any provision in the bankruptcy rules allowing a local court to extend the time limits of the national rules. He suggested that it will only encourage extensions.

Fed. R. Bankr. P. 8017

Professor Gibson reported that Rule 8017 (amicus briefs) was new to bankruptcy and was derived from FED. R. APP. P. 29 (amicus briefs). She pointed out that proposed Rule 8017(a) would allow a bankruptcy court on its own motion to request an amicus brief.

Fed. R. Bankr. P. 8018

Professor Gibson reported that Rule 8018 (serving and filing briefs) would continue the existing bankruptcy practice that allows an appellee to file a separate appendix. It differs from FED. R. APP. P. 30 (appendix to briefs), which requires all the parties to file a single appendix. Rule 8018(a) lengthens the period for filing initial briefs from the current 14 days to 30. Since requests for extensions of time are very common, she said, it just makes sense to increase the deadline to 30 days.

Fed. R. Bankr. P. 8019

Professor Gibson noted that proposed Rule 8019 (oral argument) tracks FED. R. APP. P. 34(a)(1) (oral argument) and is more detailed than the current bankruptcy rule. Rule 8019(a) would alter the existing bankruptcy rule by: (1) authorizing the court to require the parties to submit a statement about the need for oral argument; and (2) permitting a statement to explain why oral argument is not needed, rather than only why it should be allowed. Rule 8019(f) gives the court discretion, when the appellee fails to appear for oral argument, either to hear the appellant's argument or to postpone it.

Fed. R. Bankr. P. 8020

Professor Gibson reported that Rule 8020 (frivolous appeal and other misconduct) was derived from FED. R. APP. P. 38 (frivolous appeals, damages and costs) and FED. R. APP. P. 46(c) (attorney discipline). It applies to misconduct both by parties and attorneys.

Fed. R. Bankr. P. 8021

Professor Gibson noted that Rule 8021 (costs) would continue the existing bankruptcy practice that gives the bankruptcy clerk the entire responsibility for taxing costs on appeal. The practice under FED. R. APP. P. 39 (costs), on the other hand, involves both the court of appeals and the district court in taxing costs.

Rule 8021(b) was added to govern costs assessed against the United States. Derived from FED. R. APP. P. 39(b), it is not included in the current bankruptcy rules.

Fed. R. Bankr. P. 8022

Professor Gibson reported that Rule 8022 (motion for rehearing) would continue the current bankruptcy practice of requiring that a motion for rehearing be filed within 14 days after entry of judgment on appeal. It differs from FED. R. APP. P. 40(a)(1) (time to file a petition for rehearing), which gives parties 45 days to file a rehearing motion in any civil case in which the United States is a party. She added that the Department of Justice reported that it had no problem with the rule.

Fed. R. Bankr. P. 8023

Professor Gibson reported that proposed Rule 8023 (voluntary dismissal) deviates from both the existing bankruptcy rule and the Federal Rules of Appellate Procedure. It would allow a voluntary dismissal while a case is still pending. Under the current rules, a case on appeal from a bankruptcy judge is not docketed in the district court or bankruptcy appellate panel until the record is transmitted. But under the new Rule 8023, the appeal will be docketed immediately after the notice of appeal is filed. The notice, moreover, will normally be transmitted electronically to the district court or bankruptcy appellate panel. The advisory committee, she said, concluded that it is very unlikely that an appeal will be voluntarily dismissed before it is docketed.

Fed. R. Bankr. P. 8024

Professor Gibson reported that Rule 8024 (clerk's duties on disposition of an appeal) contained virtually no changes, other than stylistic, from the current bankruptcy rule.

Fed. R. Bankr. P. 8025

Professor Gibson reported that Rule 8025 (stay of a district court or BAP judgment) contained only stylistic changes from the existing bankruptcy rule. She pointed out, though, that subdivision (c) was new. It specifies that if the district court or BAP affirms a bankruptcy court ruling and the appellate judgment is stayed, the bankruptcy court's order, judgment, or decree will be automatically stayed to the same extent as the stay of the appellate judgment.

Fed. R. Bankr. P. 8026

Professor Gibson reported that Rule 8026 (rules by circuit councils and district courts, and procedure when there is no controlling law) contained only stylistic changes from the current bankruptcy rule.

Fed. R. Bankr. P. 8027

Professor Gibson reported that Rule 8027 (notice of mediation procedure) was a new rule with no counterpart in the Federal Rules of Appellate Procedure. It provides that if a district court or bankruptcy appellate panel has a mediation procedure applicable to bankruptcy appeals, the clerk of the district court or the panel must notify the parties promptly after the appeal is docketed whether the mediation procedure applies, what its requirements are, and how it affects the time for filing briefs in the appeal.

Fed. R. Bankr. P. 8028

Professor Gibson explained that Rule 8028 (suspension of rules in Part VIII) was derived from current FED. R. BANKR. P. 8019 (suspension of rules in Part VIII) and FED. R. APP. P. 2 (suspension of rules). It authorizes a district court, bankruptcy appellate panel, or court of appeals to suspend the requirements or provisions of the Part VIII rules, except for certain enumerated rules. The new rule expands the current list of rules that may not be suspended.

Professor Gibson reported that the current FED. R. BANKR. P. 8013 (disposition of appeal and weight accorded fact findings) would be eliminated. The first part of that rule specifies what a district court or BAP may do on an appeal, *i.e.,* affirm, modify, reverse, or remand. She noted that there is no similar provision in the Federal Rules of Appellate Procedure. The second part of the current rule specifies the weight that must be given to a bankruptcy judge's findings of fact. She explained that the provision is not needed because it is already covered by FED. R. CIV. P. 52 (findings and conclusions) and incorporated by FED. R. BANKR. P. 7052 (findings by the court).

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 9023 and 9024

Judge Wedoff explained that FED. R. BANKR. P. 9023 (new trials and amendment of judgments) and FED. R. BANKR. P. 9024 (relief from a judgment or order) would be amended to add a cross-reference in each rule to the procedure set forth in proposed new Rule 8008, governing indicative rulings.

The committee without objection by voice vote approved the proposed amendments for publication.

MODERNIZATION OF THE OFFICIAL FORMS

Judge Wedoff explained that the bankruptcy process is driven in large measure by forms. Several of the current forms, however, are difficult to complete, especially for people unfamiliar with the bankruptcy system. In addition, the forms take little cognizance of electronic filing in the bankruptcy courts.

He explained that forms modernization has been a major, multi-year project of the advisory committee, working under the leadership of Judge Elizabeth L. Perris and in close coordination with the Administrative Office and the Federal Judicial Center. The major goals of the project have been: (1) to improve the quality and clarity of the forms in

order to elicit more complete and accurate information from debtors and creditors; and (2) to enhance the interface between the forms and modern technology, especially the "next generation" of CM/ECF currently under development.

He said that the advisory committee and the forms-project team had reached out extensively to users of the bankruptcy system to seek their input in redesign and testing of the forms. In addition, the committee had made an important policy decision at the outset to separate the forms used by individual debtors from those used by entities other than individuals.

He explained that the first nine forms, now presented for authority to publish, are a subset of the larger package of individual forms filed by debtors at the beginning of a case. He emphasized that the forms used by individuals need to be less technical in language because individuals are generally less sophisticated than other entities and may not have the assistance of experienced bankruptcy counsel. As a result, he said, the revised individual forms are written in more conversational language, have a more approachable format, and contain substantially more instructions.

OFFICIAL FORMS 3A AND 3B

Judge Wedoff explained that debtors who cannot pay the filing fee have two options – either to ask the court for permission to pay the fee in installments (Form 3A) or to waive the fee (Form 3B). The latter option is available only to individuals whose combined family monthly income is less than 150% of the official poverty guideline last published by the Department of Health and Human Services.

In addition to major stylistic and formatting changes common to all the new forms, three minor substantive changes were made in Form 3B. First, the opening question asks for the size of the debtor's family, as listed on Schedule J. That information is currently required on Schedule I. Second, the income portion of the form was changed to specify that non-cash governmental assistance, such as food stamps or housing subsidies, will not count against the debtor as income in determining eligibility for a fee waiver. The information, though, will continue to be reported for purposes of determining the debtor's ability to pay the filing fee. Third, the new form eliminates the declaration and signature section for non-attorney bankruptcy petition preparers because the same declaration is already required on Official Form 19.

The committee without objection by voice vote approved the proposed forms for publication.

OFFICIAL FORMS 6I and 6J

Judge Wedoff noted that some substantive changes had been made on Forms 6I (statement of the debtor's income) and 6J (statement of the debtor's expenses) to elicit more accurate and useful information from individual debtors. First, the debtor will have to provide more information on Form 6J about non-traditional living arrangements, such as living with an unmarried partner or living and sharing expenses in a household with non-relatives. The form asks for all financial contributions to the household. Second, Form 6J asks for separate information on dependents who live with the debtor, dependents who live separately, and other members of the household. Third, in Chapter 13 cases, Form 6J asks for the debtor's expenses at two different points in time – when the debtor files the bankruptcy petition and when the proposed Chapter 13 plan is confirmed. Fourth, a line has been added to the form setting out a calculation of the debtor's monthly net income.

The committee without objection by voice vote approved the proposed forms for publication.

OFFICIAL FORMS 22A-1, 22A-2, 22B, 22C-1, and 22C-2

Judge Wedoff explained that Form 22, commonly referred to as the "means test" form, has five variations. It is used to determine a debtor's "current monthly income" under 11 U.S.C. § 101(10A) and, in Chapter 7 and Chapter 13 cases, to determine the debtor's income remaining after deducting certain specified expenses.

In Chapter 7 cases, the form is used to assess whether the debtor qualifies under the statute to file a petition under Chapter 7. In Chapter 13, cases, it determines how much the debtor is able to pay under the plan. Other than stylistic changes, no changes were made in the form's Chapter 11 version (Form 22B). But four changes would be made in the Chapter 7 and Chapter 13 versions.

First, the advisory committee separated both the Chapter 7 and Chapter 13 forms into two distinct forms each because debtors with income below the median of their state do not have to list their expenses. As a result, the vast majority of debtors will only have to fill out the income portion. Thus, all debtors will complete an income form (Form 22A-1 or 22C-1), but only some will have to file the expense form (Form 22A-2 or 22C-2).

Second, the revised forms modify the deduction for cell phone and internet expenses to reflect more accurately the Internal Revenue Service allowances incorporated by the Bankruptcy Code.

Third, line 60 on the Chapter 13 expense form (Form 22C-2)) would be removed because it is rarely used. It allows debtors to list, but not deduct from income, "other necessary expense" items not included within the categories specified by IRS.

Fourth, Form 22C-2 reflects the Supreme Court's decision in *Hamilton v. Lanning,* 560 U.S. ___, 130 S. Ct. 2464 (2010). *Lanning* requires taking a "forward-looking approach" in calculating a Chapter 13 debtor's projected disposable income by considering changes in income or expenses that have occurred or are virtually certain to occur by the time the plan is confirmed. The changes may either increase or decrease the debtor's disposable income. Part 3 of Form 22C-2 will require the debtor to report those changes.

The committee without objection by voice vote approved the proposed forms for publication.

Information Items

FED. R. BANKR. P. 3007(a)

Judge Wedoff reported that proposed amendments to FED. R. BANKR. P. 3007(a) (objections to claims), published in August 2011, would have specified the time and manner of serving objections to claims. The rule currently requires that notice of an objection be provided at least 30 days "prior to the hearing" on the objection. The proposal would have authorized a negative notice procedure – requiring notice of an objection to be made at least 30 days before "any scheduled hearing on the objection or any deadline for the claimant to request a hearing."

He noted that at its March 2012 meeting, the advisory committee decided to withdraw the proposed amendments temporarily and consider them as part of its project to draft a national Chapter 13 form plan.

OFFICIAL FORM 6C

Judge Wedoff reported that the advisory committee had decided not to proceed with amending Form 6C (property claimed as exempt) by adding a box to give debtors the option of declaring that the value of property claimed as exempt is the "full fair market value of the exempted property." The amendment, published in August 2011, was intended to reflect the Supreme Court's decision in *Schwab v. Reilly,* 560 U.S. ___, 130 S. Ct. 2652 (2010).

He said that representatives of the Chapter 7 and Chapter 13 trustee associations had objected to the change on the grounds that it would encourage debtors to claim the

full market value of property even when the exemption is capped by statute at a specific dollar amount. They predicted that the revision would lead to gamesmanship and a "plethora of objections." On the other hand, supporters of the amendment, including representatives of the consumer bankruptcy attorneys' association, disputed the prediction. They argued that it was consistent with *Schwab* and would be beneficial to debtors.

Judge Wedoff reported that the advisory committee decided not to proceed with the amendment because: (1) it is unnecessary since debtors already incorporate the *Schwab* language into the existing form; and (2) courts are divided on whether it is always improper for a debtor to claim as exempt the full fair market value of property when the exemption is capped at a specific dollar amount. The advisory committee decided, therefore, that any amendment to the form should await further case law development. It might also be considered as part of the forms modernization project.

OFFICIAL FORMS 22A AND 22C

Judge Wedoff reported that the advisory committee had decided to defer final approval of proposed amendments to Forms 22A and 22C (the means test forms) that would have: (1) reflected changes in the IRS standards on telecommunication expenses; and (2) changed the Chapter 13 version of the form to respond to the Supreme Court's decision in *Hamilton v. Lanning,* 560 U.S. ___, 130 S. Ct. 2464 (2010).

He said that it would be better to avoid having the proposed amendments take effect in 2012, only to have substantially reformatted versions of the same forms take effect in 2013 as part of the forms modernization project. The proposed amendments, he added, had been incorporated into the first set of modernized forms to be published for comment in August 2012. (See pages 21-23 of these minutes.)

OFFICIAL FORM FOR CHAPTER 13 PLAN AND RELATED RULE AMENDMENTS

Judge Wedoff explained that the advisory committee was working on drafting a national form for Chapter 13 plans. He pointed out that a wide variety of local forms and model plans are currently used in the bankruptcy courts. They impose different requirements and distinctive features from district to district. The lack of a national form, he said, makes it difficult for lawyers who practice in several districts, and it adds transactional costs that are passed on to debtors.

He reported that a recent survey of the bankruptcy bench had established that a majority of chief bankruptcy judges support developing a national form plan. Therefore, he said, the advisory committee had established a working group that expects to have a draft ready soon for informal circulation and comment. He added that it became apparent

during the course of the group's work that the effectiveness of a national form plan will depend on making some simultaneous amendments to the bankruptcy rules to harmonize practice among the courts and clarify certain procedures.

MINI-CONFERENCE ON NEW MORTGAGE FORMS

Judge Wedoff reported that the advisory committee will hold a mini-conference in conjunction with its September 2012 meeting to discuss the effectiveness of the new mortgage-information disclosure forms that took effect on December 1, 2011.

ELECTRONIC SIGNATURES

Judge Wedoff noted that the advisory committee was considering the use of electronic signatures as part of its forms modernization project. In particular, it was focusing on whether, and under what circumstances, bankruptcy courts should accept for filing documents signed electronically without also requiring retention of a paper copy with an original signature. If retention of an original signature is required, moreover, who should maintain it? He noted that the committee was exploring a range of options and contemporary practices.

FORMS MODERNIZATION PROJECT

Judge Wedoff reported that the forms modernization project had nearly completed its work on all the individual-debtor forms and had begun its work on revising the non-individual forms.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professor Cooper presented the report of the advisory committee, as set forth in Judge Campbell's memorandum and attachments of May 8, 2012 (Agenda Item 4).

Amendments for Final Approval

FED. R. CIV. P. 45 and 37

Judge Campbell reported that the advisory committee had undertaken a multi-year project to revise Rule 45 (subpoenas) by simplifying the rule and addressing several problems brought to its attention. He noted that during the course of its study, the advisory committee came to appreciate that Rule 45 is an important workhorse in civil litigation that governs virtually all discovery involving non-parties and accomplishes several other important procedural purposes.

After reviewing the pertinent literature on the rule and canvassing the bar, the committee developed a list of 17 concerns that might potentially be addressed through rule amendments. The list was eventually boiled down to four proposed changes: (1) simplification of the rule; (2) transfer of subpoena-related motions; (3) trial subpoenas for distant parties and party witnesses; and (4) notice of service of documents-only subpoenas. A revised rule incorporating those changes was published for public comment in August 2011, and some minor modifications were made after publication. The revised rule, he said, was now ready for final approval by the Judicial Conference.

1. Simplification of the rule

He noted that the first category of proposed changes would simplify an overly complex rule. As Rule 45 is now written, he explained, a lawyer has to look in three different parts of the rule to determine where a subpoena may be issued, where it may be served, and where performance may be required.

First, Rule 45(a)(2) specifies which court may issue a subpoena. It may be a different court for trial, for deposition discovery, or for document discovery. Second, Rule 45(b)(2) specifies four different possibilities for the place where a subpoena may be served. It may be within the district, outside the district but within 100 miles of the place of compliance, anywhere in the state where the district sits if state law permits, or anywhere in the United States if federal law authorizes it. Third, Rule 45(c) imposes limits on the place of enforcement. A non-party, for example, cannot be required to travel more than 100 miles to comply with a subpoena, except to attend a trial. In that case, attendance may be anywhere in the state if the person does not have to incur "substantial expense" to travel. He said that it was the experience of all the judges on the advisory committee that even good lawyers get the various provisions of the rule wrong from time to time.

The advisory committee's proposed simplification addresses those problems and should eliminate most of the confusion. First, revised Rule 45(a)(2) specifies that the court that issues a subpoena is the court that presides over the case. There are no other possibilities. Second, Rule 45(b)(2) specifies that a subpoena may be served at any place in the United States. Third, Rule 45(c)(3) specifies where performance may be required. Essentially, it preserves the performance requirements of the current rule, but eliminates its reference to state law.

There is, he said, precedent in the rules for authorizing nationwide service. Rule 45(b)(2)(D), he noted, currently authorizes service in another state if there is a federal statute that authorizes it. In addition, the Federal Rules of Criminal Procedure authorize nationwide service (FED. R. CRIM. P. 17)(e)).

Professor Marcus said that the public comments on simplification of the rule were very favorable, and some offered suggestions for additional clarification. As a result, the committee made some changes in the committee note, dealing with depositions of party witnesses and subpoenas for remote testimony. In essence, though, the changes made after publication were very minor.

Professor Marcus pointed out that under the committee's proposal, as published, Rule 45(c)(2) would have left it essentially to the parties to designate the place for production of Rule 34 discovery materials. It provided that a subpoena could command production "at a place reasonably convenient for the person who is commanded to produce." But, he explained, that simplification did not work and could lead to mischief. Accordingly, the committee revised Rule 45(c)(2) to specify that a subpoena may command production "at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person." That formulation essentially preserves the current arrangements, but states them more clearly.

2. Transfer of subpoena-related motions

Judge Campbell explained that the modified rule, like the current rule, specifies that a party receiving a subpoena typically has to litigate the enforceability of the subpoena in the court in the district where the performance is required. The producing party, thus, enjoys the convenience of having its dispute handled locally and does not have to travel to a different part of the country to litigate.

Rule 45, however, does not currently allow the court where production is required to transfer a dispute back to the court having jurisdiction over the case. Yet, there are certain situations in which the court in the district of performance should be allowed to refer a dispute to the judge presiding over the case. There is, he said, a split in the case law on the matter, and some courts in fact transfer disputes. The current rule, though, does not authorize the practice expressly.

The proposed new Rule 45(f) would resolve the matter and explicitly allow certain disputes to be resolved by the judge presiding over the case. It would allow the local court to transfer the case either on the consent of the person subject to the subpoena or if the court finds "exceptional circumstances." He reported that some public comments questioned whether exceptional circumstances was the appropriate standard for authorizing a transfer, but the advisory committee ultimately concluded unanimously that it was.

The proposed amendment to FED. R. CIV. P. 37 (failure to make disclosures or cooperate in discovery) would conform that rule to the proposed amendments to Rule 45(f). A new second sentence in Rule 37(b)(1) deals with contempt of orders entered after a transfer. It provides that failure to comply with a transferee court's deposition-

related order may be treated as contempt of either the court where the discovery is taken or the court where the action is pending..

Professor Marcus pointed out that the August 2011 publication had highlighted the new transfer provision and expressly invited comment on two questions: (1) whether consent of the parties should be required in addition to consent by the person served with the subpoena; and (2) whether "exceptional circumstances" should be the standard for transfer if the non-party does not consent. Considerable public comment argued that it was inappropriate to require party consent. As long as the recipient of the subpoenas consents to the transfer, the parties should have no veto over the matter. The advisory committee, he said, revised the rule to remove the party-consent feature.

With regard to the appropriate standard for authorizing a transfer in the absence of consent, considerable public support was voiced for a more flexible, less demanding standard. But formulating an appropriate lesser standard, while still protecting the primary interests of the producing party, had been very challenging. The advisory committee and its discovery subcommittee discussed the matter at considerable length and decided to retain the exceptional circumstances standard, but add some clarifying language to the committee note. The note was recast to state that if the local non-party served with a subpoena does not consent to a transfer, the court's prime concern should be to avoid imposing burdens on that person. In some circumstances, though, a transfer may be warranted to avoid disrupting the issuing court's management of the underlying litigation. In short, transfer is appropriate only if those case-management interests outweigh the interests of the producing party in obtaining local resolution of the dispute.

A member praised the work of the advisory committee and said that the proposed changes were long overdue. He noted that few rules of procedure are used more often, yet are harder to work with, than Rule 45. Nevertheless, he said, the "exceptional circumstances" standard may be too high. It may underestimate the needs of a judge presiding over a big, hotly disputed civil case to have flexibility in controlling the case. It may also underestimate how easy it is today to conduct hearings and resolve disputes by telephone or video-conference. He noted that when subpoena disputes arise, it is common for the judge in the district of compliance to call the judge having jurisdiction over the underlying case to discuss the matter.

In addition, he said, the language in the committee note stating that transfers should be "truly rare" events is much too restrictive. It tells judges, in essence, that transfers should almost never occur. He added that a more generous standard is warranted, and "good cause" should be considered as a substitute. He recommended combining a good cause standard with an appropriate explanation in the committee note to give judges the flexibility they need to decide what is best in each case.

Judge Campbell explained that some public comments had suggested a good cause standard, and the advisory committee considered them carefully. But it ultimately concluded that it had to err in favor of protecting third parties who receive subpoenas and sparing them from assuming undue burdens and hiring counsel in other parts of the country. The exceptional circumstances standard, he said, will afford them more protection than the good cause standard.

He said that the committee was concerned that if the rule were to contain a "good cause" standard, many busy district judges faced with subpoena disputes in out-of-district cases would be readily inclined to transfer them routinely to the issuing court. The rule, he said, should make those busy district judges pause and carefully balance the reasons for a transfer against the burdens imposed on the subject of the subpoena. In essence, he explained, the committee concluded that it was essential to have a higher threshold than mere good cause.

Professor Marcus added that it is very difficult to achieve just the right balance in the rule. It is, he said, particularly difficult to draft a standard that falls somewhere between "exceptional circumstances," which is very difficult to satisfy, and "good cause," which is quite easy to satisfy. He added that the comments from the ABA Section on Litigation were very supportive of retaining the exceptional circumstances standard in order to protect non-party witnesses.

A member argued in favor of retaining the exceptional circumstances standard, and emphasized that it was important to resolve the current conflict in the law and explicitly authorize transfers in appropriate, limited circumstances. She added that the rule should be designed for the average civil case, not the exceptional case. The great majority of subpoena disputes, she said, involve local issues and should be resolved locally. As a practical matter, a good cause standard would lead to excessive transfers.

A participant spoke in favor of the good cause standard, but recommended that if the exceptional circumstances standard were retained, the committee note should be toned down and revised to eliminate the current language stating that transfers should be "truly rare." In addition, it would be useful to refer in the note to the difference between the average case with a local third party and complex litigation in which the lawyers hotly dispute every aspect of a case, including the subpoenas. He added that not all subpoenaed persons are in fact uninvolved, uninterested third parties. Often, the subpoenaed person, although not a party to the case, may well have a direct financial interest in the litigation.

A member agreed that the word "truly" should be eliminated from the note, but supported the advisory committee's decision to retain the exceptional circumstances standard. A member recommended resolving the matter by eliminating the second sentence in the third paragraph of the portion of the committee note dealing with Rule 45(f). As revised, it would read: "In the absence of consent, the court may transfer in

exceptional circumstances, and the proponent of transfer bears the burden of showing that such circumstances are presented."

A member expressed concern about the language added to the committee note after publication regarding the issuance of subpoenas to require testimony from a remote location. He suggested that the committee should consider amending Rule 45(c)(1) itself to clarify that it applies both to attendance at trial and testimony by contemporary transmission from a different location under Rule 43(a).

3. Trial subpoenas for distant parties and party officers

Judge Campbell explained that the third change in the rule resolves the split in the case law in the wake of *In re Vioxx Products Liability Litigation,* 438 F. Supp. 2d 664 (E.D. La. 2006). The district court in that case read Rule 45 as permitting a subpoena to compel a party's officer to testify at a trial at a distant location. Other courts, though, have ruled that parties cannot be compelled to travel long distances from outside the state to attend trial because they have not been served with subpoenas within the state, as required by Rule 45(b)(2).

The advisory committee, he said, was of the view that *Vioxx* misread Rule 45, in part because the current rule is overly complex. The proposed amendments, he said, would overrule the *Vioxx* line of cases and confirm that party officers can only be compelled to testify at trial within the geographical limits that apply to all witnesses. He noted that the committee had highlighted the matter when it published the rule by including in the publication an alternative draft text that would have codified the *Vioxx* approach.

The public comments, he said, were split, with no consensus emerging for either position. The advisory committee decided ultimately that it should not change the original intent of a rule that has worked well for decades. Professor Marcus added that the committee's concern was that if the rule were amended to codify *Vioxx,* subpoenas could be used to exert undue pressures on a party and its officers. Moreover, there are alternate ways of dealing with the problems of obtaining testimony from party witnesses, including the use of remote testimony under Rule 43(a).

4. Notice of service of documents-only subpoenas

Judge Campbell explained that the current Rule 45 requires parties to notice other parties that they are serving a subpoena. But the provision is hidden as the last sentence of Rule 45(b)(1), and many lawyers are unaware of it. The advisory committee proposal, he said, relocates the provision to a more prominent place as a separate new paragraph 45(a)(4), entitled "notice to other parties before service." In addition, the revised rule requires that a copy of the subpoena be attached to the notice.

Judge Campbell said that the advisory committee realized that many other reasonable notice provisions might have been added to the rule. For example, it could have required that: notice be given a specific number of days in advance of service of the subpoena; additional notice be given if the subpoena is modified by agreement; notice be given when documents are received; and copies of documents be provided by the receiving party to the other parties in the litigation. The rule could also have specified the sanctions for non-compliance with the notice requirements.

The advisory committee, however, concluded that those provisions, though sensible, should not be included because the primary purpose of the amendments is to get parties to give notice of subpoenas. Just accomplishing that objective should resolve most of the current problems. The remaining issues can generally be worked out if lawyers are left to their own devices to consult with opposing counsel to obtain copies of whatever documents they need. The committee, he said, was concerned about the length and complexity of the current rule and did not want to add to that length and complexity by dictating additional details. He added, though, that the committee could return to the rule in the future if problems persist.

Professor Marcus said that many competing suggestions had been received for additional provisions. He added that, at the urging of the Department of Justice, the committee had made a change in the rule following publication to restore the words "before trial" to the notice provision. It also added in Rule 45(c)(4) the word "pretrial" before "inspection of premises."

Judge Campbell noted that the advisory committee had considered whether the time limit in current Rule 45(c) for serving objections to subpoenas was too short, but decided not to change it. He added that the matter rarely results in litigation, as courts allow extensions of time when appropriate. He agreed to a member's suggestion that language in lines 43 and 44 of the committee note be deleted. It had suggested that parties may ask that additional notice requirements be included in a court's scheduling order.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Information Items

PRESERVATION AND SPOLIATION

Judge Campbell reported that one of the panels at the committee's 2010 Duke Law School conference had urged the committee to approve a detailed civil rule specifying when an obligation to preserve information for litigation is triggered, the scope of that obligation, the number of custodians who should preserve information, and the

sanctions to be imposed for various levels of culpability. After the conference, Judge Kravitz, then chair of the advisory committee, tasked the committee's discovery subcommittee with following up on the recommendations.

The subcommittee began its work in September 2010 by asking the Federal Judicial Center to study the frequency and nature of sanctions litigation in the district courts. The Center's research found that litigation is rare, as only 209 spoliation motions had been filed in more than 130,000 civil cases studied, and only about half the motions involved electronic discovery. The subcommittee also studied a large number of federal and state laws that impose various preservation obligations.

The subcommittee, he said, then drafted three possible rules to address preservation. The first was a very detailed rule that provided specific directives and attempted to prescribe which events trigger a duty to preserve, what the scope of the preservation duty is, and what sanctions may be imposed for a failure to preserve. The committee, however, found it exceedingly difficult to draft a detailed rule that could be applied across all the broad variety of potential cases and give any meaningful certainty to the parties.

The second rule also addressed the triggering events for preservation, the scope of retention obligations, and sanctions for violations, but it did so in a much more general way. Essentially it provided broad directions to behave reasonably and preserve information in reasonable anticipation of litigation.

The third rule focused just on sanctions under Rule 37 in order to promote national uniformity and constraint in imposing sanctions. Currently, there is substantial dispute among the circuits on what level of culpability gives rise to sanctions for failure to preserve. The prevailing standards now range from mere negligence to wilfulness or bad faith.

The third rule specified that a court may order curative or remedial measures without finding culpability. Imposition of sanctions of the kind listed in Rule 37(b), on the other hand, would require wilfulness or bad faith. The proposed rule identified the factors that a court should consider in assessing the need for sanctions. Those factors, moreover, should also provide helpful guidance to parties at the time they are considering their preservation decisions.

Judge Campbell said that the three draft rules had been discussed with about 25 very knowledgeable people at the committee's September 2011 mini-conference in Dallas. A wide range of views was expressed, but no consensus emerged. Many written comments were received by the committee and posted on the judiciary's website. They embrace a full range of proposals. Some groups argued that there is an urgent need for a very detailed rule on preservation and spoliation with bright-line standards. One, for

example, suggested that a duty to preserve should only be triggered by the actual commencement of litigation. Others contended that no rule is needed at all, as the common law should continue its development. The Department of Justice, he said, took the position that it is premature to write a rule on these subjects.

The subject area, he said, continues to be very dynamic. In April 2012, the RAND Corporation completed a study of large corporations, documenting that they spend millions of dollars in trying to comply with preservation obligations. About 73% of the costs are spent on lawyers reviewing materials and 27% on the preservation of information itself. A recent in-house study by the Department of Justice generally corroborated the conclusion of the Federal Judicial Center that spoliation disputes in court are rare. Another recent study, by Professor William Hubbard, found that the problem arises only in a small percentage of cases, but when it does it can be extraordinarily expensive.

Judge Campbell pointed out that the Seventh Circuit was conducting a pilot program on electronic discovery and preservation that emphasizes the need for the parties to cooperate and discuss preservation early in the litigation. The pilot, he said, was entering its third phase and producing a good deal of helpful information. The Southern District of New York recently launched a complex-case pilot program that also includes preservation as an element. The Federal Circuit promulgated clear guidelines on discovery of electronically stored information and has placed some important limits on discovery in patent cases. A Sedona Conference working group has been working for months on a consensus rule for the committee's consideration. The group, he noted, had not yet reached consensus on potential rule amendments. Finally, he said, the case law continues to evolve, as trial judges are taking imaginative steps to deal with preservation problems and restrain unnecessary costs.

Judge Campbell reported that the advisory committee was still leaning towards a sanctions-only rule, rather than a rule that tries to define trigger and scope. Nevertheless, the subcommittee was still absorbing and discussing the many sources of information coming before it. He suggested that the subcommittee may have a more concrete draft available for the advisory committee's consideration at its November 2012 meeting.

He noted that the advisory committee was aware that some are frustrated with the pace of the project. But, he said, the delay in producing a rule has not been for lack of effort. Rather, the issues are particularly difficult, and the views expressed to the subcommittee have been very far apart. He noted that even if the committee were to approve a rule at its next meeting, it could not take effect before December 2015.

He reported that in December 2011, the House Judiciary Subcommittee on the Constitution had held a hearing on the costs and burdens of civil discovery. The proceedings included substantial discussion on electronic discovery issues. The basic

message from the majority was that preservation obligations and electronic discovery cost corporations substantial money and are a drain on innovation and jobs. He pointed out that the witnesses testified that the federal rules process works well, and the rules committees should continue their efforts to solve the current problems. After the hearings, the subcommittee chair wrote a letter urging the advisory committee to approve a strong rule. The subcommittee minority, though, followed with a letter asking the committee to proceed slowly and let the common law work its course.

Professor Marcus pointed out that the advisory committee had not resolved two critical policy questions and invited input on them from the members. First, he said, a decision must be made on whether a new rule should be confined just to electronic discovery or apply to all discoverable information. Second, in light of the strikingly divergent views expressed to the committee on the subject, a basic decision must be made on how urgently a new rule is needed and how aggressive it should be.

A member argued that national uniformity is very important because preservation practices and litigation holds cost parties a great deal of money. The precise contents of the new rule may not be clear at this point, but the advisory committee should continue to proceed deliberately and carefully study the various pilot projects underway in the courts. Eventually, however, it needs to produce a national rule. A participant added that the primary risk of moving too slowly is that courts will develop their own local rules and become attached to them, making it more difficult to impose a uniform national rule.

A participant pointed out that efforts have been made, without much result so far, to prod the corporate community into developing a series of best practices to deal with preservation of information. Corporations, he said, need to balance their legitimate need to get rid of information in the normal course of business against the competing need to preserve certain information in anticipation of eventual litigation. There is, he said, reluctance on the part of corporate management even to consider the matter, but there may be some movement in that direction in the future.

He suggested that a sanctions-only rule is appropriate. It would also be desirable, he said, to include a more emphatic emphasis in Rules 16 and 26 on getting the parties and the judge to address preservation obligations more directly at the outset of a case.

A member expressed great appreciation for the advisory committee's work and agreed with its inclination to pursue a narrow rule that focuses just on Rule 37 sanctions. He emphasized that the Rules Enabling Act restricts the rules committees' authority to matters of procedure only. Preservation duties, though, generally go beyond procedure and simply cannot be fixed by a rule.

Moreover, he said, the committee cannot solve all preservation problems because most litigation is conducted in the state courts, not the federal courts. He suggested that

the more the committee sticks to procedure and avoids matters of substantive conduct, the more likely the states will follow its lead. A member added that there is an important opportunity for the committee to achieve greater national uniformity by working with the state courts. If the committee produces a good rule, he said, effective complementary state-court rules could be promoted with the support and encouragement of the Conference of Chief Justices.

DUKE CONFERENCE SUBCOMMITTEE

Judge Campbell pointed out that it is difficult to speak about preservation without considering more broadly what information should be permitted in the discovery process, especially electronically stored information. He reported that the advisory committee had established a separate subcommittee, chaired by Judge John G. Koeltl, to evaluate the many helpful ideas for discovery reform raised at the Duke conference and to recommend which should be proposed as rule amendments. Eventually, he said, the advisory committee will marry the work of the Duke Conference subcommittee with that of the discovery subcommittee on spoliation because the two are closely related.

He reported that Professor Cooper had produced very helpful and thought-provoking drafts of several potential rule amendments to implement the Duke recommendations. The proposals, he explained, can be categorized as falling into three sets of proposed changes.

The first set of proposals was designed to promote early and active case management. They include: reducing the time for service of a complaint from 120 days to 60; reducing the time for holding a scheduling conference from 120 days to 60 or 45; requiring judges to actually hold a scheduling conference in person or by telephone; no longer allowing local court rules to exempt cases from the initial case-management requirements; requiring parties to hold a conference with the court before filing discovery motions; and allowing written discovery to be sought before the Rule 26(f) conference is held, but providing that requests do not have to be answered until after the case-management conference. The latter provision would let the parties know what discovery is contemplated when they meet with the judge to discuss a discovery schedule. Those and other ideas were designed to get the courts more actively involved in the management of cases and at an earlier stage.

Judge Campbell noted that the second category of possible changes was designed to curtail the discovery process and make it more efficient. One set of proposals would take the concept of proportionality and move it into Rule 26(b)((1)'s definition of discoverable information. It is already there by cross-reference in the last sentence of that provision, but the proposals would make it more prominent. In essence, the revised definition would define discoverable information as relevant, non-privileged information that is proportional to the reasonable needs of the case.

In addition, he said, the subcommittee was considering limiting discovery requests by lowering presumptive numbers and time limits, such as reducing the number of depositions from 10 to 5, the time of depositions from 7 hours to 4, and the number of interrogatories from 25 to 15, and by imposing caps of 25 requests for production and 25 requests for admissions. Although courts may alter them, just reducing the presumptive limits may reduce the amount of discovery that occurs and change the prevailing ethic that lawyers must seek discovery of everything.

Another proposal, he noted, would require parties objecting to a request for production to specify in their objection whether they are withholding documents. A responding party electing to produce copies of electronically stored information, rather than permitting inspection, would have to complete the production no later than the inspection date in the discovery request. Rule 26(g) would be amended to require the attorney of record to sign a discovery response to attest that the response is not evasive. Another proposal would defer contention interrogatories and requests to admit until after the close of all other discovery. The subcommittee, he said, was also considering cost-shifting provisions and may make cost shifting a more prominent part of discovery. All these changes are designed to streamline the discovery process and reduce the expenses complained about at the Duke conference.

Judge Campbell reported that a third category of proposals was designed to emphasize cooperation among the attorneys. One amendment would make cooperation an integral part of Rule 1. The rule, thus, might specify that the civil rules are to be construed and used to secure the just, speedy, and inexpensive determination of cases, and the parties should cooperate to achieve these ends.

Judge Campbell said that the advisory committee will study these drafts at its November 2012 meeting. It will likely marry them with the proposed rule on preservation to produce a package of rule amendments to make litigation more efficient. Professor Cooper added that it would be very beneficial for the Standing Committee members to review the proposed drafts carefully and point out any flaws and make additional suggestions that the advisory committee might consider.

A member praised the comprehensive and impressive efforts of the committee. She noted, though, that several corporate counsel had expressed concern about giving proportionality a more prominent place in the rules. They fear that it would give attorneys an excuse to litigate more discovery disputes.

A participant pointed out that the objective of fostering cooperation among the parties is excellent, but specifying a cooperation requirement in the text of the rules is troublesome. Cooperation inevitably is entwined with attorney conduct, an area on the edge of the Rules Enabling Act that may impinge on the role of the states in regulating attorney conduct.

Another participant suggested that consideration be given to appointing special masters to handle discovery in complex cases because busy judges often do not have the time to devote undivided attention to overseeing discovery. Some way would have to be found to pay for masters, but at least in large corporate cases, the parties may be able to work it out. He also recommended reducing the presumptive limit for expert-witness depositions to 4 hours.

A member commended the advisory committee for undertaking the discovery project. He suggested that anything the committee can do to limit the number of discovery requests and reduce discovery time periods, at least in the average case, will be beneficial. He also commended the proposed modest recommendations on cost-shifting and proportionality. He urged the committee to carry on the work and move as quickly as possible.

His only reservation, he said, concerned adding a cooperation requirement to the rules. The concept, he said, was fine, but it may conflict with an attorney's ethical duty to pursue a client's interests zealously. He asked how much lawyers can be reasonably expected to cooperate in discovery when they are not expected to cooperate very much in other areas. The adversarial process, he said, is a highly valued attribute of the legal system, and the committee should avoid intruding into the states' authority over attorney conduct.

Members noted that some states have imposed effective, stricter limits on depositions that led lawyers to reassess how long they really need to take a deposition. A member added that depositions of expert witnesses have been eliminated completely in his state. It was noted that the original intent of Rule 26(a)(2)'s report requirement was to reduce the length of depositions of expert witnesses or even to eliminate them in many cases. That benefit, however, has not been realized.

PLEADING STANDARDS

Professor Cooper reported that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) and *Iqbal v. Ashcroft,* 556 U.S. 662 (2009). There is, he said, no sense that the lower courts have unified around a single, identifiable pleadings standard for civil cases, but there is also no sense of a crisis or emergency. The committee, he said, was essentially biding its time and did not plan to move forward quickly. It has several potential proposals on the table, including directly revising the pleading standards in FED. R. CIV. P. 8 (general rules of pleading), addressing pleading indirectly through Rule 12(e) motions for a more definite statement, or integrating pleading more closely with discovery, particularly in cases where there is an asymmetry of information.

Dr. Cecil reported that the Federal Judicial Center had begun pilot work on its new study of all case-dispositive motions in the district courts. The study, he said, will be different from earlier studies because it will take a more comprehensive, holistic look at all Rule 12 motions and summary judgment issues and explore whether there are any tradeoffs, such as whether an increase in motions to dismiss has led to a reduction in motions for summary judgment. In addition, the Center is collaborating closely with several civil procedure scholars and hopes to reach a consensus with them about what is actually going on in the courts regarding dispositive motions. The study, he said, will be launched in September 2012 with the help of law professors and students in several schools.

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FED. R. CIV. P. 84 AND FORMS

Judge Campbell reported that the advisory committee was examining FED. R. CIV. P. 84 (forms), which states that the forms appended to the rules "suffice" and illustrate the simplicity and brevity that the rules contemplate. He explained that many of the forms are outdated, and some are legally inadequate.

Professor Cooper pointed out that the Standing Committee had appointed an ad hoc forms subcommittee, chaired by Judge Gene E. K. Pratter of the civil committee, to review how the advisory committees develop and approve forms. The subcommittee, he said, made two basic observations: (1) in practice, the civil, criminal, bankruptcy, and appellate forms are used in widely divergent ways; and (2) the process for generating and approving forms differs substantially among the advisory committees.

The civil and appellate forms, for example, adhere to the full Rules Enabling Act process, including publication, approval by the Judicial Conference and the Supreme Court, and submission to Congress. The bankruptcy rules, on the other hand, follow the process partly, only up through approval by the Judicial Conference. At the other extreme, the criminal rules have no forms at all. Instead, the Administrative Office drafts the criminal forms, sometimes in consultation with the criminal advisory committee. He said that the subcommittee ultimately concluded that there is no overriding need for the advisory committees to adopt a uniform approach.

Professor Cooper explained that the civil advisory committee was now in the second phase of the forms project and was focusing on what to do specifically with the civil forms. He noted that the project had received an impetus from the Supreme Court's *Twombly* and *Iqbal* decisions on pleading requirements and from the widely held perception that the illustrative civil complaint forms are legally insufficient. There is, he said, a clear tension between the simplicity of those forms and the pleading requirements announced in the Supreme Court decisions.

He noted that the advisory committee was considering several different options. One would be just to eliminate the pleading forms. An alternate would be to develop a set of new, enhanced pleading forms for each category of civil cases consistent with *Twombly* and *Iqbal*. There was, though, no enthusiasm in the committee for that approach. Going further, the committee could consider getting back into the forms business full-bore and spend substantial amounts of time on improving and maintaining all the forms. At the other extreme, the committee could eliminate all the forms and allow the Administrative Office to generate the forms, with appropriate committee consultation.

CLASS ACTIONS AND RULE 23 SUBCOMMITTEE

Judge Campbell reported that the advisory committee had appointed a Rule 23 subcommittee to consider several topics involving class-action litigation and whether certain amendments to the class-action rule were appropriate.

Professor Marcus said that the subcommittee had begun its work and was examining a variety of controversial issues that have emerged as a result of several Supreme Court decisions in the past couple of years, recent litigation developments, and experience under the Class Action Fairness Act. Among the topics being considered are: (1) the relationship between considering the merits of a case and determining class action certification, particularly with regard to the predominance of common questions; (2) the viability of issues classes under Rule 23(c)(4); (3) monetary relief in a Rule 23 (b)(2) class action; (4) specifying settlement criteria in the rule; and (5) revising Rule 23 to address the Supreme Court's announcement in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), that the fairness and adequacy of a settlement are no substitute for full-dress consideration of predominance.

Professor Marcus noted that the list of issues continues to evolve and many were discussed at the panel discussion during the Standing Committee's January 2012 meeting. He pointed out that the project to consider appropriate revisions to Rule 23 will take time, since several topics are controversial and will pose drafting difficulties.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professor Beale presented the report of the advisory committee, as set forth in Judge Raggi's memorandum and attachments of May 17, 2012 (Agenda Item 8).

Amendment for Final Approval

FED. R. CRIM. P. 11(b)

Judge Raggi reported that the proposed amendment to FED. R. CRIM. P. 11(b)(1) (pleas) would add a new subsection (o) to the colloquy that a court must conduct before accepting a defendant's guilty plea. It would require a judge to advise defendants who are not United States citizens that they may face immigration consequences if they plead guilty.

She noted that at every stage of the advisory committee's deliberations, a minority of members questioned whether it is wise or necessary to add further requirements to the already lengthy Rule 11 plea colloquy. Moreover, the Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473 (2012), addressed the duty of defense counsel, not the duty of courts, to provide information on immigration consequences to the defendant. Nevertheless, a majority of the advisory committee concluded that immigration is qualitatively different from other collateral consequences that may flow from a conviction. Moreover, a large number of criminal defendants in the federal courts are aliens who are affected by immigration consequences.

The committee, she said, recognized the importance of not allowing Rule 11(b) to become such a laundry list of every possible consequence of a guilty plea that the most critical factors bearing on the voluntariness of a plea do not get lost, *i.e.,* knowledge of the important constitutional rights that the defendant is waiving. She added that the only change made after publication was a modest change in the committee note.

The committee unanimously by voice vote approved the proposed amendment for final approval by the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 5(d) and 58(b)

Judge Raggi explained that the proposed amendments to FED. R. CRIM. P. 5(d) (initial appearance) and FED. R. CRIM. P. 58(b)(2) (initial appearance in a misdemeanor) dealt with advising detained foreign nationals that they may have their home country's consulate notified of their arrest.

The amendments had been approved by the Judicial Conference in September 2011, but returned by the Supreme Court in April 2012. The advisory committee then discussed possible concerns that the Court may have had, such as that the possibility that the language of the amendments could be construed to intrude on executive discretion or confer personal rights on a defendant. She suggested that there may have been concern

over the proposed language in Rule 5(d)(1)(F), which specified that a detained non-citizen be advised that an attorney for the government or law-enforcement officer will do either of two things: (1) notify a consular office of the defendant's country, or (2) make any other consular notification required by treaty or international agreement.

She suggested that use of the word "will" might have been seen as potentially tying the hands of the executive in conducting foreign affairs. In addition, despite language in the committee note that the rule did not create any individual rights that a defendant may enforce in a federal court, the rule might have been seen as taking a step in that direction,

After the rule was returned by the Court, the advisory committee went back to the drawing board and produced a revised draft of the amendments. As revised, the first part provides that the defendant must be told only that if in custody, he or she "may request" that an attorney for the government or law-enforcement officer notify a consular office. It does not guarantee that the notification will in fact be made. The second part of the amendments was not changed. It specifies that even without the defendant's request, consultation notification may be required by a treaty or other international agreement.

Judge Raggi pointed out that the primary concern in revising the amendments was to assuage any concerns that the Supreme Court may have had with the amendments as originally presented. She noted that the Department of Justice had been consulting closely with the Department of State, which is very eager to have a rule as an additional demonstration to the international community of the nation's compliance with its treaty obligations.

A member noted that the Vienna Convention only requires notification of a consular office if a defendant requests it. She said that the Supreme Court might have found the original language of proposed Rule 5(d)(1)(F)(i) too strong in stating that the government will notify a consular office if the defendant requests. But the new language in Rule 5(d)(1)(F)(ii) may go too far in the other direction by requiring notification without the defendant's request if required by a treaty or international agreement.

Ms. Felton explained that several bilateral treaties, separate from the Vienna Convention, require notification regardless of the defendant's request. She added that the Departments of Justice and State had proposed the amendments to Rules 5 and 58 primarily as additional, back-up insurance that consular notification will in fact be made.

The main thrust of the amendments, she said, was to inform defendants of their option to request consular notification. In the vast majority of cases, however, the notification will already have been made by a law-enforcement officer or government attorney at the time of arrest. That is what the Vienna Convention contemplates. The

proposed amendments, which apply at initial appearance proceedings, will help catch any cases that may have slipped through the cracks.

Judge Raggi noted that this factor was part of the discussion on whether a rule is needed at all because there are no court obligations under the Convention and treaties. The rule, essentially, is a belt-and-suspenders provision designed to cover the rare cases when a defendant has not been advised properly. It only states that a defendant may request notification, and that is as far as it can go. If were to imply that the notice will in fact be given, which is what some treaties actually require, there would be concern that the rule itself was creating an enforceable individual right in the defendant.

Professor Beale added that the revised amendments were acceptable to the Departments of Justice and State. They may be more acceptable to the Supreme Court because they do not in any way tie the hands of the executive and avoid creating any individual rights or remedies. A member noted that the last part of the committee notes makes that point explicitly.

Judge Raggi pointed out that it was up to the Standing Committee to decide whether to republish the rule. Although the changes made after the return from the Supreme Court simply clarify the intent of the amendments, the advisory committee had reason to think that they were different enough to warrant publishing the rule again for further comment.

The committee unanimously by voice vote approved the proposed amendments for republication.

Information Items

FED. R. CRIM. P. 12 and 34

Judge Raggi explained that the proposed amendments to FED. R. CRIM. P. 12 (pleadings and pretrial motions) and the conforming amendment to FED. R. CRIM. P. 34 (arresting judgment) deal with motions that have to be made before trial and the consequences of an untimely motion. The amendments, she said, had been prompted by a proposal by the Department of Justice to include motions objecting to a defect in the indictment in the list of motions that must be made before trial.

The proposal, she said, had now come to the Standing Committee for the third time. The last draft was published for public comment in August 2011. It generated many thoughtful comments, which led the advisory committee to make some additional changes. It is expected that the ad hoc subcommittee reviewing the rule will present a final draft to the advisory committee in October 2012, and it may be presented to the Standing Committee for final approval in January 2013.

FED. R. CRIM. P. 6(e)

Judge Raggi reported that the advisory committee had received a letter from the Attorney General in October 2011 recommending that FED. R. CRIM. P. 6(e) (grand jury secrecy) be amended to establish procedures for disclosing historically significant grand jury materials. She noted that applications to release historic grand jury materials had been presented to the district courts on rare occasions, and the courts had resolved them by reference to their inherent supervisory authority over the grand jury.

The Department of Justice, however, questioned whether that inherent authority existed in light of Rule 6(e)'s clear prohibition on disclosure of grand jury materials. Instead, it recommended that disclosure should be permitted, but only under procedures and standards established in the rule itself. The Department submitted a very thoughtful memo and proposed rule amendments that would: (1) allow district courts to permit disclosure of grand jury materials of historical significance in appropriate circumstances and subject to required procedures; and (2) provide a specific point in time at which it is presumed that materials may be released.

She noted that a subcommittee, chaired by Judge John F. Keenan, had examined the proposal and consulted with several very knowledgeable people on the matter. In addition, the advisory committee reporters prepared a research memorandum on the history of Rule 6(e), the relationship between the court and the grand jury and case law precedents on the inherent authority of a judge to disclose grand jury material. After examining the research and discussing the proposal, all members of the subcommittee, other than the Department of Justice representatives, recommended that the proposed amendment not be pursued.

The full advisory committee concurred in the recommendation and concluded that in the rare cases where disclosure of historic materials had been sought, the district judges acted reasonably in referring to their inherent authority. Therefore, there is no need for a rule on the subject.

Judge Raggi added that she had received a letter from the Archivist of the United States strongly supporting the Department of Justice proposal. She spoke with him at length about the matter and explained that it would be a radical change to go from a presumption of absolute secrecy, which is how grand juries have always operated, to a presumption that grand jury materials should be presumed open after a certain number of years. A change of that magnitude, she said, would have to be accomplished through legislation, rather than a rule change. She noted that the archivist has a natural, institutional inclination towards eventually releasing historical archived documents and might consider supporting a legislative change.

FED. R. CRIM. P. 16

Judge Raggi reported that a suggestion had been received from a district judge to amend FED. R. CRIM. P. 16(a) (government's disclosure) to require pretrial disclosure of all the defendant's prior statements. There was, however, a strong consensus on the advisory committee that there are no real problems in criminal practice that warrant making the change. The committee, accordingly, decided not to pursue an amendment.

Judge Raggi reported that the Senate Judiciary Committee was considering legislation addressing the government's obligations to disclose exculpatory materials under *Brady* and *Giglio*. The committee had asked the judiciary for comments and a witness at the hearings. She said that she had decided not to testify but wrote to the committee to document the work of the advisory committee and the Standing Committee on the subject over the last decade. Attached to the letter were 900 pages of the public materials that the committee had produced.

She explained in the letter that the advisory committee had tried to write a rule that would codify all the government's disclosure obligations under case law and statute, but concluded that it could not produce a rule that fully captures the obligations across the wide range of federal criminal cases. In addition, she said, her letter alluded to a Federal Judicial Center survey of federal judges showing, among other things, that judges see non-disclosure as a problem that only arises infrequently. Although the advisory committee decided not to pursue a rule change, she added, the subject is being addressed in revisions to the *Bench Book for U.S. District Court Judges*. She noted that the Federal Judicial Center's Bench Book Committee was close to completing that work.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum and attachments of May 3, 2012 (Agenda Item 6). Judge Fitzwater noted that the advisory committee had no action items to present.

Amendments for Final Approval

FED. R. EVID. 803(10)

Judge Fitzwater reported that the proposed amendment to FED. R. EVID. 803(10) (hearsay exception for the absence of a public record) was needed to address a constitutional infirmity as a result of the Supreme Court's decisions in *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009). It raised the concern that "testimonial" evidence is being allowed when a certificate that a public record does not exist is introduced in

evidence without the presence of the official who prepared the certificate. The proposed amendment would create a notice-and-demand procedure that lets the prosecution give written notice of its intention to use the information. Unless the defendant objects and demands that the witness be produced, the certificate may be introduced.

The proposed procedure, he said, had been approved in *Melendez-Diaz*. The advisory committee received two comments on the amendment, one of which endorsed it and the other approved it in principle with some comments.

The committee unanimously by voice vote approved the proposed amendment for final approval by the Judicial Conference.

Amendments for Publication

FED. R. EVID. 801(d)(1)(B)

Judge Fitzwater reported that FED. R. EVID. 801(d) (declarant-witness's prior statement) specifies that certain prior statements are not hearsay. Under Rule 801(d)((1)(B), the proponent of testimony may introduce a prior consistent statement for its truth, *i.e*. to be admitted substantively, but not for another rehabilitative purpose, such as faulty recollection.

He said that two problems have been cited with the way the rule is now written. First, the prior consistent statement of the witness is of little or no use for credibility unless the jury actually believes the testimony to be true anyway. The jury instruction, moreover, is very difficult for jurors to follow, as it asks them to distinguish between prior consistent statements admissible for the truth and those that are not. Second, the distinction has little, if any, practical effect because the proponent of the testimony has already testified in the presence of the trier of fact.

The proposed amendment would allow a prior consistent statement to be admitted substantively if it otherwise rehabilitates the witness' credibility.

The committee without objection by voice vote approved the proposed amendment for publication.

FED. R. EVID. 803(6)-(8)

Judge Fitzwater noted that FED. R. EVID. 803(6), (7), and (8) are the hearsay exceptions, respectively, for business records, the absence of business records, and public records. When the admissibility requirements of the rule are met, the evidence is admitted as an exception to the hearsay rule unless the source, method, or circumstances indicate a lack of trustworthiness.

During the restyling of the rules, he said, a question arose as to who has the burden on the issue of lack of trustworthiness. By far the vast majority of court decisions have held that the burden is on the opponent of the evidence, not the proponent. But a few decisions have placed the burden on the proponent. Since the case law was not unanimous, the advisory committee decided that it could not clarify the matter as part of the restyling project because a change would constitute a matter of substance.

Although the ambiguity was not resolved during the restyling project, the Standing Committee suggested that the advisory committee revisit the rule. The advisory committee initially was of the view that no further action was needed until it was informed that the State of Texas, during its own restyling project, had looked at the restyled federal rules and concluded that FED. R. EVID. 803(6)-(8) had placed the burden on the proponent of the evidence. This, clearly, was not the advisory committee's intention. At that point, it decided to make a change in the rules to make it clear that the burden is on the opponent of the evidence.

At members' suggestions, minor changes were made in the proposed committee notes. Line 34 of the note to Rule 806(8) was corrected to conform to the text of the rule, and an additional sentence was added to the second paragraph of the note to Rule 806(6).

The committee without objection by voice vote approved the proposed amendments for publication.

Information Items

SYMPOSIUM ON FED. R. EVID. 502

Judge Fitzwater noted that the advisory committee's next meeting will be held on October 4 and 5, 2012, in Charleston, South Carolina. A symposium on Rule 502 will be held in conjunction with the meeting, with judges, litigators, and academics in attendance. There is concern, he said, that Rule 502 (limitations on waiver of attorney-client privilege and work product) is not being used as widely as it should be as a means of reducing litigation costs. He noted that Professor Marcus will be one of the speakers at the program, and he invited the members of the Standing Committee to attend.

REPORT OF THE E-FILING SUBCOMMITTEE

Judge Gorsuch noted that the ad hoc committee, which he chaired, was comprised of representatives from all the advisory committees. It was convened to consider appropriate terminology that the rules might use to describe activities that previously had only involved paper documents but now are often processed electronically. Although the

impetus for the subcommittee's formation arose in connection with the appropriate terminology to use in the pending amendments to Part VII of the bankruptcy rules and FED. R. APP. P. 6, the subcommittee took a comprehensive look at all the federal rules. Professor Struve served as the subcommittee reporter, and Ms. Kuperman compiled a comprehensive list of all the terms used in each set of federal rules to describe the treatment of the record and other materials that may be either in paper or electronic form.

He noted that the subcommittee had identified four possibilities for defining its work and listed them from the most aggressive to the least. First, he said, it could conduct a major review of all the federal rules in order to achieve uniformity in terminology across all the rules. That major project would be conducted along the lines of the recent restyling efforts. Second, the subcommittee could compile a glossary of preferred terms. Third, it could serve as a screen for all future rule amendments, and advisory committees would have to run their proposals through the subcommittee. And fourth, the subcommittee could simply make itself available for assistance at the request of the advisory committees.

He reported that the subcommittee opted for the last alternative, largely because the others would all take a great deal of time and effort. Moreover, it recognized that technology is changing so rapidly that it may not be timely to undertake a more aggressive approach at this juncture. At some point in the future, though, terminology will have to be addressed more comprehensively. He added that the most valuable result of the subcommittee's work was to make the reporters cognizant of the extraordinary number of synonyms currently in use in the rules and to encourage them to coordinate with each other on terminology.

INTERIM ASSESSMENT OF THE JUDICIARY'S STRATEGIC PLAN

Judge Kravitz noted that he would work with the advisory committees to prepare a response to Judge Charles R. Breyer, the Judicial Planning Coordinator, on the committee's progress in implementing the *Strategic Plan for the Federal Judiciary.*

NEXT MEETING

The committee will hold its next meeting on Thursday and Friday, January 3 and 4, 2013 in Boston, Massachusetts.

Respectfully submitted,

Peter G. McCabe,
Secretary

TAB 1B

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JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE THOMAS F. HOGAN
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 11, 2012

****

All the following matters requiring the expenditure of funds were approved by the Judicial Conference *subject to the availability of funds* and to whatever priorities the Conference might establish for the use of available resources.

****

At its September 11, 2012 session, the Judicial Conference of the United States —

EXECUTIVE COMMITTEE

Approved a resolution in recognition of the substantial contributions made by five Judicial Conference committee chairs whose terms of service end in 2012.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

With regard to continuing need for bankruptcy judgeships:

a. Agreed to recommend to Congress that no existing bankruptcy judgeship be statutorily eliminated; and

b. Agreed to advise the Eighth Circuit Judicial Council with respect to the District of South Dakota and the Northern District of Iowa, and the Ninth Circuit Judicial Council with respect to the District of Alaska, to consider not filling vacancies that currently exist or may occur by reason of resignation, retirement, removal, or death, until there is a demonstrated need to do so.

Approved amendments to its regulations governing the ad hoc and extended service recall of retired bankruptcy judges (*Guide to Judiciary Policy*, Vol. 3, Ch. 9 and Ch. 10) to —

a. Establish national standards for approval of recall of retired bankruptcy judges and for approval of staff for recalled judges;

b. Provide for Bankruptcy Committee approval of any request for funds for a recall of a retired bankruptcy judge that exceeds $10,000 in judicial salary, Office of Personnel Management annuity reimbursement, travel, and subsistence, and any request for staff for a recalled bankruptcy judge.

c. Establish October 1, 2012, as the effective date for the amended regulations and authorize all bankruptcy judges serving on recall at the time the amended regulations become effective, as well as all staff to recalled judges on-board at that time, to complete their current terms, notwithstanding the amendments to the regulations; and

d. Make non-substantive, stylistic changes.

Approved further amendments to the retired bankruptcy judge recall regulations (*Guide to Judiciary Policy*, Vol. 3, Ch. 9 and Ch. 10) to —

a. Require that any retired bankruptcy judge who is eligible and consents to serve on recall, and has been approved for recall service, but has been separated from federal judicial service for more than 1 year but no more than 10 years, be subject to a name and fingerprint check by the FBI, a tax check by the IRS, and a credit check by OPM; and

b. Require that a retired bankruptcy judge who is eligible and consents to serve on recall, and has been approved for recall service, but has been separated from federal judicial service for more than 10 years, be subject to a full-field background investigation by the FBI with a 15-year scope.

Authorized the designation of Sioux Falls, in the District of South Dakota, as the official duty station for Bankruptcy Judge Charles L. Nail, Jr.

COMMITTEE ON THE BUDGET

Approved the Budget Committee's budget request for fiscal year 2014, subject to amendments necessary as a result of (a) new legislation, (b) actions of the Judicial Conference, or (c) any other reason the Executive Committee considers necessary and appropriate.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

Agreed to request each individual court unit within each district (district, probation and pretrial services, and bankruptcy) to work together to adopt a Shared Administrative Services plan. The plans should be submitted to the chief judge of the circuit and the circuit executive, and be provided to the Committee on Court Administration and Case Management by February 15, 2013.

Endorsed the elimination of funding for the printing of court of appeals slip opinions, with a one-year exception for courts that have contracted with vendors prior to September 11, 2012, for services to be provided in FY 2013, and agreed to encourage courts to use electronic dissemination in lieu of printing.

Approved the following proposed changes to the miscellaneous fee schedules:

a. For the Bankruptcy Court Miscellaneous Fee Schedule:

(i) Added the following item, effective May 1, 2013:

(20) For filing a transfer of claim, $25 per claim transferred.

(ii) Amended items (11) and (18) for filing a motion to reopen or divide a Chapter 11 case, and amended item (15) for filing a case under Chapter 15 of the Bankruptcy Code, to increase fees from $1,000 to $1,167, effective November 21, 2012.

b. For the District Court Miscellaneous Fee Schedule, added the following item, effective May 1, 2013:

(14) Administrative fee for filing a civil action, suit, or proceeding in a district court, $50. This fee does not apply to persons granted *in forma pauperis* status under 28 U.S.C. § 1915.

c. For the Electronic Public Access Fee Schedule, amended item III to raise the record search fee from $26 to $30, and amended item V to raise the returned check fee from $45 to $53, effective October 1, 2012.

Approved revisions to the legal research materials policy, *Guide to Judiciary Policy*, Vol. 21, Ch. 3, to further encourage cost savings in legal research materials for judges' chambers, and to make other technical, non-substantive changes.

Amended the bankruptcy records disposition schedule to add two new items to address bankruptcy miscellaneous proceedings and records, and attorney disbarment proceedings, and authorized the revised schedule to be transmitted to the National Archives and Records Administration.

Approved national implementation of the program to provide access to court opinions via the Government Printing Office's Federal Digital System and agreed to encourage all courts, at the discretion of the chief judge, to participate in the program.

COMMITTEE ON CRIMINAL LAW

Authorized revisions to Monograph 109, *The Supervision of Federal Offenders*, *Guide to Judiciary Policy*, Volume 8, Part E, Chapter 4, to clarify the type of information that an officer may disclose to law enforcement.

Declined to approve the following recommendation:

> Because the independence of the federal judiciary requires that judges make case-related decisions freely in accordance with the law and without fear or intimidation —
>
> a. Re-affirm its existing positions with regard to the release of judge-specific sentencing data by judicial branch organizations; and
>
> b. With regard to judge-identifying information, specifically oppose any:
>
> i. effort to hold judges individually accountable for their sentencing decisions except through established processes for appellate review;
>
> ii. congressional use of judge-identifying sentencing data for the purpose of singling out individual judges for denigration, harassment, questioning, or retaliation; and
>
> iii. release to Congress of judge-identifying data by the Sentencing Commission in the continuing absence of an articulated legitimate legislative purpose for acquiring such data.

COMMITTEE ON DEFENDER SERVICES

Approved proposed CJA guidelines (to be included in both the capital and non-capital chapters of Volume 7A, *Guide to Judiciary Policy*) pertaining to notification to the presiding judicial authority of familial relationships between (a) counsel and potential service providers and (b) co-counsel.

COMMITTEE ON FINANCIAL DISCLOSURE

Agreed to postpone consideration of a motion to disapprove the report of the Committee on Financial Disclosure and require the Committee to file with the Judicial Conference amended reports that provide information about actions taken pursuant to a delegation of Conference authority under 5 U.S.C. app. § 104(b), so that the Committee may first consider the matter and report back to the Conference.

COMMITTEE ON INFORMATION TECHNOLOGY

Adopted a policy that a single network infrastructure will be installed in new buildings, new annexes, newly leased space, and repair and alterations projects in which new space is being configured for multiple court units. Exceptions to this policy must be approved by the appropriate circuit judicial council and, if approved, any increased costs, including facilities-related costs, resulting from duplicate infrastructure must be funded locally.

Approved the proposed fiscal year 2013 update to the *Long Range Plan for Information Technology in the Federal Judiciary*.

COMMITTEE ON THE JUDICIAL BRANCH

Approved an amendment to section 250.40.20(b) of the Travel Regulations for United States Justices and Judges, *Guide to Judiciary Policy*, Vol. 19, Ch. 2, to clarify that whenever a judge is provided a continental breakfast in connection with a judiciary meeting and the continental breakfast consists of more than "light refreshments" as defined under judiciary policy, the judge's subsistence allowance should be reduced accordingly.

COMMITTEE ON JUDICIAL RESOURCES

Approved new bankruptcy clerk's office staffing formulas starting in fiscal year 2013 as follows:

a. Six separate staffing formulas for bankruptcy courts with one, two, three, four-to-six, seven-to-ten, and 24 authorized judgeships, respectively; and

b. A weighted calculation of staffing formula results that reduces staffing volatility by using 60 percent of workload data from the statistical year (July 1 to June 30) closing immediately prior to the start of the fiscal year of execution and 40 percent of workload data from the statistical year ending 15 months prior to the start of the relevant fiscal year.

Approved a shared administrative services component for use with the new staffing formulas for bankruptcy clerks' offices with the following stipulations:

a. Defer presumed shared administrative services reductions in the staffing formulas for bankruptcy clerks' offices for fiscal year 2013;

b. Presume shared administrative services reductions for fiscal year 2014 in the bankruptcy clerks' offices excluding information technology, budget, and finance functions;

c. Presume shared administrative services reductions for fiscal year 2015 in the bankruptcy clerks' offices excluding budget and finance functions, but including

an appropriate percentage of information technology functions, currently estimated at 19 percent; and

d. Presume shared administrative services reductions for fiscal year 2016 in the bankruptcy clerks' offices excluding budget and finance functions, but including all information technology functions.

With regard to pro se law clerks:

a. Approved establishing a staffing formula for pro se law clerks in fiscal year 2013 based on prisoner cases only, providing a credit of 13.4 hours per civil rights case for nature of suit codes 540 (Mandamus & Other), 550 (Civil Rights), 555 (Prison Condition), and 560 (Civil Detainee - Conditions of Confinement); and a credit of 8.3 hours per habeas corpus case for nature of suit codes 463 (Alien Detainee (Prisoner Petition)), 510 (Motions to Vacate Sentence), 530 (General), and 535 (Death Penalty);

b. Agreed to retain the two-year stabilization policy, which requires prisoner case filings to drop below a staffing threshold for two consecutive years before decreasing staff allocations;

c. Eliminated the one full-time equivalent minimum allocation per district and agreed to allocate pro se law clerk positions in 0.5 full-time equivalent increments;

d. Eliminated grandfathering for pro se law clerks with the implementation of the new formula;

e. Deferred termination of current minimum staffing and grandfathered pro se law clerks until December 31, 2013;

f. Provided no additional resources for cases that do not involve a pro se prisoner-plaintiff, including civil rights and social security cases; and

g. Agreed to encourage sharing or pooling of pro se law clerks and death penalty law clerks to enable the most efficient and effective use of resources.

Authorized a third Judiciary Salary Plan-16 Type II chief deputy clerk position for the district clerk's office of the Central District of California, to be funded only with the court's decentralized funds.

Approved a revision of the highest previous rate rule for courts to permit them to use this pay-setting flexibility prospectively at any time within one year of re-employment, or within one year of the last transfer, reassignment, promotion, demotion, or change in type of appointment. Federal public defender organizations are excluded from the change in this rule.

Modified its March 2007 policy on honorary (non-monetary) awards to allow courts to —

a. Incur the reasonable cost associated with engraving or other personalization of an honorary award;

b. Provide a plaque in addition to a framed certificate or court seal for a retiring employee, subject to the $100 per court employee, per year limitation; and

c. Have probation and pretrial services officers receive their nonfunctional deactivated badges and/or credentials at retirement, subject to the $100 per court employee, per year limitation.

Approved revision of the September 1991 transcript rates policy and guidelines to reflect newer technology.

Amended the 2010 *Model Employment Dispute Resolution Plan* to extend whistleblower protection to employees.

COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM

Approved recommendations regarding specific magistrate judge positions to: (a) redesignate the location of one full-time magistrate judge position in the Western District of Oklahoma; and (b) reduce the salary of the full-time magistrate judge position at Yellowstone National Park.

Agreed to amend its regulations governing the ad hoc and extended service recall of retired magistrate judges, *Guide to Judiciary Policy*, Vol. 3, Ch. 11 and Ch. 12, to (a) provide for Magistrate Judges Committee approval of any request for staff for recalled magistrate judges and any request for funds for recall of a retired magistrate judge that exceeds $10,000 in judicial salary, Office of Personnel Management annuity reimbursement, travel, and subsistence; (b) provide workload standards for recalled magistrate judges when staff is requested; and (c) make non-substantive, stylistic changes.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Approved proposed amendments to Appellate Rules 13, 14, 24, 28, and 28.1, and to Form 4, and agreed to transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Bankruptcy Rules 1007(b)(7), 4004(c)(1), 5009(b), 9006(d), 9013, and 9014, and agreed to transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed revisions of Official Bankruptcy Forms 7, 9A–9I, 10, and 21, to take effect on December 1, 2012.

Approved proposed amendments to Civil Rules 37 and 45, and agreed to transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved a proposed amendment to Criminal Rule 11, and agreed to transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Approved a proposed amendment to Evidence Rule 803(10), and agreed to transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

COMMITTEE ON SPACE AND FACILITIES

Endorsed, upon the recommendations of the respective circuit judicial councils and this Committee, the closure of six non-resident facilities in the following locations: (a) Wilkesboro, North Carolina, upon the completion of the renovation of the courthouse in Statesville, North Carolina; (b) Beaufort, South Carolina, at the end of the lease term in 2014; (c) Meridian, Mississippi; (d) Amarillo, Texas, upon the cancellation of the lease for the bankruptcy court space at the earliest point at which it is economically feasible; (e) Pikeville, Kentucky, to release the bankruptcy courtroom and chamber in the leased space; and (f) Gadsden, Alabama.

Approved an exception to the *U.S. Courts Design Guide* for the chambers and courtroom project in Clarksburg, West Virginia subject to the following conditions: design may begin, but (a) no construction can commence until (i) the judge to be replaced provides formal notice that she will take senior status upon a date certain, and (ii) the court commits that a district judge will reside in the chambers being constructed; and (b) Component B funding for design and construction may not be obligated until the beginning of fiscal year 2013.

Approved a change to Circuit Rent Budget Business Rule #1, such that the new rule would make an allotment equal to one year's rental savings available for use within two years, by the chief judge of any district court, bankruptcy court, or court of appeals, on behalf of a court unit that releases space accepted by GSA as marketable. The court would then use those funds to: (a) fund requirements related to space relinquishment, such as tenant alterations or furniture; or (b) fund other activities or items necessary for their operations.

Approved the proposed *Five-Year Courthouse Project Plan for FYs 2014-2018.*

TAB 2

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TAB 2A

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MEMORANDUM

To: Honorable Jeffrey S. Sutton, Chair,
Standing Committee on Rules of Practice and Procedure

From: Honorable David G. Campbell, Chair,
Advisory Committee on Federal Rules of Civil Procedure

Date: December 5, 2012

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on November 2, 2012. The meeting had been scheduled for November 1 and 2, but in anticipation of travel disruptions following Super Storm Sandy it was rescheduled to enable most participants to attend by video conference, webcast, or other remote means. Several participants gathered at the Administrative Office. Draft Minutes of this meeting are attached. This report has been prepared by Professor Cooper, Committee Reporter, with Professor Marcus, Associate Reporter, and various subcommittee chairs.

Part I of this Report presents for action a proposal recommending publication for comment of a revised Rule 37(e). The revisions provide both remedies and sanctions for failure to preserve discoverable information that reasonably should have been preserved. In addition, they describe factors to be considered both in determining whether information reasonably should have been preserved and also in determining whether a failure was willful or in bad faith.

Three other items are presented for action. One seeks approval to publish an amendment of Rule 6(d) to correct an inadvertent oversight in conforming former rule text to style conventions. The second seeks approval to publish a modest revision of Rule 55(c) to clarify a latent ambiguity that has caused some confusion. Both of these proposals seek approval for publication when they can be included in a package with more substantial rule proposals. The third seeks a recommendation to adopt without publication an inadvertent failure to correct a cross-reference in Rule 77(c)(1) when Rule 6 was revised in the Time Computation Project.

Part II presents several matters on the Committee agenda for information and possible discussion. The 2010 Duke Conference bristled with ideas for reducing cost and delay in civil litigation, including many that seem suitable subjects for incorporation in the rules. Several of these ideas are presented by rules drafts. The Committee hopes it will be possible to have a fairly full discussion of the drafts, aiming toward polished drafts that can be presented in June with a recommendation to publish for comment.

Other topics in Part II include the question whether Rule 84 and the Rule 84 Forms should be abandoned. Brief notes are made on the early stages of the Class-action Subcommittee's work and on the ongoing empirical work on pleading standards. Finally, there is a report on the Committee's conclusion that the Enabling Act process is not the arena to pursue proposals to encourage prompt rulings on motions to remand actions removed from state court and to make mandatory an award of fees and expenses whenever an action is remanded.

PART I: ACTION ITEMS

I.A. ACTION TO RECOMMEND PUBLICATION OF REVISED RULE 37(e)

ACTION ITEM: RULE 37(e)

The Civil Rules Advisory Committee has been working on the issues raised by concerns about preservation and sanctions since the May, 2010, Duke Conference. During that conference, the E-Discovery Panel recommended adoption of rule provisions to address these concerns. Very soon thereafter, the Advisory Committee's Discovery Subcommittee began work on these issues. That work has involved one major full-day conference and repeated discussions with the full Advisory Committee. During that time the Standing Committee also had a panel discussion (during its January, 2011, meeting) of these issues. Since the last Standing Committee meeting in June, 2012, the pace of work has quickened.

Beginning on July 5, 2012, the Discovery Subcommittee held a total of eight conference calls to discuss and develop its proposal. The last of those calls occurred after the Advisory Committee's Nov. 2 meeting, and addressed matters the full Committee remitted to the Subcommittee for further consideration.

At the Nov. 2 meeting, the full Committee voted to recommend approval of a new Rule 37(e) for publication for public comment during the Standing Committee's January, 2013, meeting. It is understood that actual publication would not occur until August, 2013, but the Subcommittee felt that there was no reason to delay submission of the preliminary draft it had developed and the full Committee agreed. The Advisory Committee continues to work on additional case-management amendment ideas with the help of its Duke Subcommittee, and those may be presented to the Standing Committee at its June, 2013, meeting with a recommendation for publication. If that happens, it is hoped that they would form a broad package of amendment ideas with new Rule 37(e). If that does not happen, at least Rule 37(e) would be available to respond to the pressing concerns about preservation and sanctions.

This memorandum provides background on this work and introduces the issues. It contains the Rule 37(e) preliminary draft that the Advisory Committee recommends be published for public comment.

Need for action

The Civil Rules Advisory Committee was first advised of the emerging difficulties presented by discovery of electronically stored information in 1997, but the nature of those problems and the ways in which rules might respond productively to them remained uncertain for some time. After considerable inquiry, the Committee was uncertain whether or how to proceed. Eventually, about a decade ago, it decided to proceed to try to draft rule amendments that addressed a variety of issues on which concern had then focused. Eventually that work led to the 2006 E-Discovery amendments to the Civil Rules.

One of those amendments was a new Rule 37(e), which provided protection against sanctions for loss of electronically stored information due to the "routine, good faith operation of an electronic information system." The Committee Note to that rule provision observed that the routine operation might need to be altered due to the prospect of litigation, and mentioned that a "litigation hold" would sometimes be needed.

The amount and variety of digital information has expanded enormously in the last decade. And the costs and burdens of litigation holds have escalated as well. In December, 2011, the House Judiciary Committee held a hearing on the costs of American discovery that largely focused on the costs of preservation. For details on that hearing, one can visit the following site:

http://judiciary.house.gov/hearings/hear_12132011_2.html

The Discovery Subcommittee developed three general models of possible rule-amendment approaches which it presented to the participants in its mini-conference in September, 2011, and summarized as follows at the time:

Category 1: Preservation proposals incorporating considerable specificity, including specifics regarding digital data that ordinarily need not be preserved, elaborated with great precision. Submissions the Committee received from various interested parties provided a starting point in drafting some such specifics. A basic question is whether a single rule with very specific preservation provisions could reasonably apply to the wide variety of civil cases filed in federal court. A related issue is whether changing technology would render such a rule obsolete by the time it became effective, or soon thereafter. Even worse, it might be counter-productive. For example, a rule that triggers a duty to preserve when a prospective party demands that another prospective party begin preservation measures (among the triggers suggested) could lead to overreaching demands, counter-demands, and produce an impasse that could not be resolved by a court because no action had yet been filed.

Category 2: A more general preservation rule could address a variety of preservation concerns, but only in more general terms. It would, nonetheless, be a "front end" proposal that would attempt to establish reasonableness and proportionality as touchstones for assessing preservation obligations. Compared to Category 1 rules, then, the question would be whether something along these lines would really provide value at all. Would it be too general to be helpful?

Category 3: This approach would address only sanctions, and would in that sense be a "back end" rule. It would likely focus on preservation decisions, making the most serious sanctions unavailable if the party who lost information

acted reasonably. In form, however, this approach would not contain any specific directives about when a preservation obligation arises or the scope of the obligation. By articulating what would be "reasonable," it might cast a long shadow over preservation without purporting directly to regulate it. It could also be seen as offering "carrots" to those who act reasonably, rather than relying mainly on "sticks," as a sanctions regime might be seen to do.

All three categories were presented -- with sketches of possible rule language raising subsidiary questions -- during the Subcommittee's September, 2011, mini-conference on preservation and sanctions. This conference gathered together about 25 practicing lawyers and judges from around the country with extensive experience on these topics. A number of papers were submitted to the Subcommittee before the conference, and they (along with notes of the conference) can be found at the following site:

www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DallasMiniConfSept2011/aspx

After the mini-conference, the Subcommittee decided to focus on the Category 3 approach, embodied at the time in a proposed Rule 37(g) dealing with sanctions for failure to preserve information. There were many questions about how to refine this proposal. Many of those questions remained when the same proposal was presented to the full Committee and discussed during the March 2012 meeting in Ann Arbor. A further version of that Rule 37(g) approach was presented to the Standing Committee during its June, 2012, meeting. At that time, it included a large number of language choices and footnoted questions that had not been resolved.

Beginning in early July, 2012, the Subcommittee tackled those language choices and footnoted questions. Eventually that task took seven conference calls to prepare a final proposed rule for the full Advisory Committee meeting in November, 2012. The initial effort focused on arriving at rule language that satisfied the entire Subcommittee. That was an extended effort, and on several occasions involved returning to points previously considered and re-evaluating them. Once it was completed, the Subcommittee turned to the draft Note. Finally, it turned to whether this new provision should be a new Rule 37(g), or perhaps should replace current Rule 37(e), and the Subcommittee decided that current 37(e) would not provide any protection beyond that provided by the new rule, so that replacing the current rule seemed more suitable.

A central objective of the proposed new Rule 37(e) is to replace the disparate treatment of preservation/sanctions issues in different circuits with a single standard. In addition, the amended rule makes it clear that -- in all but very exceptional cases in which failure to preserve "irreparably deprived a party of any meaningful opportunity to present a claim or defense" -- sanctions (as opposed to curative measures) could be employed only if the court finds that the failure was willful or in bad faith, and that it caused substantial prejudice in the litigation. The proposed rule therefore rejects Residential Funding Corp. v. DeGeorge Finan. Corp., 306 F.3d 99 (2d Cir. 2002), which stated that negligence is sufficient culpability to support sanctions.

The Subcommittee's proposed new Rule 37(e) was presented to the Advisory Committee at its November, 2012, meeting and discussed at length. Eventually, there were votes on whether to retain certain provisions on which the Subcommittee did not reach consensus, leading to the removal of one factor listed in the draft rule and of a possible paragraph in the Committee Note. All members except the Department of Justice voted in favor of submitting the proposed rule to the Standing Committee at its January meeting. (The Department reported that it had not gathered input from interested parties within the Department and could not vote in favor at the time of the Advisory Committee meeting.)

The full Committee also tasked the Subcommittee with considering and acting on a suggestion by one liaison member for a rewording a factor in the rule and several other minor adjustments, as well as considering concerns about the *Erie* doctrine or rulemaking power that were raised at the full Committee meeting and in a submission received before that meeting. On November 28, the Subcommittee met again by conference call and considered these issues. The preliminary draft presented below implements the decisions made during that conference call.

Erie Doctrine Concerns

In a comment during the Advisory Committee's Nov. 2 meeting, and in a pre-meeting submission, John Vail of AAJ argued that the *Erie* doctrine or the Rules Enabling Act constitute serious obstacles to going forward with 37(e). Based on further discussion on Nov. 28, additional Committee Note language was added to make clear that the rule would have no effect on the cognizability in federal court of a tort claim for spoliation, which is recognized in a few states. With that clarification,

those issues do not appear to be a weighty reason for declining to proceed with the proposed amendments to Rule 37(e).

Certainly the Rules Enabling Act authorizes adoption of rules about how to handle federal-court litigation in relation to failure to provide through discovery materials that would assist in the resolution of the case before the court. Under the Supreme Court's decisions, such a rule is permissible if it is "arguably procedural." Thus, one could say that the issue is what "remedy" the federal court should grant when presented with a failure to respond to discovery on the ground that the material sought no longer exists. Rule 37 addresses exactly that sort of issue, and revising it so it more suitably handles this problem should not tax the Enabling Act authority.

Under 28 U.S.C. § 2072(b), a rule should not be applied if doing so would "abridge, enlarge or modify any substantive right." The Committee Note has been revised to make clear that amended Rule 37(e) has no effect on the cognizability in federal court of a state-law tort claim for spoliation. It appears that a relatively small minority of states (approximately eight) recognize such a claim. For a listing of those eight jurisdictions, see Diana v. NetJets Serv., Inc., 50 Conn.Supp. 655, 657 n.6 (Conn.Super.2007). It appears that intentional spoliation must be proved to support most such claims, but for some claims negligence may suffice.

There might be an argument that -- with regard to litigation in federal court -- a civil rule could nullify such a spoliation claim and treat the matter of responses to failures to preserve evidence as governed solely by the rule. As the Committee Note makes clear, however, that is not what this rule does. The viability of such a tort claim for spoliation must be determined under the applicable law, which will often be state law. This conclusion is consistent with existing federal-court practice. See Naylor v. Rotech HealthCare, Inc., 679 F.Supp.2d 505, 510-11 (D. Vt. 2009) (looking to Vermont law to determine "whether or not spoliation of evidence constitutes an independent cause of action," and deciding it did not).

Providing by rule for a uniform approach to spoliation in all federal-court cases (unless they include a state-law spoliation tort claim) should not present *Erie* or Enabling Act problems. In Burlington Northern R.R. v. Woods, 480 U.S. 1 (1987), the Supreme Court recognized that § 2072(b) was "an additional requirement" when competing state law is invoked against application of a Federal Rule, but the Court's actual holding in that case seems to provide strong support for proposed

37(e). The Court held that an Alabama statute commanding that 10% always be added to a money judgment if a defendant appealed and lost could not apply in federal court because it conflicted with Fed. R. App. 38, which grants the court of appeals discretion to decide whether or not to impose a sanction for a groundless appeal. The Court explained that § 2072(b) has a limited effect (480 U.S. at 5-6):

> The cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules. Moreover, the study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect, give the Rules presumptive validity under both the constitutional and statutory constraints.

In Business Guides, Inc. v. Chromatic Communications Ent., Inc. 498 U.S. 533 (1991), the Court upheld imposition of Rule 11 sanctions on a party despite Justice Kennedy's argument in dissent that doing so "creates a new tort of 'negligent prosecution' or 'accidental abuse of process.'" The majority concluded that "[t]here is little doubt that Rule 11 is reasonably necessary to maintain the integrity of the system of federal practice and procedure, and that any effect on substantive rights is incidental."

Lower courts have recognized that state law does not control federal-court spoliation sanctions even in the absence of a rule directly addressing the questions addressed by new 37(e). For example, here is the analysis of the Sixth Circuit en banc in Adkins v. Woelever, 554 F.3d 650, 652 (6th Cir. 2008), abandoning that court's prior reference to state law regarding spoliation:

> In contrast to our persistent application of state law in this area, other circuits apply federal law for spoliation sanctions. See, e.g., Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001): Reilly v. Natwest Mkts. Group, Inc., 181 F.3d 253, 267 (2d Cir. 1999); Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993). We believe that this is the correct view for two reasons. First, the authority to impose sanctions for spoliated evidence arises not from substantive law but, rather, "from a court's inherent power to control the judicial process." Silvestri,

> 271 F.3d at 590. Second, a spoliation ruling is evidentiary in nature and federal courts generally apply their own evidentiary rules in both federal question and diversity matters. These reasons persuade us now to acknowledge the district court's broad discretion in crafting a proper sanction for spoliation.

The goal of amended 37(e) is to achieve uniformity in the federal courts in their handling of failures to preserve. One of the chief stimuli behind the proposed amendment is the diversity of treatment of preservation sanctions across the country. So there seems little reason to expect that it would run afoul of § 2072(b), as interpreted by the Supreme Court.

Replacing Rule 37(e)

In 2006, Rule 37(e) was added to provide some protection against sanctions for failure to preserve. At the time, some objected that it would not provide a significant amount of protection. Since then, as explored in Andrea Kuperman's memorandum (which should be in this agenda book), the rule has been invoked only rarely. Some say it has provided almost no relief from preservation burdens. The question whether this rule provision would serve any ongoing purpose if a better provision could be devised was in the background from the beginning of the Subcommittee's efforts on preservation and sanctions.

The proposed amendment is designed to provide more significant protection against inappropriate sanctions, and also to reassure those who might in its absence be inclined to over-preserve to guard against the risk that they would confront serious sanctions. Thus, Rule 37(e)(2)(A) permits sanctions only if the court finds that the failure to preserve was willful or in bad faith. One goal of this requirement is to overturn the decision of the Second Circuit in Residential Funding Corp. v. DeGeorge Finan. Corp., 306 F.3d 99 (2d Cir. 2002), which authorized sanctions for negligence and has continued to apply despite the adoption in 2006 of current Rule 37(e). Other circuits have reached different conclusions, some requiring that willfulness or bad faith be proved to support spoliation sanctions. These divergences have created particular difficulties for entities that engage in operations throughout the nation and do not know which standard will apply if a suit is filed. Not only is the amendment designed to raise the threshold for sanctions above negligence, it is also meant to provide a uniform standard for federal courts nationwide and thereby to replace this divergent case law cacophony that many have reported causes difficulty for those trying to make preservation

decisions.

Amended Rule 37(e), in short, provides better protection than current Rule 37(e). The Subcommittee has been unable to identify any activity that would be protected by the current Rule 37(e) but not protected under the proposed rule. The proposed rule is significantly broader than the current rule, providing more guidance to those who must make preservation and sanctions decisions. It also applies to all discoverable information, not just electronically stored information.

The Discovery Subcommittee therefore recommended that current Rule 37(e) be replaced with amended Rule 37(e), and the Advisory Committee agreed. The Subcommittee reached this conclusion only after completing the long process of refining its amendment proposal, then called Rule 37(g). Having completed that refinement, it reflected on whether current 37(e) provides any useful protection beyond its proposed amendment and concluded that the current rule does not. The Subcommittee discussed abrogating current Rule 37(e) and also adopting its new proposal as 37(g), but that seems unnecessary and potentially confusing. If useful, the invitation for public comment could call attention to the question whether existing Rule 37(e) would have any ongoing value after adoption of the proposed amendment.

Grant of authority to sanction;
limitation on that authority to
situations involving willfulness or bad faith

The proposed amendment (in 37(e)(2)) says that if a party failed to preserve information that should have been preserved, "the court may impose any of the sanctions listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction only if the court finds" that the loss was willful or in bad faith. This formulation differs from the formulation in current Rule 37(e) in that it is a grant of authority to impose sanctions of the sort listed in Rule 37(b)(2)(A). There is accordingly no need to worry (as the language of Rule 37(b) might suggest if the sanction were imposed directly under that rule) about whether failure to preserve violated a court order. The new rule provision is not limited (as is current Rule 37(e)) to "sanctions under these rules," so that the grant of authority should make it unnecessary for courts to rely on inherent authority to support sanctions for failure to preserve. At the same time, the limitation to situations involving willfulness or bad faith should correspond to what is normally said to be necessary to support inherent power sanctions. It is important to ensure that looser notions of inherent power are not invoked to circumvent

the protections established by new Rule 37(e).

The limitation to situations in which the party to be sanctioned has acted willfully or in bad faith should provide significantly more protection than current Rule 37(e), as well as providing a uniform national standard.

Some thought was given to whether it would be helpful to try in the Note to define willfulness or bad faith, but the conclusion was that it would not be useful. The courts have considerable experience dealing with these concepts, and efforts to capture that experience in Note language seemed more likely to produce problems than provide help.

Sanctions in the absence of willfulness or bad faith

Rule 37(e)(2)(B) does permit sanctions in the absence of willfulness or bad faith when the loss of the information "irreparably deprived a party of any meaningful opportunity to present a claim or defense." The Subcommittee means this authority to be limited to the truly exceptional case. It functions as something of a safety valve for the general directive that sanctions can only be imposed on one who has acted willfully or in bad faith. The point is that the prejudice is not only irreparable, but also exceptionally severe. Rule 37(e)(2)(B) comports with cases such as Silvestri v. General Motors Corp., 273 F.3d 583 (4th Cir. 2001), which have recognized the need for consequences when one side loses information or evidence that is clearly essential to the other side's case. The Subcommittee spent considerable time refining and discussing the proper way to phrase this authority and ultimately arrived at the recommended formulation.

Precise preservation rules

As mentioned above, the Subcommittee began its analysis of these problems with two possible amendment approaches that sought to provide guidance on when a preservation obligation arises and the scope of that obligation. The amendment recommended below does not contain such a provision.

But Rule 37(e)(3) attempts nonetheless to provide general guidance for parties contemplating their preservation obligations. It lists a variety of considerations that a court should take into account in making a determination both about

whether the party failed to preserve information "that reasonably should be preserved" and also whether that failure was willful or in bad faith.

The Subcommittee carefully reviewed the catalog of considerations, and it was discussed by the full Committee during its November meeting. The full Committee decided to remove one factor, and remitted the issues to the Subcommittee for a final review. The Subcommittee further clarified another factor during its Nov. 28 conference call. The goal of Rule 37(e)(3) is to provide the parties with guidance on how to approach preservation decisions, and to identify factors that may often be relevant to courts in deciding whether a party failed to preserve information as it should have, and also whether that failure to preserve was willful or in bad faith.

At the same time, the rule does not attempt to prescribe new or different rules on what must be preserved. As the Note states, the question whether given information "reasonably should be preserved" is governed by the common law. Given the wide variety of cases brought in federal court, the Subcommittee concluded that it was not possible to write a single rule that would specify the materials to be preserved in every case. The decision is necessarily case-specific.

In the same vein, the Subcommittee considered whether providing specifics in the Note on what might trigger a duty to preserve would be desirable. Some versions of proposed rules contained very specific specifications of this sort. The Subcommittee's eventual conclusion, however, was that no single rule could be written that would apply fairly and effectively to the wide variety of cases in federal court.

Department of Justice Submission

On December 4, 2012, Principal Deputy Assistant Attorney General Stuart Delery submitted a letter to the Advisory Committee raising concerns about the Rule 37(e) proposal, with the request that these comments be forwarded to the Standing Committee. A copy of this letter should be included in these agenda materials.

As reflected in the minutes of the Advisory Committee's November 2 meeting, the Department raised many of the points included in this letter during that meeting. Some of these points had already been raised by the Department during earlier

discussion of preservation and sanctions problems in earlier meetings of the Advisory Committee. Some of them were also raised during the Discovery Subcommittee's September, 2011, mini-conference, at which the Department was represented. Based on the discussion at the Advisory Committee meeting, the Discovery Subcommittee revisited several of the Department's concerns during its November 28 conference call, as reflected in the notes of that call included in this agenda book. Because the letter did not arrive until December 4, the Subcommittee was not able to review it also. We would be happy to discuss any of these points during the Standing Committee meeting, and expect that the Department's concerns will continue to inform the Advisory Committee's evaluation of the Rule 37(e) proposal.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

~~**(e) FAILURE TO PROVIDE ELECTRONICALLY STORED INFORMATION.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~

(e) FAILURE TO PRESERVE DISCOVERABLE INFORMATION. If a party failed to preserve discoverable information that reasonably should have been preserved in the anticipation or conduct of litigation,

(1) The court may permit additional discovery, order the party to undertake curative measures, or require the party to pay the reasonable expenses, including attorney's fees, caused by the failure.

(2) The court may impose any of the sanctions listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction only if the court finds:

(A) that the failure was willful or in bad faith, and caused substantial prejudice in the litigation; or

(B) that the failure irreparably deprived a party of any meaningful opportunity to present a claim or defense.

(3) In determining whether a party failed to preserve discoverable information that reasonably should have been preserved, and whether the failure was willful or in bad faith, the court should consider all relevant factors, including:

(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;

(B) the reasonableness of the party's efforts to preserve the information;

(C) whether the party received a request that information be preserved, the clarity and reasonableness of the request, and whether the person who made the request and the party engaged in good-faith consultation regarding the scope of preservation;

(D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and

(E) whether the party sought timely guidance from the court regarding any unresolved disputes concerning the preservation of discoverable information.

Draft Committee Note

In 2006, Rule 37(e) was added to provide protection against sanctions for loss of electronically stored information under certain limited circumstances, but preservation problems have nonetheless increased. The Committee has been repeatedly informed of growing concern about the increasing burden of preserving information for litigation, particularly with regard to electronically stored information. Many litigants and prospective litigants have emphasized their uncertainty about the

obligation to preserve information, particularly before litigation has actually begun. The remarkable growth in the amount of information that might be preserved has heightened these concerns. Significant divergences among federal courts across the country have meant that potential parties cannot determine what preservation standards they will have to satisfy to avoid sanctions. Extremely expensive overpreservation may seem necessary due to the risk that very serious sanctions could be imposed even for merely negligent, inadvertent failure to preserve some information later sought in discovery.

This amendment to Rule 37(e) addresses these concerns by adopting a uniform set of guidelines for federal courts, and applying them to all discoverable information, not just electronically stored information. It is not limited, as is the current rule, to information lost due to "the routine, good-faith operation of an electronic information system." The amended rule is designed to ensure that potential litigants who make reasonable efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts. It does not provide "bright line" preservation directives because bright lines seem unsuited to a set of problems that is intensely context-specific. Instead, the rule focuses on a variety of considerations that the court should weigh in calibrating its response to the loss of information.

Amended Rule 37(e) applies to loss of discoverable information "that reasonably should have been preserved in the anticipation or conduct of litigation." This preservation obligation arises from the common law, and may in some instances be triggered or clarified by a court order in the case. Rule 37(e)(3) identifies many of the factors that should be considered in determining, in the circumstances of a particular case, when a duty to preserve arose and what information should be preserved.

Except in very rare cases in which the loss of information irreparably deprived a party of any meaningful opportunity to present a claim or defense, sanctions for loss of discoverable information may only be imposed on a finding of willfulness or bad faith, combined with substantial prejudice.

The amended rule therefore displaces any other law that would authorize imposing litigation sanctions in the absence of a finding of wilfulness or bad faith, including state law in diversity cases. But the rule does not affect the validity of an independent tort claim for relief for spoliation if created by

the applicable law. The law of some states authorizes a tort claim for spoliation. The cognizability of such a claim in federal court is governed by the applicable substantive law, not Rule 37(e).

Unlike the 2006 version of the rule, amended Rule 37(e) is not limited to "sanctions under these rules." It provides rule-based authority for sanctions for loss of all kinds of discoverable information, and therefore makes unnecessary resort to inherent authority.

Subdivision (e)(1) When the court concludes that a party failed to preserve information it reasonably should have preserved, it may adopt a variety of measures that are not sanctions. One is to permit additional discovery that would not have been allowed had the party preserved information as it should have. For example, discovery might be ordered under Rule 26(b)(2)(B) from sources of electronically stored information that are not reasonably accessible. More generally, the fact that a party has failed to preserve information may justify discovery that otherwise would be precluded under the proportionality analysis of Rule 26(b)(2)(C).

In addition to, or instead of, ordering further discovery, the court may order the party that failed to preserve information to take curative measures to restore or obtain the lost information, or to develop substitute information that the court would not have ordered the party to create but for the failure to preserve. The court may also require the party that failed to preserve information to pay another party's reasonable expenses, including attorney fees, caused by the failure to preserve. Such expenses might include, for example, discovery efforts caused by the failure to preserve information.

Subdivision (e)(2)(A). This subdivision authorizes imposition of the sanctions listed in Rule 37(b)(2)(A) for failure to preserve information, whether or not there was a court order requiring such preservation. Rule 37(e)(2)(A) is designed to provide a uniform standard in federal court for sanctions for failure to preserve. It rejects decisions that have authorized the imposition of sanctions -- as opposed to measures authorized by Rule 37(e)(1) -- for negligence or gross negligence.

This subdivision protects a party that has made reasonable preservation decisions in light of the factors identified in Rule 37(e)(3), which emphasize both reasonableness and

proportionality. Despite reasonable efforts to preserve, some discoverable information may be lost. Although loss of information may affect other decisions about discovery, such as those under Rule 26(b)(2)(B) and 26(b)(2)(C), sanctions may be imposed only for willful or bad faith actions, unless the exceptional circumstances described in Rule 37(e)(2)(B) are shown.

The threshold under Rule 37(e)(2)(A) is that the court find that lost information reasonably should have been preserved; if so, the court may impose sanctions only if it can make two further findings. First, it must be established that the party that failed to preserve did so willfully or in bad faith. This determination should be made with reference to the factors identified in Rule 37(e)(3).

Second, the court must also find that the loss of information caused substantial prejudice in the litigation. Because digital data often duplicate other data, substitute evidence is often available. Although it is impossible to demonstrate with certainty what lost information would prove, the party seeking sanctions must show that it has been substantially prejudiced by the loss. Among other things, the court may consider the measures identified in Rule 37(e)(1) in making this determination; if these measures can sufficiently reduce the prejudice, sanctions would be inappropriate even when the court finds willfulness or bad faith. Rule 37(e)(2)(A) authorizes imposition of Rule 37(b)(2) sanctions in the expectation that the court will employ the least severe sanction needed to repair the prejudice resulting from loss of the information.

Subdivision (e)(2)(B). Rule 37(e)(2)(B) permits the court to impose sanctions without making a finding of either bad faith or willfulness. As under Rule 37(e)(2)(A), the threshold for sanctions is that the court find that lost information reasonably should have been preserved by the party to be sanctioned.

Even if bad faith or willfulness is shown, sanctions may only be imposed under Rule 37(e)(2)(A) when the loss of information caused substantial prejudice in the litigation. Rule 37(e)(2)(B) permits sanctions in the absence of a showing of bad faith or willfulness only if that loss of information deprived a party of any meaningful opportunity to present a claim or defense. Examples might include cases in which the alleged injury-causing instrumentality has been lost before the parties may inspect it, or cases in which the only evidence of a critically important event has been lost. Such situations are extremely rare.

Before resorting to sanctions, a court would ordinarily consider lesser measures, including those listed in Rule 37(e)(1), to avoid or minimize the prejudice. If such measures substantially cure the prejudice, Rule 37(e)(2)(B) does not apply. Even if such prejudice persists, the court should employ the least severe sanction.

Subdivision (e)(3). These factors guide the court when asked to adopt measures under Rule 37(e)(1) due to loss of information or to impose sanctions under Rule 37(e)(2). The listing of factors is not exclusive; other considerations may bear on these decisions, such as whether the information not retained reasonably appeared to be cumulative with materials that were retained. With regard to all these matters, the court's focus should be on the reasonableness of the parties' conduct.

The first factor is the extent to which the party was on notice that litigation was likely and that the information lost would be discoverable in that litigation. A variety of events may alert a party to the prospect of litigation. But often these events provide only limited information about that prospective litigation, so that the scope of discoverable information may remain uncertain.

The second factor focuses on what the party did to preserve information after the prospect of litigation arose. The party's issuance of a litigation hold is often important on this point. But it is only one consideration, and no specific feature of the litigation hold -- for example, a written rather than an oral hold notice -- is dispositive. Instead, the scope and content of the party's overall preservation efforts should be scrutinized. One focus would be on the extent to which a party should appreciate that certain types of information might be discoverable in the litigation, and also what it knew, or should have known, about the likelihood of losing information if it did not take steps to preserve. The court should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than other litigants who have considerable experience in litigation. The fact that some information was lost does not itself prove that the efforts to preserve were not reasonable.

The third factor looks to whether the party received a request to preserve information. Although such a request may

bring home the need to preserve information, this factor is not meant to compel compliance with all such demands. To the contrary, reasonableness and good faith may not require any special preservation efforts despite the request. In addition, the proportionality concern means that a party need not honor an unreasonably broad preservation demand, but instead should make its own determination about what is appropriate preservation in light of what it knows about the litigation. The request itself, or communication with the person who made the request, may provide insights about what information should be preserved. One important matter may be whether the person making the preservation request is willing to engage in good faith consultation about the scope of the desired preservation.

The fourth factor emphasizes a central concern -- proportionality. The focus should be on the information needs of the litigation at hand. That may be only a single case, or multiple cases. Rule 26(b)(2)(C) provides guidance particularly applicable to calibrating a reasonable preservation regime. Rule 37(e)(3)(D) explains that this calculation should be made with regard to "any anticipated or ongoing litigation." Prospective litigants who call for preservation efforts by others (the third factor) should keep those proportionality principles in mind.

Making a proportionality determination often depends in part on specifics about various types of information involved, and the costs of various forms of preservation. The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited resources to devote to those efforts. A party may act reasonably by choosing the least costly form of information preservation, if it is substantially as effective as more costly forms. It is important that counsel become familiar with their clients' information systems and digital data -- including social media -- to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.

Finally, the fifth factor looks to whether the party alleged to have failed to preserve as required sought guidance from the court if agreement could not be reached with the other parties. Until litigation commences, reference to the court may not be possible. In any event, this is not meant to encourage premature resort to the court; Rule 26(f) directs the parties to discuss and to attempt to resolve issues concerning preservation before presenting them to the court. Ordinarily the parties' arrangements are to be preferred to those imposed by the court.

But if the parties cannot reach agreement, they should not forgo available opportunities to obtain prompt resolution of the differences from the court.

Notes of Conference Call
Discovery Subcommittee
Advisory Committee on Civil Rules
Nov. 28, 2012

On Nov. 28, 2012, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participating were Hon. Paul Grimm (Chair, Discovery Subcommittee); Hon. David Campbell (Chair, Advisory Committee); Hon. John Koeltl (Chair, Duke Subcommittee); Anton Valukas; Elizabeth Cabraser; John Barkett; Peter Keisler; Prof. Edward Cooper (Reporter, Advisory Committee); and Prof. Richard Marcus (Assoc. Reporter, Advisory Committee).

Judge Grimm introduced the call as a follow-up to the full Committee Nov. 2 meeting, convened to resolve issues remaining after that meeting on details left for further Subcommittee consideration in preparation of the Rule 37(e) proposal to the Standing Committee.

Erie Issues

Both before the Nov. 2 meeting and during the meeting, issues about the application of the Erie Doctrine to 37(e) were raised. But an analysis of rulemaking authority seems to make it clear that the authority extends far enough to include what's in proposed 37(e). An initial question, then, is whether there is an Erie Doctrine problem.

A reaction was that the chief concern seems to be with whether adoption of proposed 37(e) would nullify tort claims in states that permit tort-type claims for spoliation. That would be a substantive spoliation doctrine, and there is concern that adoption of 37(e) might raise questions about whether such claims could be asserted in federal court. So it would seem desirable to make clear that the rule provision is not focused on, and does not affect, a cognizable cause of action for spoliation recognized by state law.

A reaction was that the rule is only about sanctions for failure to preserve -- the kind of thing that Rule 37 ordinarily addresses -- not about independent causes of action created by state law.

Another reaction was agreement -- Rule 37(e) does not do anything to limit such state-law claims. There might be an interesting issue about whether state law properly could create a spoliation claim for destruction of evidence that was relevant only to a federal claim, in other words whether state law overreaches when it seeks to implement federal claims in this manner. But that is surely beyond the scope of what we have been discussing doing.

The original speaker agreed, but said that it would be wise

and politic to say something about these points either in the transmittal letter or in the Note.

A reaction was that this probably should be in the Note. If there is a concern that arguments might be made that 37(e) somehow stymies the assertion of a tort claim for spoliation in federal court, the Committee Note is the place to put the answer so that the Note can be used for guidance if the issue arises in a case. A statement in the transmittal memo would likely be too obscure to be used for that sort of guidance.

Another participant elaborated on the existence of such claims. It seems that they are recognized in Alaska, New Mexico, Ohio and possibly Connecticut. In West Virginia, there may be both first-party and third-party claims. As to most of these, however, one must prove intent to support the claim.

A reaction to this catalog was that in California such claims may in some circumstances survive a demurrer.

Another participant observed that we need to deal with these issues in the Note -- to say as clearly as we can that (a) we preempt reliance on state law in the non-tort sanctions setting, and (b) we do not intend to have any effect on the assertion in federal court of a state-law tort claim for spoliation.

This point drew agreement, and the suggestion that it could be expressed as displacing "procedural" but not "substantive" state law. But that characterization drew concerns about the uncertain meaning of those words in different contexts.

A further response was that we need to be clear that the federal-court cases relying on state law to determine the extent or availability of sanctions must be disapproved, but that goal should be distinguished from displacing independent claims created by state law.

A concurring opinion was expressed, noting that states may express this as a matter of common law or by legislative enactment. It should be made clear that Rule 37(e) does not affect the viability of claims, whether based on common law or legislation.

Attention was drawn to two possible locations in the current Note, where possible language dealing with Erie issues was suggested in the materials for the call. The question was whether there was a need to tweak one or the other of those possible additions.

A reaction was that the second addition (accompanying footnote 8) seemed to be the right location, but to be too brief. A suggestion was instead to include a new paragraph at this point

addressing both the positive and negative points. The positive point is that the rule displaces state law on sanctions that is different. The negative point is that the rule has no effect on state-law causes of action for spoliation, whether based on common law or statute and whether considered a separate "tort" or otherwise.

Another expression of agreement emphasized that it would be desirable to avoid entering into the thicket of possible issues about the extent of the Rules Enabling Act authority to define "remedies" in federal court that vary from what state courts might do in similar circumstances. In addition, it was noted that because Rule 37(e) could be applied in situations in which the activity on which the sanctions are based occurred before suit was filed, it might be uncertain at the time the action was taken whether a case would be in state or federal court.

The consensus was that Note language should be added to address both aspects of the Erie concern, and that Professor Marcus should draft this language and circulate the draft to the Subcommittee by email seeking an expedited "last look" (in an effort to deliver agenda materials in to the A.O. on schedule).

Judge Harris's suggested
revision of Rule 37(e)(3)

This issue was introduced as looking desirable at first blush, but raising questions after further consideration. As outlined in Prof. Marcus's memorandum for this conference call (attached hereto as an Appendix), the change would actually seem to raise possible concerns about focusing attention for some matters on factors that really should not be considered pertinent. On balance, it may be that making the change could create risks of mischief.

A first reaction was similar. "I don't quite understand Judge Harris's concern." For example, consider the issue whether (e)(2)(B) might apply in a given case. Is it really true that the factors in (e)(3) should be brought to bear on whether the loss of the information "deprived a party of any meaningful opportunity to present a claim or defense"?

Another participant agreed -- "these factors could be a distraction in addressing (e)(2)(B)."

Another participant noted that (e)(3) was not designed to address all issues that could arise under new 37(e). For example, they are not particularly pertinent to whether to apply a sanction or instead to use a curative measure under (e)(1). If one wanted to identify factors pertinent to that choice, one would probably add a number of things that are not in current (e)(3), such as whether the party that failed to preserve had

been guilty of other discovery misconduct, the degree of prejudice, etc.

That drew agreement -- this is a "very complicated matrix."

The consensus was to make no change in 37(e)(3).

Judge Pratter's concern

The issue was introduced as pointing out the risk that current (e)(2)(A) might be read to call for reference to the prejudice factor only when bad faith is shown, and not when willfulness is shown. Whether this is a problem might be debated. Prof. Marcus' memo suggested three alternative ways of clarifying to avoid the risk.

The consensus was to adopt alternative one -- adding a comma after "bad faith," to make clear (as the Committee Note does also) that prejudice must be proved to support sanctions even if willfulness is shown.

Adding "when appropriate"
to 37(e)(3)

The issue was introduced as focusing on the language of (e)(3), which says that the court "should consider all relevant factors, including [the listed factors]." The concern is whether the command ("should") could require a court to consider factors that ought not bear on the questions actually before the court. Alternatively, the use of "relevant" and "including" may make it clear that this list does not include all factors that might bear on decisions in a given case, and that some on the list might not be relevant in a given case.

An initial reaction was that adding "when appropriate" is not necessary. Another participant agreed.

Another participant expressed misgivings, however. "Linguistically, when I first read this, I was concerned about whether all factors are always relevant." Might it be better to say "consider all relevant factors, which may include~~ing~~"? Another participant expressed support for this revision.

A reaction to both the use of "when appropriate" and "which may include" was that either would likely raise style questions. The assumption is that judges are to do only appropriate things under the rules, and also that they are to consider only appropriate things.

Another reaction was that, under the current language, any judge going down this list would be likely to react to some as being irrelevant to the particular case before the court. The

reaction would be "This one does not apply."

Another reaction was that this issue is one on which we might be focused during the public comment period; we could await comments about whether this causes a problem.

Based on this discussion, the participant who originally expressed concerns retracted them; "I'm happy to leave the language as it is, pending public comment."

The consensus was to leave the language as it is.

Reference to litigation hold in 37(e)(3)(B)

The Subcommittee has discussed this issue before and retained the reference in the rule to litigation holds. The issue was raised again by many comments during the Nov. 2 meeting. The question is whether to end the reasonableness of preservation efforts factor at ". . . preserve the information."

The issue was introduced as sparked by the question whether "litigation hold" is something of a lightening rod. Is it too specific and controversial (and perhaps uncertain) to warrant mention in rule language?

An initial reaction was "I think it should stay in. It's a positive factor." People are aware of what a litigation hold is. Putting it into the rule recognizes that such an effort is desirable, and should be acknowledged if sanctions issues arise.

A competing view was "I continue to think that it should go out." Individual litigants don't do things like big companies. "Am I supposed to send myself a written litigation hold?" This participant had recently had extended discussions with several individual clients in which the topic of preservation had been explored at length. But there would be no formal "litigation hold" in these instances. In addition, putting it into the rule raises issues about whether privilege or work-product protection applies to such documents. Is it always required to turn over such a document?

Another participant sees the question as cutting both ways. For large companies, some litigation hold procedure is fairly routine by now. They would perhaps benefit from inclusion of the explicit factor so that they can emphasize "We did what the rule says." But the reference to the litigation hold in (B) is jarring because it is much more specific than the rest of the matters listed in (e)(3), raising the concern that it is receiving disproportional emphasis. Smaller entities and individual litigants are much less likely to have "litigation hold" practices than large entities.

Attention was drawn to the existing Committee note on the second factor, as expanded a bit by Prof. Marcus to note the relevance of the party's sophistication in matters of litigation. Is there a problem with that reference to a litigation hold, and is there a need to mention it also in the rule provision itself?

A reaction from one concerned with the reference in the rule is that "Having it there in the Note is o.k."

Another participant said there was no problem with mentioning "litigation holds" in the rule. But it would surely suffice to do so in the Note. There is no universally recognized or accepted definition of what a hold involves. Moreover, the greater the emphasis, the greater the pressures on privilege and work product issues.

A summary was that we seem to be reaching the conclusion that the rule's reference to a litigation hold should be removed. If it were, would it not be proper also to continue with the same Committee Note language (expanded as Prof. Marcus did for the removal of former (D))?

A question was raised: There are a number of other issues that could be raised but are not addressed in relation to litigation holds. For example, questions arise about whether counsel must follow up regularly, whether a collection effort must be undertaken, what should be done with computers that are going to be replaced, whether one can entrust collection to the individuals at the company who were involved in the actions that might lead to corporate liability, etc. Should these topics be mentioned?

A reaction was that many of those topics are heavily disputed in given cases, and some of them relate to "cutting edge" questions. Getting into those could be very problematical.

Another reaction was that the revised Note language in Prof. Marcus' memo seems fine. In particular, judges are sensitive to the sophistication of litigants, even governmental litigants. Another point was that some mention of individual litigants seems important. More than once we have been reminded that "People change their Facebook pages and discard their diaries without thinking about preservation." We should acknowledge that somewhere.

It was also noted that, in relation to proportionality, the Note had been augmented to call attention to litigant resources, particularly with regard to governmental litigants.

The consensus was to remove the rule's reference to litigation holds but and to retain the Note as revised by Prof. Marcus in the materials for the conference call.

Department of Justice concerns

As the time for ending the call was approaching, attention turned to the various concerns raised by the Department of Justice. The Department is certainly an important source of input on civil litigation in federal courts, as it appears in far more cases than any other litigant, and is involved in cases running the gamut of types of litigation. It is unfortunate that the Department was not able to complete its internal review of the rule with all the agencies with which it works in time for the Nov. 2 meeting.

An overall reaction was that although the Department made many comments and raised questions about several aspects of the rule, it was surely not entirely negative. At least four of its comments supported decisions reached in the long drafting process, and four more seemed to seek a more expansive rule. It did urge retention of current Rule 37(e), but the Subcommittee has concluded that the amended rule would provide protection in any instance in which the current rule does so. And Andrea Kuperman's memo shows at length that the current rule is rarely invoked. Moreover, the Committee has actually done one of the things the Department recommended -- removing the reference in proposed 37(e)(3) to the resources and sophistication of a party as bearing on sanctions decisions. And the Committee Note has also been modified to note that governmental entities may actually have limited resources for preservation efforts. Finally, the Committee voted also to delete the draft Note language on failed bad-faith efforts to destroy evidence. On balance, the rule proposal responds to most of the Department's concerns.

One specific was raised, however: The Department expressed concern that proposed (e)(3)(A) might be interpreted to permit a party accused of spoliation to avoid the consequences by claiming lack of knowledge, so that some sort of "should have known" formulation should be used instead. Is that concern troubling?

A reaction was that the current language -- "the extent to which the party was on notice that litigation was likely and that the information would be discoverable" -- should provide a suitable method for dealing with such issues. In particular, "the extent to which the party was on notice" standard seems clearly to adopt a "constructive notice" attitude. It provides no handholds for a litigant trying to escape responsibility because "I did not realize" if the court is persuaded the party should have appreciated that litigation was likely.

A judge agreed: "This objection did not resonate with me; I think the current language is preferable."

Others agreed; the consensus was to retain 37(e)(3)(A) as

currently written.

APPENDIX

Memo considered by Subcommittee during Conference call

Nov. 28 Conference Call
Issues after Nov. 2 Committee meeting
Redraft of 37(e)

This memorandum addresses issues remaining after the Nov. 2 meeting of the full Committee, which can be discussed during the Nov. 28 Conference Call. It also presents the version of the rule that was presented to the Committee, with changes responsive to the vote of the Committee. The revised rule proposal shows changes to rule language either with strikeover (for language removed) or double underlining (for language added). In the Note underline and strikeover is used for the same purpose. A couple of very small fixes to the Note that occurred to the Reporter are also so indicated.

The Committee voted (a) to remove our proposed 37(e)(3)(D) factor from the rule, (b) to remove the bracketed paragraph in the Note regarding unsuccessful but heinous efforts to destroy evidence, (c) to retain factor 37(e)(3)(C), and (d) to recommend publication of the rule for public comment. It made this vote subject to the Subcommittee's further consideration of the Erie issues raised by John Vail and Judge Harris's suggested rewording of Rule 37(e)(3). During the meeting, Judge Pratter raised a question about the wording (or punctuation) of 37(e)(2)(A), and that is addressed below as well. Additional issues raised during the meeting discussed below were whether to add a "when appropriate" to Rule 37(e)(3) and whether to remove the reference to a litigation hold from Rule 37(e)(3)(B). These possible changes are discussed below, but the redraft does not currently include them. The Note also includes underlined language reflecting concerns formerly addressed in factor (D).

A set of draft minutes of the Nov. 2 online "meeting" of the full Committee should accompany this memorandum.

This memorandum attempts to introduce the issues remaining for Subcommittee decision. The full Committee's vote was to authorize the Subcommittee to make modest improvements before forwarding the rule to the Standing Committee, and the small changes in the Note below respond to that invitation. The Subcommittee may also decide whether there is any need to poll the full Committee about revisions after reaching conclusions about what more needs to be done now. It's worth noting that, for logistical reasons, that polling might present some difficulties in terms of submitting Standing Committee agenda materials by the beginning of December.

It is also worth noting that the full Committee will certainly have an opportunity to revisit these issues if the Standing Committee authorizes publication at its January meeting. For one thing, if the Duke Subcommittee proposals go forward after the full Committee's Spring meeting, this proposal will need to be integrated with those proposals.[1] For example, one of those proposals is to add emphasis to preservation in the Rule 26(f)/Rule 16(b) process. More importantly, the process of public comment will afford the Subcommittee and the full Committee an abundant opportunity to reflect on the Rule 37(e) amendment proposal before a decision is made whether to recommend adoption to the Judicial Conference. It is likely that this proposal will draw much more interest than our Rule 45 amendment proposal; there will be abundant commentary.

Transmittal to Standing Committee

Eventually we will need to prepare an memorandum for the Standing Committee transmitting the rule proposal. That will likely be done by the Chairs and the Reporters, so it seems useful to preface the discussion of remaining issues for the Subcommittee with some mention of what that transmittal memorandum would likely contain.

It would likely contain an introduction like the introduction presented to the full Committee in the agenda materials at pp. 121-26. Among other things, that makes clear that the goal is to displace Residential Funding.

It would also report the full Committee's action, and any revisions made by the Subcommittee after the meeting in light of the full Committee discussion.

Erie Doctrine Concerns

John Vail has argued that the Erie Doctrine or the Rules Enabling Act constitute serious obstacles to going forward with 37(e). Frankly, those issues do not appear to be weighty. Certainly the Rules Enabling Act authorizes adoption of rules about how to handle federal-court litigation in relation to failure to provide through discovery materials that would assist in the resolution of the case before the court. Under the Supreme Court's decisions, such a rule is permissible if it is "arguably procedural." Thus, one could say that the issue is what "remedy" the federal court should grant when presented with a failure to respond to discovery on the ground that the material

[1] As noted again below, to the extent the Duke proposals affect the content to Rule 26(b)(2)(C), that would require another look at this proposal, which refers to 26(b)(2)(C) in the Note.

sought no longer exists. Rule 37 addresses exactly that sort of issue, and revising it so it more suitably handles this problem should not tax the Enabling Act authority.

Under 28 U.S.C. § 2072(b), a rule should not be applied if doing so would "abridge, enlarge or modify any substantive right." It may be that a wholesale effort through a rule to define and limit or expand the duty to preserve could raise concerns on this score. But 37(e) does not do that. And the Supreme Court has been quite circumspect about the application of § 2072(b). In Burlington Northern R.R. v. Woods, 480 U.S. 1 (1987), it recognized that this provision was "an additional requirement" when competing state law is invoked against application of a Federal Rule, but the Court's actual holding in that case seems to provide strong support for our 37(e).

The issue in Burlington Northern was whether an Alabama statute that required that 10% be added to a money judgment if defendant appealed and the judgment was affirmed could be applied to a federal-court diversity judgment entered in Alabama. One could make a fairly strong argument that this right was a "substantive right," perhaps somewhat like postjudgment interest. But the Court held that the Alabama statute conflicted with Fed. R. App. 38, which permits the court of appeals to impose a sanction on a party that brings a groundless appeal and grants the court discretion to decide whether or not to impose a sanction, and also to determine the amount of any sanction. The Court said the mandatory nature of the Alabama statute conflicted with the discretionary operation of Rule 38. That finding of a conflict was also arguable; Alabama had its own Appellate Rule 38, modeled on the federal rule, and seemed perfectly able to apply both without problems of conflict between them.

Nonetheless, the Court's decision was a relatively ringing endorsement of rules adopted pursuant to the Enabling Act, even when they come up against state laws that could be said to create substantive rights (480 U.S. at 5-6):

> The cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules. Moreover, the study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect, give the Rules presumptive validity under both the constitutional and statutory constraints.
>
> In Business Guides, Inc. v. Chromatic Communications Ent.,

Inc. 498 U.S. 533 (1991), the Court upheld imposition of Rule 11 sanctions on a party despite Justice Kennedy's argument in dissent that doing so "creates a new tort of 'negligent prosecution' or 'accidental abuse of process.'" The majority concluded that "[t]here is little doubt that Rule 11 is reasonably necessary to maintain the integrity of the system of federal practice and procedure, and that any effect on substantive rights is incidental."

Lower courts have recognized that state law is not controlling in this area even in the absence of a rule directly addressing the questions addressed by new 37(e). For example, here is the analysis of the Sixth Circuit en banc in Adkins v. Woelever, 554 F.3d 650, 652 (6th Cir. 2008), abandoning that court's prior reference to state law regarding spoliation:

> In contrast to our persistent application of state law in this area, other circuits apply federal law for spoliation sanctions. See, e.g., Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001): Reilly v. Natwest Mkts. Group, Inc., 181 F.3d 253, 267 (2d Cir. 1999); Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993). We believe that this is the correct view for two reasons. First, the authority to impose sanctions for spoliated evidence arises not from substantive law but, rather "from a court's inherent power to control the judicial process. Silvestri, 271 F.3d at 590. Second, a spoliation ruling is evidentiary in nature and federal courts generally apply their own evidentiary rules in both federal question and diversity matters. These reasons persuade us now to acknowledge the district court's broad discretion in crafting a proper sanction for spoliation.

The goal of amended 37(e) is to achieve uniformity in the federal courts in their handling of failures to preserve. One of the chief stimuli behind the proposed amendment is the diversity of treatment of preservation sanctions across the country. So there seems little reason to expect that it would run afoul of § 2072(b), as interpreted by the Supreme Court.

Indeed, one could instead argue that the real problem of judicial power exists now, and that the proposed rule would solve it. Until now, many courts have invoked "inherent authority" to address the handling of these issues. Our Committee Note tries to make clear that new Rule 37(e) would make resort to inherent authority unnecessary. There may be an argument that these judges were overstepping their authority in doing so with regard to pre-litigation preservation.[2] That argument seems strained,

[2] On this issue, see the recent and yet-unpublished article by Joshua M. Koppel, Federal Common Law and the Courts'

but no more so than the argument that adopting 37(e) would exceed the Enabling Act or transgress Erie (which really has no application to rules adopted pursuant to the Enabling Act). Acting to regularize matters through the Enabling Act process seems preferable in many ways. Indeed, if there were Enabling Act problems, it would seem that they apply relatively equally to current Rule 37(e).

Law professors have an almost insatiable enthusiasm for discussing Erie issues that the rest of the world understandably finds perplexing, so it's best to stop here. It's worth noting, however, that one possibility would be to invite comment on whether any perceive a serious Enabling Act problem. That may, however, be an odd topic on which to invite comment. But if there is reason to foresee that many comments will decry the rule as exceeding Enabling Act authority, it may be useful to invite others to react with contrary views. As noted above, the careful consideration the Advisory Committee gives to rule revision is one of the things that the Supreme Court has cited as contributing to the presumptive validity of rules.

By way of contrast, particularly given some comments during the full Committee meeting, it is likely desirable to invite public comment on whether anything would be lost due to discarding current Rule 37(e). Andrea Kuperman's research and our thorough discussion suggest there is no reason to retain the current rule if our proposal is adopted in its stead. But to be extra certain, specifically inviting comment on that point could be desirable. Whether it is also desirable to invite comments on Enabling Act concerns is perhaps best left to the Standing Committee. But it is dubious to add a more explicit focus to the rule or Note presently.

Judge Harris's suggestion

Judge Arthur Harris suggested revising our proposed Rule 37(e)(3) as follows:

> **(3)** In determining whether to adopt measures under Rule 37(e)(1) or to impose sanctions under Rule 37(e)(2), ~~a party failed to preserve discoverable information that reasonably should have been preserved, and whether the failure was willful or in bad faith,~~ the court should consider all relevant factors, including:

Judge Harris offered the following explanation for this suggestion:

Regulation of Pre-Litigation Preservation, available at http://ssrn.com/abstract=2154484.

> It seems to me that the factors are relevant to more than just the two items listed -- failure to preserve discoverable information and whether failure was willful or in bad faith. For example, the factors could also be relevant in determining whether the failure irreparably deprived a party of any meaningful opportunity to present a claim or defense or what, if any, sanctions should be imposed.

Possibly relevant to this suggestion is the discussion during the Nov. 2 Committee meeting about whether it would be desirable to identify which issues various factors actually address. Thus, some speakers favored more precision directing the reader to employ various factors only with regard to certain criteria important under the rule, seemingly cutting in a direction different from -- possibly opposite to -- the direction of Judge Harris's suggestion.

Turning first to the Nov. 2 discussion of focusing more precisely than we do now, it is worth recalling that some suggestions the Subcommittee has received (the N.Y. State Bar Ass'n submission comes to mind) have urged considerable precision in culpability calibrations, but those efforts at precision have seemed to tend in the direction of trying to create Sanctioning Guidelines. Rule 37(e)(3) was not designed this way.

At the same time, it is not necessarily true that these factors (as revised by the Nov. 2 vote of the full Committee) really bear on everything and anything raised pertinent to decisions under new Rule 37(e).

To take as an example the use suggested by Judge Harris -- determining whether Rule 37(e)(2)(B) applies -- there seems a strong argument that inviting broader use of the factors in (e)(3) would be dubious. True, loss of essential information due to events entirely beyond the control of a party (such as a hurricane) probably does not provide support for the conclusion that "a party failed to preserve information that reasonably should have been preserved." As currently written, 37(e)(3) would make it appropriate to employ its factors on that point. But it's not at all clear whether those factors should be employed in determining whether the loss of the information "irreparably deprived a party of any meaningful opportunity to present a claim or defense." Using them might create rather than solve problems.

To take a different example, consider the question whether to employ measures identified in Rule 37(e)(1). As the Committee Note explains, that decision resembles any case-management discovery decision by a court, with the added ingredient that a party has failed to retain discoverable information it should have retained. The Note therefore addresses how that additional

factor should come into play; it recognizes that it could alter the calculus under Rule 26(b)(2)(B) or 26(b)(2)(C).[3] But to say that the reasonableness of the party's efforts to preserve (factor B) somehow has more importance than under the normal case-management evaluation because that is on the list in 37(e)(3) seems peculiar. And with regard to Rule 37(e)(2), the Committee Note says that the court should use the least severe measure needed. So it seems that the rule and Note as written adequately address the issues without change.

On the other hand, making the revision recommended by Judge Harris probably would not do mischief, and there may be situations in which leaving the language as we drafted it could seem unduly constraining.

In short, it is probably not a matter of enormous importance either way, but it should be resolved.

Judge Pratter's Suggestion on Rule 37(e)(2)(A)

Judge Pratter (probably a fan of Lynne Truss's book Eats, Shoots & Leaves: The Zero Tolerance Approach to Punctuation) raised an issue about the "or . . . and" sequence in Rule 37(e)(2)(A) as we drafted it:

> **(A)** that the failure was willful or in bad faith and caused substantial prejudice in the litigation; or

She is worried that without at least some further punctuation there may be arguments that the substantial prejudice element applies only to bad faith failures to preserve and not to willful ones.

Whether this is a serious risk might be debated, but several easy solutions seem to exist:

> **(A)** that the failure was willful or in bad faith, and caused substantial prejudice in the litigation; or [Alternative 1]

> **(A)** that the failure (i) was willful or in bad faith; and (ii) caused substantial prejudice in the

[3] This brings to mind one possible outcome of Duke Subcommittee proposals. They may affect the content or composition of Rule 26(b)(2)(C). To the extent they do, that might affect what 37(e) should say.

litigation; or [Alternative 2][4]

(A) that the failure caused substantial prejudice in the litigation, and was willful or in bad faith ~~and caused substantial prejudice in the litigation~~; or [Alternative 3]

Alternative 1 seems the simplest solution to the problem, if it is a problem. Alternative 2 should make it absolutely clear that substantial prejudice must be shown separately whether or not willfulness or bad faith is shown. Alternative 3 seems to make that clear, but also to put the less important concern -- substantial prejudice -- before the more important one.

"when appropriate"

During the Nov. 2 meeting, several participants urged that we consider adding "when appropriate" to Rule 37(e)(3) as follows:

(3) In determining whether a party failed to preserve discoverable information that reasonably should have been preserved, and whether the failure was willful or in bad faith, the court should consider all relevant factors, including when appropriate:

It appears that the reason for this suggestion is that the verb in the rule is "should," but that in given cases the court should not consider certain factors. One response to this concern (and a reaction that the Standing Committee's Style Consultant might have) is that all the rules call for judges to do only "appropriate" things. Another response is that the rule as proposed to the Committee does say that the court should consider "all relevant factors," so it takes account of the question whether given factors are relevant. But one reading of the rule is to say that the listed factors must always be considered, while other factors may be considered if relevant.

One possible comparison is Rule 23(g)(1), which lists four factors that the court "must" consider in appointing class

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[4] It may be that this alternative should be presented somewhat differently:

(A) that the failure:

(i) was willful or in bad faith; and

(ii) caused substantial prejudice in the litigation; or

counsel and then authorizes the court also to consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." The original version of this rule published for comment had only three mandatory factors, prompting objection that they were slanted in favor of certain law firms, and eventually a fourth was added. The comparison could stress the use of "must" in 23(g)(1) and "should" in 37(e). But it is valid to argue that what' son a possibly "mandatory" list matters.

In any event, the question whether to add these words to the rule prompted sufficient comment during the meeting to justify including it as a potential topic for discussion during the Nov. 28 conference call.

Removing the reference to litigation holds from 37(e)(3)(B)

The Subcommittee has already discussed this issue at some length, but it is included here because it received considerable attention during the Nov. 2 meeting. The change would be as follows:

> **(B)** the reasonableness of the party's efforts to preserve the information~~, including the use of a litigation hold and the scope of the preservation efforts~~;

One reason for making this change would be that it is undesirable to emphasize litigation holds by referring to them in the rule. The Committee Note to current Rule 37(e) refers to litigation holds, and there seems little doubt that the basic concept is recognized widely. At least some judges may be tempted to insist on specific sorts of litigation holds (e.g., written ones), which may be a different reason for avoiding mention of litigation holds in the rule itself. If this change were made, probably the reference to use of a litigation hold should be retained in the Committee Note; otherwise there might be an argument that litigation holds are irrelevant under new 37(e) because they are nowhere mentioned, while they were mentioned in the Note to the 2006 version of 37(e).

It may be that this worry overemphasizes the importance of including the term "litigation hold" in the rule. The Committee Note tries to defuse worries about the term becoming a talisman:

> The second factor focuses on what the party did to preserve information after the prospect of litigation arose. The party's issuance of a litigation hold is often important on this point. But it is only one consideration, and no specific feature of the litigation hold -- for example, a

> written rather than an oral hold notice -- is dispositive. Instead, the scope and content of the party's overall preservation efforts should be scrutinized.

The next-to-last sentence quoted above attempts to deflect arguments that only a written hold satisfies preservation responsibilities.

A competing consideration is that including specific reference to a litigation hold is a good thing for parties whose preservation efforts are challenged. All current (B) says is that a litigation hold is a consideration in assessing the party's overall preservation efforts. The inclusion of a specific reference to a litigation hold, coupled with the Note's effort to avoid having the rule's reference mean something specific in all cases, means that parties that do something like a hold can point to that fact and emphasize the rule's recognition that this is responsible behavior of the sort that should dissuade the court from finding that the party was guilty of bad faith or willful destruction of evidence.

So the tradeoff between leaving (B) as currently written and shortening it does not seem invariably to favor or disfavor entities that are called upon to preserve evidence. Indeed, it may be more likely that companies and other organizational litigants than individual litigants would (and do now) in fact undertake some sort of litigation hold.

My understanding is that the Committee authorized us to go to the Standing Committee with (B) as it was, including the reference to the litigation hold. If that paragraph does go forward and is eventually published for public comment, one question that might be illuminated is whether the reference to litigation holds in the rule is likely to do mischief.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

~~**(e) FAILURE TO PROVIDE ELECTRONICALLY STORED INFORMATION.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~

(e) FAILURE TO PRESERVE DISCOVERABLE INFORMATION. If a party ~~fails~~ failed to preserve discoverable information that reasonably should have been ~~be~~ preserved in the anticipation or conduct of litigation,[5]

(1) The court may permit additional discovery, order the party to undertake curative measures, or require the party to pay the reasonable expenses, including attorney's fees, caused by the failure.

(2) The court may impose any of the sanctions listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction only if the court finds:

(A) that the failure was willful or in bad faith and caused substantial prejudice in the litigation; or

(B) that the failure irreparably deprived a party of any meaningful opportunity to present a claim or defense.

(3) In determining whether a party failed to preserve discoverable information that reasonably should have been preserved, and whether the failure was willful or in bad faith, the court should consider all relevant

[5] This revision of verb tense responds to Peter Keisler's comment during the meeting. The verb tenses would, as he noted, now match up with those in Rule 37(e)(3).

factors, including:[6]

(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;

(B) the reasonableness of the party's efforts to preserve the information, including the use of a litigation hold and the scope of the preservation efforts;

(C) whether the party received a request that information be preserved, the clarity and reasonableness of the request, and whether the person who made the request and the party engaged in good-faith consultation regarding the scope of preservation;

~~**(D)** the party's resources and sophistication in litigation;~~

(D~~E~~E) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and

(E~~F~~F) whether the party sought timely guidance from the court regarding any unresolved disputes concerning the preservation of discoverable information.

DRAFT COMMITTEE NOTE

In 2006, Rule 37(e) was added to provide protection against sanctions for loss of electronically stored information under certain limited circumstances, but preservation problems have nonetheless increased. The Committee has been repeatedly

[6] The introductory memorandum discussed Judge Harris' suggestion for amendment to this paragraph. If the Subcommittee decides to adopt that change, the Committee Note may need to be revised as well.

informed of growing concern about the increasing burden of preserving information for litigation, particularly with regard to electronically stored information. Many litigants and prospective litigants have emphasized their uncertainty about the obligation to preserve information, particularly before litigation has actually begun. The remarkable growth in the amount of information that might be preserved has heightened these concerns. Significant divergences among federal courts across the country have meant that potential parties cannot determine what preservation standards they will have to satisfy to avoid sanctions. Extremely expensive overpreservation may seem necessary due to the risk that very serious sanctions could be imposed even for merely negligent, inadvertent failure to preserve some information later sought in discovery.

This amendment to Rule 37(e) addresses these concerns by adopting a uniform set of guidelines for federal courts,[7] and applying them to all discoverable information, not just electronically stored information. It is not limited, as is the current rule, to information lost due to "the routine, good-faith operation of an electronic information system." The amended rule is designed to ensure that potential litigants who make reasonable efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts. It does not provide "bright line" preservation directives because bright lines seem unsuited to a set of problems that is intensely context-specific. Instead, the rule focuses on a variety of considerations that the court should weigh in calibrating its response to the loss of information.

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[7] This is a point at which Note language could be added to affirm that adoption of this rule does not raise an *Erie* problem, along the following lines:

> This amendment to Rule 37(e) addresses these concerns by adopting a uniform set of guidelines for federal courts, displacing disparate federal decisions and state law as well. It applies ~~and applying them~~ to all discoverable information, not just electronically stored information.

Another possible place for a comment along these lines is in a later footnote. The question whether including anything along these lines is debatable; it may be best simply to present the Standing Committee with an explanation like the one in the introductory memorandum about why the *Erie* Doctrine does not seem like a problem rather than trying to put something along those lines into the Note.

Amended Rule 37(e) applies to loss of discoverable information "that reasonably should be preserved in the anticipation or conduct of litigation." This preservation obligation arises from the common law, and may in some instances be triggered or clarified by a court order in the case. Rule 37(e)(3) identifies many of the factors that should be considered in determining, in the circumstances of a particular case, when a duty to preserve arose and what information should be preserved.

Except in very rare cases in which the loss of information irreparably deprived a party of any meaningful opportunity to present a claim or defense, sanctions for loss of discoverable information may only be imposed on a finding of willfulness or bad faith, combined with substantial prejudice.[8]

Unlike the 2006 version of the rule, amended Rule 37(e) is not limited to "sanctions under these rules." It provides rule-based authority for sanctions for loss of all kinds of discoverable information, and therefore makes unnecessary resort to inherent authority.

Subdivision (e)(1) When the court concludes that a party failed to preserve information it should have preserved, it may adopt a variety of measures that are not sanctions. One is to permit additional discovery that would not have been allowed had the party preserved information as it should have. For example, discovery might be ordered under Rule 26(b)(2)(B) from sources of electronically stored information that are not reasonably accessible. More generally, the fact that a party has failed to preserve information may justify discovery that otherwise would be precluded under the proportionality analysis of Rule 26(b)(2)(C).

In addition to, or instead of, ordering further discovery, the court may order the party that failed to preserve information to take curative measures to restore or obtain the lost

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[8] This is another point at which additional language could be added to address the question whether there is an *Erie* problem with our rule proposal. For example, we could continue with something like: "The rule therefore displaces any other law that would authorize imposing sanctions in the absence of a showing of willfulness or bad faith, including state law applied in diversity cases." That statement seems like saying "We really mean it." As noted in the prior footnote, it is not clear this adds usefully to the Note.

information, or to develop substitute information that the court would not have ordered the party to create but for the failure to preserve. The court may also require the party that failed to preserve information to pay another party's reasonable expenses, including attorney fees, caused by the failure to preserve. Such expenses might include, for example, discovery efforts caused by the failure to preserve information.

Subdivision (e)(2)(A). This subdivision authorizes imposition of the sanctions listed in Rule 37(b)(2)(A) for failure to preserve information, whether or not there was a court order requiring such preservation. Rule 37(e)(2)(A) is designed to provide a uniform standard in federal court for sanctions for failure to preserve. It rejects decisions that have authorized the imposition of sanctions -- as opposed to measures authorized by Rule 37(e)(1) -- for negligence or gross negligence.

This subdivision protects a party that has made reasonable preservation decisions in light of the factors identified in Rule 37(e)(3), which emphasize both reasonableness and proportionality. Despite reasonable efforts to preserve, some discoverable information may be lost. Although loss of information may affect other decisions about discovery, such as those under Rule 26(b)(2)(B) and 26(b)(2)(C), sanctions may be imposed only for willful or bad faith actions, except in the exceptional circumstances described in Rule 37(e)(2)(B).

The threshold under Rule 37(e)(2)(A) is that the court find that lost information should have been preserved; if so, the court may impose sanctions only if it can make two further findings. First, it must be established that the party that failed to preserve did so willfully or in bad faith. This determination should be made with reference to the factors identified in Rule 37(e)(3).

Second, the court must also find that the loss of information caused substantial prejudice in the litigation. Because digital data often duplicate other data, substitute evidence is often available. Although it is impossible to demonstrate with certainty what lost information would prove, the party seeking sanctions must show that it has been substantially prejudiced by the loss. Among other things, the court may consider the measures identified in Rule 37(e)(1) in making this determination; if these measures can sufficiently reduce the prejudice, sanctions would be inappropriate even when the court finds willfulness or bad faith. Rule 37(e)(2)(A) authorizes imposition of Rule 37(b)(2) sanctions in the expectation that the

court will employ the least severe sanction needed to repair the prejudice resulting from loss of the information.

~~[There may be cases in which a party's extreme bad faith does not in fact impose substantial prejudice on the opposing party, as for example an unsuccessful attempt to destroy crucial evidence. Because the rule applies only to sanctions for failure to preserve discoverable information, it does not address such situations.]~~

Subdivision (e)(2)(B). Rule 37(e)(2)(B) permits the court to impose sanctions without making a finding of either bad faith or willfulness. As under Rule 37(e)(2)(A), the threshold for sanctions is that the court find that lost information should have been preserved by the party to be sanctioned.

Even if bad faith or willfulness is shown, sanctions may only be imposed under Rule 37(e)(2)(A) when the loss of information caused substantial prejudice in the litigation. Rule 37(e)(2)(B) permits sanctions in the absence of a showing of bad faith or willfulness only if that loss of information deprived a party of any meaningful opportunity to present a claim or defense. Examples might include cases in which the alleged injury-causing instrumentality has been lost before the parties may inspect it, or cases in which the only evidence of a critically important event has been lost. Such situations are extremely rare.

Before resorting to sanctions, a court would ordinarily consider lesser measures, including those listed in Rule 37(e)(1), to avoid or minimize the prejudice. If such measures substantially cure the prejudice, Rule 37(e)(2)(B) does not apply. Even if such prejudice persists, the court should employ the least severe sanction.

Subdivision (e)(3). These factors guide the court when asked to adopt measures under Rule 37(e)(1) due to loss of information or to impose sanctions under Rule 37(e)(2). The listing of factors is not exclusive; other considerations may bear on these decisions, such as whether the information not retained reasonably appeared to be cumulative with materials that were retained. With regard to all these matters, the court's focus should be on the reasonableness of the parties' conduct.

The first factor is the extent to which the party was on notice that litigation was likely and that the information lost would be discoverable in that litigation. A variety of events may alert a party to the prospect of litigation. But often these events provide only limited information about that prospective litigation, so that the scope of discoverable information may remain uncertain.

The second factor focuses on what the party did to preserve information after the prospect of litigation arose. The party's issuance of a litigation hold is often important on this point. But it is only one consideration, and no specific feature of the litigation hold -- for example, a written rather than an oral hold notice -- is dispositive. Instead, the scope and content of the party's overall preservation efforts should be scrutinized. One focus would be on the extent to which a party should appreciate that certain types of information might be discoverable in the litigation, and also what it knew, or should have known, about the likelihood of losing information if it did not take steps to preserve. The court should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than other litigants who have considerable experience in litigation.[9] The fact that some information was lost does not itself prove that the efforts to preserve were not reasonable.

The third factor looks to whether the party received a request to preserve information. Although such a request may bring home the need to preserve information, this factor is not meant to compel compliance with all such demands. To the contrary, reasonableness and good faith may not require any special preservation efforts despite the request. In addition, the proportionality concern means that a party need not honor an unreasonably broad preservation demand, but instead should make its own determination about what is appropriate preservation in light of what it knows about the litigation. The request itself, or communication with the person who made the request, may provide insights about what information should be preserved. One important matter may be whether the person making the preservation request is willing to engage in good faith consultation about the scope of the desired preservation.

~~The fourth factor looks to the party's resources and~~

[9] This is an effort to include in the Note considerations like those in our factor (D).

~~sophistication in relation to litigation. Prospective litigants may have very different levels of sophistication regarding what litigation entails, and about their electronic information systems and what electronically stored information they have created. Ignorance alone does not excuse a party that fails to preserve important information, but a party's sophistication may bear on whether failure to do so was either willful or in bad faith. A possibly related consideration may be whether the party has a realistic ability to control or preserve some electronically stored information.~~

The fourth ~~fifth~~ factor emphasizes a central concern -- proportionality. The focus should be on the information needs of the litigation at hand. That may be only a single case, or multiple cases. Rule 26(b)(2)(C) provides guidance particularly applicable to calibrating a reasonable preservation regime. Rule 37(e)(3)(E) explains that this calculation should be made with regard to "any anticipated or ongoing litigation." Prospective litigants who call for preservation efforts by others (the third factor) should keep those proportionality principles in mind.

Making a proportionality determination often depends in part on specifics about various types of information involved, and the costs of various forms of preservation. The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited resources to devote to those efforts.[10] A party may act reasonably by choosing the least costly form of information preservation, if it is substantially similar to more costly forms. It is important that counsel become familiar with their clients' information systems and digital data -- including social media -- to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.

Finally, the fifth ~~sixth~~ factor looks to whether the party alleged to have failed to preserve as required sought guidance from the court if agreement could not be reached with the other parties. Until litigation commences, reference to the court may not be possible. In any event, this is not meant to encourage premature resort to the court; Rule 26(f) directs the parties to discuss and to attempt to resolve issues concerning preservation before presenting them to the court. Ordinarily the parties'

[10] This is an effort to introduce into the Note considerations raised by what was our factor (D).

arrangements are to be preferred to those imposed by the court. But if the parties cannot reach agreement, they should not forgo available opportunities to obtain prompt resolution of the differences from the court.

MEMORANDUM

DATE: August 24, 2012

TO: Discovery Subcommittee

FROM: Andrea L. Kuperman

CC: Judge David G. Campbell
Professor Edward H. Cooper
Professor Daniel R. Coquillette
Judge Mark R. Kravitz
Professor Richard L. Marcus

SUBJECT: Rule 37(e) case law

The Discovery Subcommittee is currently analyzing the best means for addressing growing concerns about preservation for litigation and associated sanctions for failure to preserve. The current thinking of the Subcommittee is to take a sanctions-only approach to addressing these concerns. The Civil Rules were amended in 2006 to address electronic discovery issues. At that time, concerns about preservation and sanctions with respect to electronically stored information ("ESI") were addressed in Rule 37(e),[1] which provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." FED. R. CIV. P. 37(e).

To help assess the best course for proceeding on a preservation/sanction rule, the Discovery Subcommittee asked me to look into the case law on Rule 37(e). Specifically, I have been asked to look into the following questions:

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[1]The text now appearing in Rule 37(e) was originally added in 2006 as subsection (f). However, when the Civil Rules were restyled in 2007, the provision became subdivision (e). This memo will refer to the subdivision as Rule 37(e), unless a case or article refers to it as Rule 37(f).

- Has Rule 37(e) made a difference?
- How does the case law interpret "routine, good-faith operation of an electronic information system"? Does it encompass individual decisions to delete information?
- Has the "exceptional circumstances" clause in Rule 37(e) ever been used?
- How has Rule 37(e) been interpreted in terms of litigation holds?
- What is a "sanction" that may not be imposed under Rule 37(e)? Does it include curative measures?

I have reviewed the cases that discuss Rule 37(e), as well as some legal commentary, and I conclude that Rule 37(e) has had very limited impact. There are only a handful of cases that seem to apply it. Many disregard it because it is limited to sanctions under the Rules, and Rule 37(b) only provides for sanctions for violation of a court order. Others find it does not apply because the party failed to institute an adequate litigation hold, which many courts view as required, or at least strongly encouraged, by the advisory committee notes. Still others find it does not apply because the alleged destruction arose before the preservation duty applied (bringing in both the issue of the lack of a court order and the fact that Rule 37(e) is not necessary to address failures to preserve before the duty to do so arises). Many of the cases denying sanctions and citing Rule 37(e) seem likely to have reached the same result even without the provision.

In short, the rule was intended to do something quite limited: to clarify for courts and parties that the world of electronic discovery could not be treated the same in terms of preservation and related sanctions as the world of paper discovery, given the volume of electronic documents and the fact that electronic systems operate in ways that may destroy data unintentionally and often even without a party's knowledge. It was meant to provide limited protection so that parties could be comforted that they would not be sanctioned for good faith destruction done by electronic systems.

As a practical matter, however, this has proven to be a truly narrow area of protection, as most courts seem to find plenty of other reasons for denying sanctions in instances of good-faith destruction. To the extent litigants sought a true safe harbor for failure to preserve, Rule 37(e) does not appear to have provided much comfort.

This memo will first explore the history behind the adoption of Rule 37(e), to gain a better understanding of the Committee's goals in enacting that provision. It will then examine the case law on each of the questions listed above.

I. The History of Rule 37(e)

Amendments to add the provision in Rule 37(e) were published for public comment in August 2004. The brochure accompanying the proposals explained that the proposed amendments to Rule 37 would place a limit on sanctions for the loss of ESI as a result of the routine operation of computer systems. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, SUBMITTED FOR PUBLIC COMMENT, A SUMMARY FOR BENCH AND BAR 2 (Aug. 2004), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/comment2005/CompleteBrochure.pdf. The brochure further explained that the new provision would create a limited "safe harbor" that would address "a unique and necessary feature of computer systems — the automatic recycling, overwriting, and alteration of electronically stored information." *Id.* at 3. As published, the rule was meant to address only a small subset of issues involving sanctions for the loss of electronic information. At the time of publication, the Committee seemed to believe that the rule would require reasonable preservation efforts, including, in many instances, a litigation hold. The Committee report stated: "Proposed Rule 37(f) requires that a party seeking to invoke the 'safe harbor' must

have taken reasonable steps to preserve electronically stored information when the party knew or should have known it was discoverable in the action. Such steps are often called a 'litigation hold.'" *See* Memorandum from Hon. Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure, to Hon. David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure, Report of the Civil Rules Committee, at 18 (May 17, 2004, rev. Aug. 3, 2004), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/comment2005/CVAug04.pdf [hereinafter Civil Rules 2004 Report].

At the time of publication, the Advisory Committee was continuing to examine the appropriate degree of culpability or fault that would preclude application of the limited safe harbor. *Id.* at 19. The Advisory Committee's report submitting the proposal for public comment noted that "[s]ome have voiced concern that the proposed amendment to Rule 37 is inadequate because it only provides protection from sanctions for conduct unlikely to be sanctioned under the current rules: when information is lost despite a party's reasonable efforts to preserve the information and no court order is violated." *Id.* But "[o]thers have voiced concern that raising the culpability standard would provide inadequate assurance that relevant information is preserved for discovery." *Id.* The Committee requested comments "on whether the standard that makes a party ineligible for a safe harbor should be negligence, or a greater level of culpability or fault, in failing to prevent the loss of electronically stored information as a result of the routine operation of a computer system." *Id.* The published proposal used a negligence standard, but set out a possible alternative amendment that would be framed in terms of intentional or reckless failure to preserve ESI lost as a result of ordinary operation of a computer system. *Id.* The Committee also sought public comment on whether the proposed amendment accurately described the type of automatic computer operations that should be

covered. *Id.* at 20. The Committee explained that it intended "that the phrase, 'the routine operation of the party's electronic information system,' identifies circumstances in which automatic computer functions that are generally applied result in the loss of information." *Id.*

As published, the proposal stated:

> (f) **Electronically Stored Information**. Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if:
>
> (1) the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and
>
> (2) the failure resulted from loss of the information because of the routine operation of the party's electronic information system.

Id. at 51–52.[2]

After considering the extensive public comments, the Advisory Committee ultimately went with an intermediate standard for the degree of culpability — "good faith." The Advisory Committee noted that many comments urged that the negligence standard would provide no meaningful protection, but would only protect against conduct unlikely to be sanctioned in the first place, while others urged that the more restrictive standard in the footnote went too far in the other

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[2]The alternative version that was set out as a possible example of a proposal that would impose a higher degree of culpability before excluding the conduct from the safe harbor stated:

> **(f) Electronically Stored Information**. A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information system unless:
>
> (1) the party intentionally or recklessly failed to preserve the information; or
>
> (2) the party violated an order issued in the action requiring the preservation of information.

Civil Rules 2004 Report, *supra*, at 53.

direction by insulating conduct that should be subject to sanctions. *See* Memorandum from Hon. Lee H. Rosenthal, Chair, Advisory Comm. on the Federal Rules of Civil Procedure, to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure, Report of the Civil Rules Advisory Committee, at 74 (May 27, 2005, rev. Jul. 25, 2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/supct1105/Excerpt_CV_Report.pdf [hereinafter Civil Rules 2005 Report]. The Advisory Committee viewed the "good faith" standard as an intermediate option between the two published options. *See id.* at 74–75. The Advisory Committee's report indicated that it believed that the adequacy of a litigation hold would often bear on whether the party acted in good faith, but the Committee did not view it as a dispositive factor. *See id.* at 75 ("[G]ood faith may require that a party intervene to suspend certain features of the routine operation of an information system to prevent loss of information subject to preservation obligations. . . . The steps taken to implement an effective litigation hold bear on good faith, as does compliance with any agreements that the parties have reached regarding preservation and with any court orders directing preservation."). After publication, the Advisory Committee also decided to add the "exceptional circumstances" provision that appears in the final rule, explaining that it "adds flexibility not included in the published drafts."[3]

[3]No further explanation of the addition of the "exceptional circumstances" provision is provided in the Civil Rules 2005 Report, but there is evidence that the Advisory Committee originally intended it to mean "severe prejudice" and that the Standing Committee revised the committee note to remove that explanation, prompting the Advisory Committee to revise its report to the Standing Committee before it was attached as an appendix to the Standing Committee's report to the Judicial Conference. (It is standard practice for an advisory committee to submit a report to the Standing Committee and then to revise the report to take account of Standing Committee actions after the Standing Committee's meeting and before the report is included as an attachment to the Standing Committee's report to the Judicial Conference.) For example, the original Advisory Committee report to the Standing Committee, before the June 2005 Standing Committee meeting, provided a fuller explanation of the "exceptional circumstances" exception. That report stated, with

respect to the "exceptional circumstances" provision:

> The revised rule also includes a provision that permits sanctions in "exceptional circumstances" even when information is lost because of a party's routine good-faith operation of a computer system. As the Note explains, an important consideration in determining whether exceptional circumstances are present is whether the party seeking sanctions can demonstrate that the loss of the information is highly prejudicial to it. In such circumstances, a court has the discretion to require steps that will remedy such prejudice. The exceptional circumstances provision adds flexibility not included in the published drafts. The Note is revised, also in response to public commentary, to provide further guidance by stating that severe sanctions are ordinarily appropriate only when the party has acted intentionally or recklessly.

Memorandum from Hon. Lee H. Rosenthal, Chair, Advisory Comm. on the Federal Rules of Civil Procedure, to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure, Report of the Civil Rules Committee, at 85 (May 27, 2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2005.pdf [hereinafter May 2005 Civil Rules Report]. The underlined provisions do not appear in the version of the report that was revised after the June 2005 Standing Committee meeting and ultimately submitted to the Judicial Conference.

The committee note that was originally proposed after publication to the Standing Committee for final approval stated: "In exceptional circumstances, sanctions may be imposed for loss of information even though the loss resulted from the routine, good faith operation of the electronic information system. If the requesting party can demonstrate that such a loss is highly prejudicial, sanctions designed to remedy the prejudice, as opposed to punishing or deterring discovery conduct may be appropriate." *Id.* at 88. But at the Standing Committee's June 2005 meeting, there were objections to the note language on severe prejudice. *See, e.g.*, COMM. ON RULES OF PRACTICE AND PROCEDURE, MINUTES, JUN. 15–16, 2005, at 28 (2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST06-2005-min.pdf ("One member stated that the amendment was very beneficial, but reiterated that the language of the note is troublesome. The rule focuses on good faith, but the note says there can be sanctions, even if the party acted in good faith, if the opposing party suffers 'severe prejudice.'"). The Standing Committee voted to adopt the amendment, but to delete the parts of the committee note that were troubling some of the members. *Id.* at 29. The deletion of the note language on severe prejudice is likely what led to the revision of the portion of the Advisory Committee's report that originally indicated that prejudice bears heavily on whether exceptional circumstances are present. Notably, the "Changes Made after Publication and Comment Report," or "GAP Report," which was part of the Advisory Committee's report to the Standing Committee and which was part of an appendix to

Id. at 75. Finally, the Advisory Committee decided to remove the provision in the published rule that would have prevented application of the safe harbor if the party had violated a court order requiring preservation, noting that many comments had persuasively argued that the provision would create an incentive to obtain a preservation order to prevent operation of the safe harbor.[4] *Id.*

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the Standing Committee's report to the Judicial Conference that transmitted the rule for final approval, stated, even after the June 2005 Standing Committee meeting, that the "exceptional circumstances" provision "recognizes that in some circumstances a court should provide remedies to protect an entirely innocent party requesting discovery against serious prejudice arising from the loss of potentially important information." *See* Civil Rules 2005 Report, *supra*, at 78; *see also* May 2005 Civil Rules Report, *supra*, at 89 (original, unrevised report of the Civil Rules Committee from May 2005, containing the same language on "exceptional circumstance" in the GAP report as the revised report included as an appendix to the Standing Committee's report to the Judicial Conference).

It is worth noting, however, that it is not clear that the Advisory Committee, even before revision by the Standing Committee, intended exceptional circumstances to be limited to situations involving severe prejudice. The minutes of the Advisory Committee's meeting after the public comment period closed seem to suggest that the "exceptional circumstances" phrase was merely meant to allow for some degree of flexibility. It was added in place of "ordinarily" at the beginning of the proposed rule. As published, the rule began, "Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions . . . ." After the public comment period, the Advisory Committee decided to abandon the provision excepting violation of a preservation order. During the course of its deliberations, a suggestion was made to have the rule state that "[*o*]*rdinarily*, a court may not impose sanctions . . . ." CIVIL RULES ADVISORY COMMITTEE, MINUTES, APR. 14–15, 2005, at 41 (2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CRAC0405.pdf [hereinafter CIVIL RULES MINUTES APR. 2005] (emphasis added). But "[o]rdinarily was questioned as not a good word, either in terms of general rule drafting or in terms of a rule that sets up a presumption." *Id.* at 42. Then, "[d]rawing from Rule 11(c)(1)(A), it was suggested that it may be better to say 'Absent exceptional circumstances.'" *Id.* The minutes to do not mention "absent exceptional circumstances" necessarily meaning "severe prejudice."

[4]Notably, the minutes of the Advisory Committee's meeting following the close of the public comment period emphasize the Committee's decision to have this amendment address the narrow issue of routine operation of an electronic information system, and not preservation issues generally. The minutes state:

> A broader question was introduced: should the rule be revised to protect against sanctions imposed for failure to take reasonable

In its report to the Standing Committee, the Advisory Committee set out examples of current systems that it thought would fall within the limited safe harbor, including: "programs that recycle storage media kept for brief periods against the possibility of a disaster that broadly affects computer operations; automatic overwriting of information that has been 'deleted'; programs that change metadata (automatically created identifying information about the history or management of an electronic file) to reflect the latest access to particular electronically stored information; and programs that automatically discard information that has not been accessed within a defined period or that exists beyond a defined period without an affirmative effort to store it for a longer period." *Id.* at 73. The Advisory Committee's report clearly indicated that the Committee intended to encompass automatic features of electronic systems, rather than individual decisions to delete data. *See, e.g.*, *id.* ("many database programs automatically create, discard, or update information without specific direction from, or awareness of, users"; "the proposed rule recognizes that such automatic features are essential to the operation of electronic information systems."). This was confirmed in the Standing Committee's report to the Judicial Conference, recommending the rule for final approval. *See* COMM. ON RULES OF PRACTICE AND PROCEDURE, EXCERPT FROM THE REPORT OF THE JUDICIAL CONFERENCE COMM. ON RULES OF PRACTICE AND PROCEDURE, TO THE CHIEF JUSTICE OF

> steps to preserve information that was lost for reasons other than routine operation of an electronic storage system? The response was that a rule this broad would directly address the duty to preserve information. As much as many litigants would welcome an explicit preservation rule, the Committee has concluded that the difficulties of drafting a good rule would be so great that there is no occasion even to consider the question whether a preservation rule would be an authorized or wise exercise of Enabling Act authority.

CIVIL RULES MINUTES APR. 2005, *supra*, at 30.

THE UNITED STATES AND THE MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, at 13 (Sept. 2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/supct1105/Excerpt_STReport_CV.pdf [hereinafter STANDING COMM. REPORT SEPT. 2005] ("The proposed amendment to Rule 37(f) responds to a distinctive and necessary feature of computer systems — the recycling, overwriting, and alteration of electronically stored information that attends normal use. This is a different problem from that presented by information kept in the static form that paper represents; such information is not destroyed without affirmative, conscious effort. By contrast, computer systems lose, alter, or destroy information as part of routine operations, making the risk of losing information significantly greater than with paper.").

Based on the history, I think it is safe to say that the Advisory Committee and the Standing Committee intended the addition of Rule 37(e) to address a very limited scenario — where the automatic features of an electronic system overwrite or otherwise destroy discoverable information without the party's knowledge — thus providing a limited security to litigants that they will not be sanctioned for such unintentional destruction that would not have occurred in the paper world. *See* STANDING COMM. REPORT SEPT. 2005, *supra*, at 14 ("The proposed amendment provides limited protection against sanctions under the rules for a party's failure to provide electronically stored information in discovery.").[5]

[5]The "legislative history" of the proposal repeatedly emphasizes that it is meant to protect parties from sanctions due to routine recycling, overwriting, or changed information due to the operation of an electronic storage system. At the same time, the advisory committee notes clearly indicate that litigation holds are often required in order for a party to comply with the good faith requirement. Courts seem to have struggled with reconciling the need for a litigation hold with the safe harbor for routine operation of an electronic information system. One possibility is that the amendment was meant to get at truly mistaken deletion, such as where a party institutes a litigation

II. The Application of Rule 37(e)

There are only a few cases in which Rule 37(e) can be said to have been truly applied by the court. *See* Philip J. Favro, *Sea Change or Status Quo: Has the 37(e) Safe Harbor Advanced Best Practices for Records Management?*, 11 MINN. J. L. SCI. & TECH. 317, 333 (2010) ("In very few instances have courts invoked the rule to shield parties from sanctions."). The commentary published on the rule generally concludes that the rule has not been applied by courts in a way that provides much solace to those concerned about escalating costs associated with electronic discovery. *See, e.g.*, Thomas Y. Allman, *Preservation Rulemaking After the 2010 Litigation Conference*, 11 SEDONA CONF. J. 217, 227–28 (2010) (noting that "some courts have interpreted an ambiguous Committee Note to Rule 37(e) as a mandatory duty to take specific action, regardless of the need to [do] so to effectuate preservation, thereby barring application of [the] Rule when a duty to preserve is identified and the action is not taken," and concluding that "'if the party cannot avail itself of the safe harbor because it had a duty to preserve data in the first instance, then Rule 37 does little to change the state of the pre-existing common law'" (quoting Emily Burns, Michelle Greer Galloway & Jeffrey Gross, *E-Discovery: One Year of the Amended Federal Rules of Civil Procedure*, 64 N.Y.U. ANN. SURV. AM. L. 201, 217 (2008))); Thomas Y. Allman, *Inadvertent Spoliation of ESI After the 2006 Amendments: The Impact of Rule 37(e)*, 3 FED. CTS. L. REV. 25, 26 (2009) [hereinafter Allman, *Impact of Rule 37(e)*] ("To say that Rule 37(e) has been met with intellectual disdain since its enactment is putting it mildly. To many it evokes 'a low standard [which] seems to protect against sanctions only in situations where [they] were unlikely to occur.' . . . Many commentators have characterized Rule 37(e) as 'illusory' and a 'safe' harbor in name only."

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hold, but the electronic system nonetheless overwrites some relevant data.

(alterations in original) (footnotes omitted)); John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 590–91 (2010) ("Although well-intentioned, this rule fails to provide adequate protection for a variety of reasons. First, it does not account for the possibility that even the most careful attempts to locate and preserve electronic data may not succeed in preserving all potentially relevant information. For example, if a party deletes electronic data in good faith but not as part of routine operations, Rule 37(e) would not protect it. Second, the phrase 'routine, good-faith operation of an electronic information system' is too vague to provide clear guidance as to a party's preservation obligations. It is unclear whether sanctions would be available against a party that fails to suspend a deleting or overwriting program that routinely rids the company's information system of data that are not reasonably accessible. Third, the rule fails to explain what exceptional circumstances might warrant the imposition of sanctions even when data are lost through the routine, good-faith operation of a computer system. Finally, the rule applies only to parties, and thus provides no protection to nonparties, who play an increasingly important role in litigation."); Robert Hardaway, Dustin D. Berger & Andrea Defield, *E-Discovery's Threat to Civil Litigation: Reevluating Rule 26 for the Digital Age*, 63 RUTGERS L. REV. 521, 566 (2011) ("[F]ederal courts have all but read this safe harbor provision out of the rules. They have generally concluded that once the duty to preserve arises—and it arises as soon as litigation becomes foreseeable—any deletion of relevant data is, by definition, not in good faith. These safety valve provisions not only fail to adequately control the costs associated with e-discovery, they sometimes increase it by fostering ancillary litigation on the producer's entitlement to the protection of these safety valves.");[6]

[6]This article suggests several problems with the rule, including that a party seeking to rely on it "must show that it 'act[ed] affirmatively to prevent the system from destroying or altering information, even if such destruction would occur in the regular course of business'"; that the rule

Andrew Hebl, *Spoliation of Electronically Stored Information, Good Faith, and Rule 37(e)*, 29 N. ILL. U. L. REV. 79, 85 (2008) ("Despite the fact that courts should be prohibited from imposing sanctions for spoliation of electronically stored information which occurs after a preservation obligation has arisen, as a result of the good faith, routine operation of a party's electronic information system, this has not been the case. Instead, courts have in some cases limited their analysis to whether a preservation obligation has arisen at all, imposing sanctions per se if one has, and failing to consider the extent to which a party acted in good faith or not." (footnote omitted));[7] John H. Jessen, Charles R. Kellner, Paul M. Robertson & Lawrence T. Stanley, Jr., *Digital Discovery*, MA-CLE 10-1 (2010) (arguing that courts have interpreted the advisory committee notes to mean that the rule is inapplicable once the duty to preserve arises and that "[i]n view of the lack of protection and clarity provided by Rule 37(e) and the cases construing the rule, a litigant is well served to use the procedures currently recognized by the courts as adequate steps for the preservation of electronic data"); Dan H. Willoughby, Jr., Rose Hunter Jones & Gregory R. Antine, *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 791, 828 (2010) ("[T]he safe harbor

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contains an exception for exceptional circumstances; that the rule is limited to "'sanctions under these rules'" and therefore probably does not protect a party from sanctions pursuant to inherent authority; and that the term "electronic information system" may limit protection if a litigant, as operator of the system, directed deletion through configuration or programming of the system. Hardaway et al., *supra*, at 586–87.

[7]The author argues that this is "tantamount to strict liability, in that the state of mind of the spoliating party plays no role in determining whether sanctions should be imposed." Hebl, *supra*, at 85. He also notes that "negligent conduct has been sufficient to support the imposition of sanctions, despite the fact that the rule clearly requires a reckless or intentional state of mind. As a result, concerns about the intersection of electronically stored information and spoliation are not being addressed, and Rule 37(e) has been rendered largely superfluous." *Id.* He suggests that "courts have imposed sanctions for considerably less-culpable conduct than the rule was meant to target." *Id.*

provisions of Rule 37(e) of the Federal Rules of Civil Procedure have provided little protection to parties or counsel."; "[T]he safe harbor was intended to provide limited protection, and it has. Parties or counsel seeking refuge from the increasing sanction-motion practice will be able to reach Rule 37(e)'s refuge only in very limited situations. Since the rule's adoption, approximately two cases per year have met its requirements.");[8] Gal Davidovitch, Comment, *Why Rule 37(e) Does Not Create a New Safe Harbor for Electronic Evidence Spoliation*, 38 SETON HALL L. REV. 1131, 1131–32 (2008) ("Rule 37(e) will not, in most cases, offer any protection that the federal rules did not already provide. And in those few cases where 37(e) will deliver a novel safe harbor, it will be the result of a jurisdictional idiosyncrasy rather than the rule drafters' policy.");[9] Nicole D. Wright, Note, *Federal Rule of Civil Procedure 37(e): Spoiling the Spoliation Doctrine*, 38 HOFSTRA L. REV. 793, 815 (2009) ("The language of Rule 37(e) is problematic because, once put into practice, it offers little constructive guidance as to precisely when a party will be relieved from sanctions due to its failure to produce evidence. Additionally, it provides the opportunity for corporate defendants to utilize the Rule's safe harbor provision as a cushion and allow those who are 'inclined to obscure

[8]The authors found that between the rule's promulgation in 2006 and January 1, 2010, it had been cited in only 30 federal court decisions, three of which did not relate to discovery of ESI in civil cases, two of which involved paper documents, and one of which was a criminal case. Willoughby et al., *supra*, at 825. Of the remaining 25 cases, they found, at most, 7.5 that invoked Rule 37(e) to protect a party from sanctions. *Id.* In two of those cases, the court mentioned 37(e) and denied sanctions, but it was unclear whether the court relied on the rule in making its decision. *Id.* at 825–26.

[9]Davidovitch argues that the circumstances in which Rule 37(e) applies are quite narrow, especially when coupled with the "exceptional circumstances" exception, and that Rule 37 already included various requirements that effectively functioned similarly to the safe harbor created under Rule 37(e). Davidovitch, *supra*, at 1132. Nonetheless, Davidovitch believes that Rule 37(e) "is not entirely irrelevant" because "[i]t organizes the pre-existing exceptions into one rule and thus provides guidance to litigants and judges on how to deal with electronic information loss." *Id.*

or destroy evidence of any sort . . . to hide behind the shield of good faith and undue burden to protect themselves from sanctions.'" (footnote omitted) (omission in original));[10] *cf.* Timothy J. Chorvat, *E-Discovery and Electronic Evidence in the Courtroom*, 17 BUS. L. TODAY 13, 15 (2007) ("Rule 37(f) will protect truly routine deletions of data such as when data in a computer's RAM memory is erased and a file is saved to a hard disk, or when a file is moved from one storage medium to another. But those 'routine, good-faith' actions have not been the source of clients' concern. If Rule 37(f) protects only conduct that never would have been sanctioned, then it is not a safe harbor in any useful sense."); *but see* Favro, *supra*, at 319 ("[O]ne rule is helping to clarify preservation and production burdens for electronically stored information: Federal Rule of Civil Procedure 37(e)."). While the legal commentary has generally concluded that Rule 37(e) has had very minimal impact, Allman notes that "even if it were true that 'Rule 37(e) [does] not, in most cases, offer any protection that the Federal Rules did not already provide,' there is, as a member of the Advisory Committee noted at the time, a 'real benefit in reassuring parties that if they respond to [challenges] reasonably, they will be protected.'" Allman, *Impact of Rule 37(e)*, *supra*, at 37 (alterations in original) (footnote omitted).

A. Cases Applying or Influenced by Rule 37(e)

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[10]Wright concludes that "[t]he absence of guidance for parties that are following document retention policies and for when a party may expect to incur spoliation sanctions leads one to believe parties are, in fact, worse off since Rule 37(e) was enacted." Wright, *supra*, at 816. She argues: "In light of the multitude of factors to be taken into account, Rule 37(e) is ineffective. The considerations that a court must make prior to imposing sanctions on a party already encompass the concern that fueled the implementation of the Rule, rendering it unnecessary. Therefore, Rule 37(e) should be removed from the FRCP." *Id.* at 820. She concludes that "the Rule, as evidenced in its interpretation and application, does no more than reiterate the policies behind the traditional spoliation doctrine," and that as a result "Rule 37(e) should be removed from the FRCP, and the traditional spoliation doctrine should instead govern the imposition of these sanctions." *Id.* at 823–24.

Only a handful of cases seem to have been directly influenced by Rule 37(e) in precluding sanctions.[11] Even in those cases, it is not clear that the result would have been different without the rule. A number of other cases have discussed the rule or been influenced by it, but have not seemed to directly apply it. The cases purporting to directly apply the rule or to have been influenced by it are described below in reverse chronological order.

2012 Cases

In *FTC v. Lights of America Inc.*, No. SACV 10-1333 JVS (MLGx), 2012 WL 695008 (C.D. Cal. Jan. 20, 2012), the court found Rule 37(e) inapplicable because there was no court order, but precluded sanctions pursuant to inherent authority, with reference to Rule 37(e). The defendants sought terminating sanctions or an adverse inference for the plaintiff's failure to institute a litigation hold when litigation became reasonably foreseeable, including failure to suspend the plaintiff's 45-day auto-delete policy for all email. *Id.* at *1, *3. The court noted that the defendants "have not asserted that the FTC failed to obey a discovery order. Absent a failure to obey a discovery order, the Court does not have authority under Rule 37 to sanction a party." *Id.* (citing *Kinnally v. Rogers Corp.*, 2008 WL 4850116 (D. Ariz. Nov. 6, 2008)). The court concluded that the motion was governed by the court's inherent authority to sanction. *Id.* Nonetheless, the court stated that "given that the Rule 37 sanctions and sanctions levied under the Court's inherent power both analyze the same factors, the Court finds case law regarding Rule 37 sanctions persuasive." *Id.* at *2 n.3. The court concluded that the FTC's e-discovery policy, which provides that relevant ESI must be

[11]The cases that seem to have applied Rule 37(e) most directly include *Kermode v. University of Mississippi Medical Center*, No. 3:09-CV-584-DPJ-FKB, 2011 WL 2619096 (S.D. Miss. Jul. 1, 2011), *Miller v. City of Plymouth*, No. 2:09-CV-205 JVB, 2011 WL 1458491 (N.D. Ind. Apr. 15, 2011), and *Olson v. Sax*, No. 09-C-823, 2010 WL 2639853 (E.D. Wis. Jun. 25, 2010).

preserved in an archive, while duplicates must be deleted, was consistent with its duty to preserve relevant material. *Id.* at *5. The court then noted that "to the extent that the auto-delete policy caused the inadvertent loss of any relevant email correspondence, that is not a sanctionable offense," and cited Rule 37(e). *FTC*, 2012 WL 695008, at *5. The court explained that Rule 37(e) "instructs that "'[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the *routine, good-faith operation of an electronic information system*,'" *id.* (alteration in original), and concluded that "[s]imilarly, the inadvertent deletion of some emails due to the good-faith operation of an electronic information system is not a ground for issuing [] sanctions under this Court's inherent power to sanction," *id.* There was no evidence that the plaintiff's retention policy was operated in bad faith, and "[t]he auto-delete system is a function of the computer information system's finite storage capacity and the desire to avoid needless retention of documents, which slows the system." *Id.* The court did not refer to the advisory committee note's reference to the possible need to suspend auto-delete functions if they are likely to result in the destruction of discoverable ESI.

2011 Cases

In *Webb v. Jessamine Cty. Fiscal Court*, No. 5:09-CV-314-JMH, 2011 WL 3652751, at *5 (E.D. Ky. Aug. 19, 2011), the court denied a request for sanctions based on the loss of video recordings because there was no bad faith and the duty to preserve did not arise until the suit was filed a year later. The court found that its decision was further supported by Rule 37(e) because the recordings were overwritten in the normal course of business after three months due to limited storage space, and "[a]s a result, these recordings were lost 'as a result of the routine, good-faith operation of an electronic information system.'" *Id.* at *6. The court then noted, however, that even

assuming the plaintiff could have shown that the defendant had a duty to preserve evidence, the recordings at issue would not have been relevant because they would have captured activity in areas that had no bearing on the plaintiff's claims. *Id.* at *6 n.6.

In *Kermode v. University of Mississippi Medical Center*, No. 3:09-CV-584-DPJ-FKB, 2011 WL 2619096 (S.D. Miss. Jul. 1, 2011), the court relied on Rule 37(e), at least in part, to preclude sanctions for automatic email purging. The plaintiff requested default judgment as a sanction for the defendants' alleged failure to preserve certain email communications, failure to produce others in native format as part of the defendants' pre-discovery disclosures, and failure to produce the emails in response to written discovery requests. *Id.* at *2. The court first noted that the sanctions request faced several procedural hurdles, including that it was raised after the close of discovery and after the motions deadline expired, and that it violated both local and national rules. *Id.* at *2–3. Besides the procedural defects, the court noted that Rule 37(e) presented "a more serious impediment" to the motion for sanctions because "the subject e-mails were apparently deleted as part of the e-mail system before reason existed to preserve them in another format." *Id.* at *3. As a result, the court concluded that "Rule 37(e) sanctions [we]re not available." *Id.* Although the court stated that Rule 37(e) precluded the default judgment, it is unclear that Rule 37(e) necessitated this result. First, since the court noted that the emails were deleted before a reason to preserve them existed, it is unclear that sanctions could be imposed anyway. Rule 37(e) presumably provides some protection after the duty to preserve has arisen; the common law generally precludes sanctions for failure to preserve before the duty to preserve arises. Second, it seems likely that the denial of sanctions would have occurred in any event in this case because of the procedural defects in the plaintiffs' motion.

The *Kermode* court also considered an alternative request for an evidentiary hearing, and ultimately an adverse inference, but concluded that neither prong of the spoliation test in the Fifth Circuit had been met because the plaintiff failed to show either that there were any missing relevant emails or that the defendants acted in bad faith. *Id.* at *4. The court noted that the plaintiff "acknowledges facts establishing that Defendants' duty to preserve electronically stored information did not arise until after much of the information had been automatically deleted from the University's e-mail server." *Kermode*, 2011 WL 2619096, at *5. The potentially missing emails would have been in the time period of June or July 2008, at which time the defendants' email system automatically deleted emails that were not saved after 60 days. *Id.* The court determined that the very earliest the defendants would have anticipated litigation would have been September 2008, and concluded that "it does not appear the e-mails in question—if they ever existed—would have survived the automatic purging." *Id.* The court concluded that even if a litigation hold had been immediately implemented at the time litigation was anticipated, it would only have preserved emails from the end of July 2008 and later. *Id.* The court held that "[s]ince the events of which Park complained transpired prior to this date, the allegedly relevant correspondence would have already been deleted." *Id.* Notably, however, the court's discussion of this automatic deletion was in the context of its determination that there was no bad faith, as required under Fifth Circuit law to impose an adverse inference, and did not reference Rule 37(e). It is unclear that Rule 37(e) could have had much force here, since the court determined that the alleged deletion occurred before a duty to preserve existed. Presumably destruction before the duty to preserve exists is protected behavior with or without Rule 37(e).

In *Miller v. City of Plymouth*, No. 2:09-CV-205 JVB, 2011 WL 1458491 (N.D. Ind. Apr. 15,

2011), Rule 37(e) seemed to make a difference in the court's decision not to impose sanctions. In that case, the plaintiffs filed a suit based on a 2008 incident in which a police officer pulled over and detained the plaintiffs while using a dog to search their car and person for contraband. The court ordered the defendants to produce any reports and audio or video recordings detailing incidents where the officer had ordered his dog to sniff a detained vehicle since January 1, 2004. *Id.* at *2. The police department apparently had a video recording policy that dated back to 1993, when VHS cassettes were still used. *Id.* That policy required officers to retain recordings for at least seven days, after which they could be reused. "If an officer believed the tape would be useful 'in the judicial process,' the officer could choose to save the video." *Id.* In 2006, the police department began using digital recording systems instead of VHS devices, but the digital recording system frequently malfunctioned. *Id.* The officer involved in the incident at issue did preserve a DVD copy of the plaintiff's traffic stop. The system in his car worked by continuously recording onto an embedded hard drive, which automatically burned video footage onto a DVD every time the officer turned on his police lights. *Id.* When the DVD was full, the system asked the user if he wished to save the entries made on the DVD or reformat the disk, which would erase the content and allow the DVD to be reused. *Miller*, 2011 WL 1458491, at *2. Although the hard drive could store up to 30 days of traffic stops, the DVD could be filled in a single shift. *Id.* At some point in 2010, the officer's camera malfunctioned and thereafter only worked off and on. *Id.* The police department installed a new video system, and the officer testified that he did not have any video recordings dating back to 2004. *Id.*

The plaintiffs argued that the magistrate judge's order denying sanctions was erroneous "'because the recording device in this case did not *automatically* record over previously stored

videos. Rather, the hard drive was knowingly and willfully 'reformatted' . . . at the prompting of the equipment operator.'" *Id.* at *3 (omission in original). The plaintiffs further asserted that the defendants were precluded from using Rule 37(e)'s safe harbor because "the choice not to burn relevant video footage to DVD was a policy, practice, or custom of the Defendants, not a routine operation of an electronic information system." *Id.* The court rejected this interpretation of Rule 37(e) as too narrow, noting that the advisory committee's note to Rule 37(e) "explain[s] that the routine operation of computer systems 'includes the alteration and overwriting of information, often without the operator's specific direction or awareness,'" and that "[s]uch features are essential to the operation of electronic information systems." *Miller*, 2011 WL 1458491, at *3 n.1. The court noted that in this case, "it was essential to the operation of Defendants' cameras that the user either save the recordings on the DVD or rewrite the information on it." *Id.* The court found that "by noting that routine operations 'often' occur without the operator's specific direction, the drafters acknowlege[d] that 'routine operations' can still occur despite the direct involvement of a system user." *Id.* The court rejected the plaintiff's argument that the camera user's minimal involvement took the loss of electronic information outside of Rule 37(e). *Id.* The court concluded that the defendants had not acted in bad faith, explaining that they "kept no 'video library' of past police stops, and its policy since the early 1990s had been to record over old footage—except when an individual officer exercised her discretion to preserve the footage. Thus, pursuant to departmental policy, the Defendants recorded over some of the desired footage long before Plaintiffs' stop on May 18, 2008." *Id.* at *4. The court further emphasized that the magistrate judge had noted that the defendants had no control over the fact that the hard drives were recorded over every 30 days and that there was no evidence that any DVD copies were destroyed. *Id.* at *5.

Although the *Miller* court rejected the argument that Rule 37(e) did not apply, it is not clear that the rule was necessary to the result. The opinion indicates that the tape of the incident itself had been preserved (and that there was no evidence that any DVDs were destroyed), so presumably the plaintiffs sought sanctions based on the defendants' inability to comply—due to the automatic overwriting of hard drives every 30 days—with the court's order to produce recordings from incidents dating back to 2004. But it is unclear that there would have been any obligation to preserve recordings before the incident in question, at which time the failure to save the recordings would have arguably been protected behavior even without Rule 37(e).[12] Perhaps Rule 37(e) operated to protect the later destruction of hard drives that occurred after the court's order in 2010, or after a 2009 post-suit letter from the plaintiff requesting any video evidence the department had of the officer and his dog.

2010 Cases

In *Streit v. Electronic Mobility Controls, LLC*, No. 1:09-cv-0865-LJM-TAB, 2010 WL 4687797 (S.D. Ind. Nov. 9, 2010), the court found that Rule 37(e) precluded sanctions where electronic data was inadvertently deleted, without any bad faith. The case involved a car accident in which a vehicle control system manufactured by the defendant allegedly malfunctioned. *Id.* at *1. The vehicle control system had a "black box" that logged data from the system in two different ways.

[12]The fact that Rule 37(e) operates only for sanctions issued under the rules, which in turn require the violation of a court order, supports the conclusion that Rule 37(e) was not meant to operate before the preservation duty arose. That is, Rule 37(e) seems to come into play only after the violation of a court order, which would not occur before the duty to preserve arose. *See* Civil Rules 2004 Report, *supra*, at 18 ("[P]roposed Rule 37(f) addresses only sanctions under the Civil Rules and applies only to the loss of electronically stored information after commencement of the action in which discovery is sought. The proposed amendment does not define the scope of a duty to preserve and *does not address the loss of electronically stored information that may occur before an action is commenced*." (emphasis added))

> The operations log records all "events," such as a problem with the wiring of the steering system, a low battery, or an impact to a vehicle. The datalogger continuously records all of the vehicle control system's inputs and outputs, including all events recorded in the operations log.
>
> When the datalogger detects an event, it stores the corresponding data on a block. At any time, there are fifteen blocks in which data is stored temporally. The datalogger is refreshed by a three block rotation that consists of 1) the oldest block, which is overwritten, 2) the block that is in use, and 3) the block that was previously in use. If an impact, or "G-event," is detected, the corresponding block is locked, so that it cannot be overwritten.

Id. (internal citations omitted). The defendant's practice after an accident involving a vehicle equipped with the control system was to download the vehicle's datalogger. *Id.* After the incident at issue, one of the defendant's employees attempted to start the vehicle a number of times because the battery was very low. *Id.* However, every time a vehicle with this system starts, the datalogger grabs the oldest of the three blocks in rotation and, if an event occurs, overwrites the oldest block with new data. *Id.* In this case, because the vehicle had a low battery, every time the employee attempted to restart the vehicle, the datalogger recorded the event of the low battery. *Streit*, 2010 WL 4687797, at *1. As a result, the blocks that would have recorded all events and inputs and outputs more than about 2.5 minutes before the accident were overwritten. *Id.* But the block recording any events within 2.5 minutes of the accident and the accident itself were not overwritten. *Id.* It was undisputed that any event that occurred before the accident would have been recorded in the operations log, which was fully preserved and produced. *Id.* There were no events recorded on the operations log before the accident, but the plaintiff alleged that at some point before the accident, she pulled her vehicle over because the steering felt abnormal. *Id.* at *1–2. The plaintiff alleged that the defendants intentionally deleted information from the vehicle's datalogger, specifically the

information from when the plaintiff pulled her vehicle over after feeling a steering abnormality. *Id.* at *2. The defendant argued that the information on the datalogger was overwritten during the ordinary course of recovery procedures and that the only relevant information would have been an "event," which would have been preserved on the operations log. *Streit*, 2010 WL 4687787, at *2.

The court stated that federal law applied and was "mindful" of Rule 37(e). *Id.* at *2. The court stated that bad faith was required to impose sanctions for destruction of ESI, and that bad faith means destruction for the purpose of hiding adverse information, but it was not clear if this was based on Rule 37(e) or the common law. *See id.* The court noted in a footnote after its citation to Rule 37(e) that "[o]f course, the Court's power to sanction is inherent and, therefore, not governed by rule or statute." *Id.* at *2 n.1. The court concluded that the request for sanctions failed because the plaintiffs had not shown bad faith. Specifically, the plaintiffs had not shown that the defendant instructed its employee to start and restart the vehicle, much less that it did so with the intent to overwrite data, or that the datalogger would have recorded the alleged steering malfunction, when it was not recorded in the operations log. *Id.* While the court seemed influenced by Rule 37(e), it seems likely that the court would have reached the same result even without the rule because it implied that it was not bound by the rule and seemed to require bad faith regardless of the safe harbor in the rule.

In *Coburn v. PN II, Inc.*, No 2:07-cv-00662-KJC-LRL, 2010 WL 3895764 (D. Nev. Sept. 30, 2010), the court awarded monetary sanctions for spoliation, but also found that certain behavior did not warrant sanctions, relying in part on Rule 37(e). The plaintiff had engaged in various acts of alleged spoliation. First, in analyzing the plaintiff's home computer pursuant to a court order, the forensic expert found that the computer's operating system had overwritten portions of files and data,

and the expert suggested that some of the files were deleted by CCleaner, but that it was likely that many of the files had been manually deleted. *Id.* at *1. The expert's report indicated that CCleaner was run on the plaintiff's computer two days before the court-ordered forensics examination and that the default configuration settings were manually modified at that time. *Id.* at *2. The program was not set to run automatically and had only been run twice since its installation two years earlier. *Id.* The plaintiff asserted that she did not even know CCleaner existed on her computer until after the forensic exam, after which she learned it was installed as part of service package she purchased. *Id.* The defendants sought sanctions on the basis of the running of CCleaner just before the forensics exam; the existence on the plaintiff's computer of nearly 4,000 "non-standard files" containing keywords relevant to litigation, allegedly indicating that the plaintiff had regularly destroyed evidence; and the alleged destruction of relevant emails on the plaintiff's home computer. *Id.* The plaintiff argued that she never deleted a large volume of files from her computer and that the normal operation of CCleaner would be protected under Rule 37(e). *Coburn*, 2010 WL 3895764, at *2.

The court noted that monetary sanctions are available either under Rule 37(b) or the court's inherent authority, and that willfulness is not required to impose monetary sanctions under Rule 37, but bad faith is required to use inherent authority to sanction. *Id.* at *3. The court noted that Rule 37(e) provides a "safe harbor" for failure to provide ESI, and explained that "[t]he destruction of emails as part of a regular good-faith function of a software application may not be sanctioned absent exceptional circumstances." With respect to the running of CCleaner two days before the forensic exam, the court declined to impose sanctions because there was no evidence that the plaintiff had run it herself or directed someone else to do so, and therefore the court could not conclude that the plaintiff "destroyed relevant evidence 'in bad faith, vexatiously, wantonly, or for oppressive

reasons.'" *Id.* at *4 (citation omitted). The quoted language was from a case the court cited for the prerequisites to using its inherent powers to sanction, and the court did not cite Rule 37(e) in this section of its opinion.

The court also denied sanctions based on the existence of nearly 4,000 irregular files on the plaintiff's computer. The plaintiff submitted expert testimony that "while many such files are technically 'intentionally deleted,' they are not necessarily *volitionally* deleted; meaning that the computer may delete the files without any user intervention." *Id.* at *5. The court concluded that levying sanctions based on the irregular files "would be to levy sanctions on the basis of an evidentiary estimate or 'hunch.'" *Id.* With respect to the deleted emails, the plaintiff testified that she regularly sent email from her work email to her home email, and that her practice was to download whatever files she sent to her home computer and then delete the email and any duplicative files. *Id.* at *6. Although the emails were deleted, it was undisputed that the files themselves were saved and produced. *Coburn*, 2010 WL 3895764, at *6. The court acknowledged that the wiser decision would have been not to delete the emails and that this was a close case, but given that the information was actually produced in the form of the files saved on the plaintiff's hard drive, the court found sanctions to be unwarranted. The court did impose sanctions for the plaintiff's destruction of audio tapes of conversations with co-workers, which was allegedly done because the tapes were of poor quality. *Id.* at *7. The court found no bad faith in the destruction, even though it was done intentionally, and awarded attorneys' fees as a sanction, pursuant to its inherent authority. In sum, although the court discussed Rule 37(e) in its discussion of the legal standards, it did not seem to actually apply it.

In *Olson v. Sax*, No. 09-C-823, 2010 WL 2639853 (E.D. Wis. Jun. 25, 2010), the court

applied Rule 37(e) to preclude sanctions for routine overwriting of surveillance video. In that employment discrimination suit, the plaintiff filed a motion for sanctions, accusing the defendant employer of failing to preserve a video tape, made just over a week before the plaintiff's termination, of her alleged theft of property from the employer. *Id.* at *1. The video tape was created on July 22, 2008; the plaintiff was terminated on July 31, 2008; and the plaintiff requested to see the videotape on the day of her termination. *Id.* Her attorney also requested the tape through formal discovery requests, although the date of that particular request was unclear. *Id.* The plaintiff requested that the defendants be barred from producing any evidence of the alleged theft and an award of expenses incurred in bringing the sanctions motion, unless the defendants showed good cause for the destruction. *Id.* The defendants invoked Rule 37(e), arguing that the court could not impose sanctions where ESI was lost as the result of the routine, good faith operation of an electronic storage system. *Id.* Specifically, the defendants stated that they were not aware of the possibility of litigation until February 24, 2009, when they received a letter from the plaintiff's attorney, but that the video was created using a recorder that recorded footage on a 500 gigabyte hard drive that holds about 29 days of video and records in a loop. *Olson*, 2010 WL 2639853, at *1. Once the hard drive is full, it records over the oldest footage. *Id.* The defendants argued that the alleged theft would have been recorded over around August 20, 2008, well before the letter from the plaintiff's attorney. *Id.* The defendants "assert that the subject video recording was recorded over as a part of Goodwill's routine good faith operation of its video electronic system—a system that is in place at all Goodwill retail stores and is commonly used throughout the retail industry." *Id.*

The *Olson* court noted that the common law required "wilfulness, bad faith or fault" in order to impose sanctions, and that Rule 37(e) precluded sanctions for failing to provide ESI lost as the

result of routine, good-faith operation of an electronic storage system. *Id.* at *2. But after citing Rule 37(e), the court stated that "'[t]he rules do not state the limits of judicial power . . . [j]udges retain authority, long predating the Rules of Civil Procedure.'" *Id.* at *2 n.1 (alterations and omission in original) (citing *Langley by Langley v. Union Elec. Co.*, 107 F.3d 510, 514 n.4 (7th Cir. 1997)). The court then stated that bad faith was required, but did not clarify whether the bad faith was required as a prerequisite to precluding application of Rule 37(e) or as a prerequisite to using inherent authority to sanction under the common law. *See Olson*, 2010 WL 2639853, at *2. The court concluded that the defendants were aware of possible litigation by August 11, 2008, and that as of that date, the video recording had not been overwritten and the defendants had a duty to preserve the evidence. *Id.* But the court denied sanctions because of Rule 37(e), stating:

> Nonetheless, the only evidence before the Court indicates that the recording over of the video record from July 22, 2008, was part of Goodwill's routine good faith operation of its video system. There is no evidence that Goodwill engaged in the "bad faith" destruction of evidence for the purpose of hiding adverse evidence. *See Trask–Morton*, 543 F.3d at 681. Therefore, pursuant to Rule 37(e) of the Federal Rules of Civil Procedure, the Court denies Olson's motion for sanctions. Neither party is awarded the fees and expenses incurred with respect to the motion.

Id. at *3.[13]

2009 Cases

In *Mohrmeyer v. Wal-Mart Stores East, L.P.*, No. 09-69-WOB, 2009 WL 4166996 (E.D. Ky.

[13]Although the court purported to apply Rule 37(e) to preclude sanctions, it is unclear whether the result would have been different in the absence of the rule, given the court's note that it was not bound by the rules in terms of imposing sanctions and its imposition of a bad faith requirement under the common law. On the other hand, perhaps Rule 37(e) operated to preclude sanctions under the rules, while the common law's bad-faith requirement operated to preclude sanctions under inherent authority.

Nov. 20, 2009), the court analogized to Rule 37(e) in finding that the destruction of temporary documents before litigation did not warrant sanctions. The case arose out of a slip-and-fall accident in a Wal-Mart store, which was alleged to have resulted from Wal-Mart's negligent failure to maintain the restroom. *Id.* at *1. Wal-Mart had a practice of maintaining a log or chart of maintenance and inspection of the restroom, but the log was not ordinarily preserved in the ordinary course of business and was destroyed on a weekly basis. *Id.* Wal-Mart asserted that it destroyed the log at issue long before it became aware of the possibility of litigation from the fall. *Id.* The court stated:

> The law does not and should not require businesses to preserve any and all records that may be relevant to future litigation for any accidental injury, customer dispute, employment dispute, or any number of other possible circumstances that may give rise to a claim months or years in the future, when there is absolutely no contemporaneous indication that a claim is likely to result at the time records are destroyed pursuant to a routine records management policy.

Id. at *2. Because the log was a temporary document that was routinely discarded on a weekly basis, the court found no basis for imposing sanctions for its destruction. The court rejected the plaintiff's reliance on a Sixth Circuit case that held: "'It is beyond question that a party to civil litigation has a duty to preserve ESI when that party has notice that the evidence is relevant to litigation or should have known that the evidence may be relevant to future litigation.'" *Id.* at *3 (quoting *John B. v. Goetz*, 531 F.3d 448 (6th Cir. 2008)). The court concluded that "[i]t is debatable whether the principle recently articulated by the Sixth Circuit in *Goetz* concerning ESI can be generalized to establish a broader pre-litigation 'duty to preserve' all evidence no matter how speculative future litigation may be," and that a narrow reading of that case was suggested by Rule 37(e). *Mohrmeyer*, 2009 WL 4166996, at *3. The court held that "[b]y analogy, it would be improper for this court to

impose any type of sanction upon Walmart on the facts presented, where evidence was discarded as a result of its routine good-faith records management practices long before Walmart received any notice of the likelihood of litigation." *Id.* The court emphasized that it was not implying that formal notice of litigation is required in every case before the duty to preserve arises, but was "merely hold[ing] that on the facts presented, the 'trigger date' requiring Walmart to preserve evidence arose well after [the date the log was destroyed]." *Id.* at *3 n.1. While Rule 37(e) seemed to support the court's determination not to award sanctions, it seems likely that the result would have been the same even without that rule. The court seemed to frame its holding in terms of when the duty to preserve arose, not in terms of destruction of ESI after the duty arose, and it is not clear that the log at issue was electronically stored.

In *Southeastern Mechanical Services v. Brody*, No. 8:08-CV-1151-T-30EAJ, 2009 WL 2242395, at *1 (M.D. Fla. Jul. 24, 2009), the defendant alleged spoliation based on the plaintiff's failure to suspend the automatic overwriting of its backup tapes that archive employee emails and other electronic information. The plaintiff's company policy was to retain emails on its server until an employee deletes the emails, to backup the server daily to backup tapes, and to overwrite the backup tapes every two weeks. *Id.* After Brody, a defendant and former employee of the plaintiff, had his last day of employment with the plaintiff, the plaintiff inspected Brody's account and discovered that emails, contacts, and tasks were deleted from his computer. *Id.* The plaintiff waited more than two weeks after Brody's departure before checking the backup tapes of Brody's account. *Id.* The defendants argued that the plaintiff spoliated evidence by failing suspend the automatic overwriting of the backup tapes, which destroyed the only evidence of the plaintiff's claim that Brody improperly deleted data from his work computer before his termination. *Id.* The plaintiff

argued that it did not act in bad faith in failing to retain its backup tapes and that the automatic overwriting was part of its regular data management policy. *Id.* at *2. The court noted that bad faith is required to impose sanctions pursuant to its inherent authority. *S.E. Mech. Servs.*, 2009 WL 2242395, at *2. It also noted that Rule 37 provides authority for imposing sanctions for failure to comply with the court's rules, and that Rule 37(e) provides a limited safe harbor for failure to preserve ESI. *Id.*

The court held that the plaintiff had a duty to turn off the overwriting function at least by the time it received a demand letter a week after Brody's termination. *Id.* at *3. Despite finding it "baffling" that the plaintiff would not have put a litigation hold in place that would have suspended the overwriting of the backup tapes a week after the termination, the court found no sanctions were appropriate because the automatic overwriting did not involve bad faith and "was part of the company's routine document management policy." *Id.* The court then noted that "[i]n accordance with the traditional view that spoliation must be predicated on bad faith, Rule 37(e) sanctions have been deemed inappropriate where 1) electronic communications are destroyed pursuant to a computer system's routine operation and 2) there is no evidence that the system was operated in bad faith." *Id.* (citing *Escobar v. City of Houston*, No. 04-1945, 2007 WL 2900581, at *18 (S.D. Tex. Sept. 29, 2007)).[14] Thus, the court cited Rule 37(e) in support of its conclusion that no sanctions

[14] *See also Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 628 n.13 (D. Colo. 2007) ("Consistent with this general rule [that '[a] litigation hold does not apply to inaccessible back-up tapes . . . which may continue to be recycled on the schedule set forth in the company's policy'], newly enacted Rule 37(f) provides limited protection against sanctions where a party fails to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system" (quoting *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 431 (2007) (alterations and omission in original))). This statement seems to imply that routine deletion of backup tapes amounts to routine operation of an electronic storage system.

were warranted, but it seems to have reached its conclusion first based on the common law requirement in its circuit of bad faith to impose spoliation sanctions, presumably pursuant to inherent authority.

In *In re Kessler*, No. 05 CV 6056(SJF)(AKT), 2009 WL 2603104, at *3 (E.D.N.Y. Mar. 27, 2009), the court implicitly applied Rule 37(e) in rejecting, on de novo review, the magistrate judge's award of attorneys' fees for the negligent destruction of video footage. That case arose out of a fire on a vessel that was docked at a marina. *Id.* at *1. The petitioner sought sanctions based on the marina's destruction of a critical video tape showing the main dock where the vessel was docked just before the fire. *Id.* at *4. The marina used a digital video recorder that recorded data from the camera onto a hard drive. *Id.* at *16. Once the hard drive was full, which occurred every 24 hours, the hard drive overwrote the old data in recording new data. *Id.* The marina did not do anything to preserve the footage from the day of the fire and it was taped over in the normal course of the video camera's operation. *Id.* The magistrate judge noted, without explanation, that Rule 37(e) was not applicable to preclude sanctions where surveillance video had been overwritten in the normal course of business, but found it useful to determine the steps necessary to preserve electronic evidence. *Kessler*, 2009 WL 2603104, at *18. The magistrate judge declined to impose an adverse inference instruction because the proponent had failed to show bad faith, but found that the opponent's negligent conduct warranted monetary sanctions, including an award of attorney's fees in connection with the motion for sanctions and the cost of a forensic examination of the surveillance system to determine if any lost data could be retrieved. *Id.* at *20. The district court rejected the portion of the magistrate judge's report and recommendation that awarded attorney's fees as a sanction. The court concluded: "Petitioner has not met his burden of showing that the Marina 'had an obligation to

preserve [the surveillance footage], acted culpably in destroying it, and that the [surveillance footage] would have been relevant to [Petitioner's] case.'" *Id.* at *3 (alterations in original) (citation omitted). The court further explained that "the surveillance footage from the date of the fire self-destructed approximately twenty-seven (27) hours after it was recorded" "[i]n accordance with the routine operation of the Marina's surveillance system." *Id.* The court did not cite Rule 37(e) in coming to this conclusion, but may have implicitly accepted it in rejecting the portion of the magistrate judge's opinion that rejected the application of the rule. Nonetheless, the court's notation that there was no obligation to preserve, no culpability in destruction, and no showing of relevance, coupled with its lack of citation to Rule 37(e), suggests that the court would have reached the same conclusion even without the existence of Rule 37(e).

2008 Cases

In *Liquidating Supervisor for Riverside Healthcare, Inc. v. Sysco Food Services of San Antonio, LP* (*In re Riverside Healthcare, Inc.*), 393 B.R. 422 (Bankr. M.D. La. 2008), the court declined to sanction the routine deletion of email. In that case, the plaintiff alleged that the defendant's deletion of email relating to the defendant's dealings with the debtors supported an adverse inference sanction. *Id.* at 428. The court noted that the Fifth Circuit requires a showing of bad faith to impose an adverse inference instruction and that the plaintiff did not prove that the defendant intentionally deleted or allowed deletion of email to frustrate litigation. *Id.* Instead, the email was deleted routinely before the lawsuit, pursuant to the computer system's routine deletion of email after 60 to 90 days (and retention of deleted email on the server for an additional 14 days). *Id.* at 429. By the time the defendant had been joined as a party, the email from the relevant time period had been deleted pursuant to the automatic deletion routine. *Id.* The plaintiff also

complained that it could not get email from a particular employee's work station, but because the employee testified that her hard drive had failed and was replaced three times since the relevant bankruptcy filing, the court concluded that the loss of information "was not the result of SSA's 'fraudulent intent and a desire to suppress the truth.'" *Id.* (citing *Consol. Aluminum v. Alcoa*, 244 F.R.D. 335, 343–44 (M.D. La. 2006)). The court also noted that the plaintiff had not shown prejudice. *Riverside Healthcare*, 393 B.R. at 429. Because the plaintiff failed to show bad faith, the court concluded that sanctions were not warranted. *Id.* at 430. The court noted in a footnote that Rule 37(e) limits the ability to sanction "where loss of information results from good faith operation of [an] electronic information system," but did not seem to rely on that provision to preclude sanctions. *See id.* at 429 n.21.

In *Gippetti v. United Parcel Service, Inc.*, No. C07-00812 RMW (HRL), 2008 WL 3264483 (N.D. Cal. Aug. 6, 2008), the court rejected sanctions when certain records were destroyed under the party's routine document retention policy. In that case, the plaintiff sued for employment discrimination and sought production of tachograph records for other UPS drivers, which show a vehicle's speed and the length of time it is moving or stationary. *Id.* at *1. UPS produced some of these, but many had been destroyed under its policy of preserving such records for only 37 days due to the large volume of data. *Id.* The court rejected sanctions for this destruction, finding that the records were not clearly relevant, that there was no clear notice to the defendants to preserve the tachograph records of other employees, and that the plaintiff was not prejudiced by destruction as similar information was available through the production of other employees' time cards. *See id.* at *3–4. The court concluded that the record "shows only that the tachographs were maintained and then destroyed several years ago in the normal course of UPS's business in accordance with the

company's document retention policy." *Id.* at *4. In the "legal standards" section of the opinion, the court mentioned the ability to sanction pursuant to its inherent authority, but did not mention sanctioning power under Rule 37. *See id.* at *2. The court noted that bad faith was not required for sanctions, but that the party's degree of fault was relevant to what sanction should be imposed. *Gippetti*, 2008 WL 3264483, at *2. The court cited common law for these principles, but added a "see also" citation to Rule 37(e) in support of its statement that the degree of fault is relevant to the determination of the sanction imposed. *Id.* The court did not mention Rule 37(e) anywhere else in the opinion. The court may have been influenced by Rule 37(e) in its decision not to impose sanctions where documents were destroyed under a routine document retention policy, but given the court's findings of lack of relevance, prejudice, duty to preserve, and culpability, it seems quite likely that the same result would have occurred without Rule 37(e).

2007 Cases

In another case, the court deferred a sanctions motion based on an entire year's worth of emails lost due to a server move, but noted that Rule 37(e) requires good faith, which depends on the circumstances. *See U&I Corp. v. Adv. Med. Design, Inc.*, No. 8:06-CV-2041-T-17EAJ, 2007 WL 4181900, at *5–6 (M.D. Fla. Nov. 26, 2007). The court deferred a decision on the request for sanctions because it lacked information on whether the computer error that caused the lost emails was made in good faith and whether the emails were truly forever lost. *Id.* Because Rule 37(e) requires good-faith operation, which in turn depends on the circumstances of each case, the court could not yet determine whether sanctions were warranted, although it did leave open the possibility of Rule 37(e) precluding sanctions if the emails were lost in good faith. *Id.* at *6.

In *Escobar v. City of Houston*, No. 04-1945, 2007 WL 2900581 (S.D. Tex. Sept. 29, 2007),

the court denied sanctions for the loss of emails, but it was unclear whether this was based on the Fifth Circuit's requirement of bad faith for imposing an adverse inference or based on Rule 37(e). The lawsuit arose out of a city police officer's deadly shooting of a teenage boy. The plaintiffs alleged that the City failed to preserve records of the police department's electronic communications in the 24 hours after the death. *Id.* at *17. The plaintiffs argued that they notified the City of their claim within 60 days of the shooting and that the police department's policy was to keep "mobile digital terminal transmissions" for 90 days. *Id.* The plaintiffs argued that destruction of electronic communications after their notice constituted spoliation; they requested an adverse inference jury instruction. *Id.* The court noted that the Fifth Circuit requires bad faith before imposing severe spoliation sanctions, including adverse inference instructions. *Id.* The court also noted that federal courts may impose sanctions for failing to obey discovery orders under Rule 37 (and that Rule 37(f) applies to ESI), or they may impose sanctions for conduct that abuses the judicial process pursuant to their inherent authority. *Id.* at *17 n.5. But the court explained that inherent power applies only when the parties' conduct is not controlled by other mechanisms. *Escobar*, 2007 WL 2900581, at *17 n.5. The court concluded that although the duty to preserve existed, an adverse inference instruction was not warranted because there was no showing that relevant electronic communications were destroyed or that the destruction was in bad faith, citing Fifth Circuit case law from before the 2006 e-discovery amendments. *Id.* at *18 (citing *Condrey v. Suntrust Bank of Ga.*, 431 F.3d 191, 203 (5th Cir. 2005); *King v. Ill. Cent. R.R.*, 337 F.3d 550, 556 (5th Cir. 2003)).

The court found further support for its conclusion in Rule 37(e), stating: "And under Rule 37(f) of the Federal Rules of Civil Procedure, if the electronic communications were destroyed in the routine operation of the HPD's computer system, and if there is no evidence of bad faith in the

operation of the system that led to the destruction of the communications, sanctions are not appropriate." *Id.* The court also found a lack of prejudice, noting that "[t]he record shows that the officers involved in the shooting were not likely to have used e-mail to communicate about the event in the day after it occurred. *Id.* at *19. The court concluded that because the plaintiffs had not shown bad faith or the loss of relevant information, no sanctions were warranted, again citing a pre-2006 Fifth Circuit case. *Id.* (citing *Toon v. Wackenhut Corrections Corp.*, 250 F.3d 950, 952 (5th Cir. 2001)). Thus, while Rule 37(e) supported the court's decision, given the lack of bad faith, as required by circuit precedent, and lack of showing of loss of relevant evidence, the court might have reached the same conclusion even without Rule 37(e).[15] *See* Hebl, *supra*, at 110 (arguing that *Escobar* is the only court that has arguably applied Rule 37(e) correctly, but noting that the case is not dispositive on the issue because there were grounds independent of Rule 37(e) for not granting sanctions). Another possibility is that the court ruled out sanctions under Rule 37 because of the safe harbor in Rule 37(e), and ruled out sanctions under inherent authority based on the common law requirement of bad faith.

Finally, in *Columbia Pictures Industries v. Bunnell*, No. 06-1093FMCJCX, 2007 WL 2080419 (C.D. Cal. May 29, 2007), the court denied sanctions for failure to preserve data stored temporarily in RAM because there was no prior preservation order or request for such temporary data. The court noted Rule 37(e), but it was unclear if it specifically applied. The court denied sanctions because the "failure to retain the Server Log Data in RAM was based on a good faith belief that preservation of data temporarily stored only in RAM was not legally required." *Id.* at *14. The

[15]The Fifth Circuit's requirement of bad faith provided an additional layer of protection here that might not have been present in circuits that do not require bad faith. Rule 37(e) might have had a greater impact on the same facts in circuits without a bad faith requirement.

court mentioned that Rule 37(e) precludes sanctions for the good-faith operation of an electronic information system, and that "good faith" may require suspending certain features of routine operation once a duty to preserve arises, but it was not clear if that rule was the basis for the court's decision not to impose sanctions. *See id.* at *13–14.

B. Cases Finding Rule 37(e) Inapplicable

The remaining cases citing Rule 37(e) have either determined that the rule did not apply or mentioned it but did not seem to directly apply it.

Some courts find that Rule 37(e) does not apply because sanctions have been requested pursuant to the court's inherent authority rather than Rule 37 or because there is no prior court order to bring the conduct within Rule 37 sanctions. *See Stanfill v. Talton*, --- F. Supp. 2d ---, No. 5:10-CV-255(MTT), 2012 WL 1035385, at *8 n.12, *9–11 (M.D. Ga. Mar. 29, 2012) (after portions of a video recording were lost because the recording system automatically overwrote old video, the court denied sanctions because even if the duty to preserve existed, it was not clear that it was owed to the plaintiff and there was no showing of bad faith (as required under circuit law); the court noted that Rule 37(e) did not apply because the plaintiff had not moved for sanctions under Rule 37 and it would not have applied anyway because the plaintiff's argument was that the video was not lost as part of the good-faith operation of an electronic storage system, but because of the defendants' knowing failure to preserve the video before it was overwritten); *Tech. Sales Assocs., Inc. v. Ohio Star Forge Co.*, Nos. 07-11745, 08-13365, 2009 WL 728520, at *8 (E.D. Mich. Mar. 19, 2009) (rejecting application of Rule 37(e) both because lost ESI was deleted intentionally and because sanctions were sought under the court's inherent authority); *Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 429 n.30, 431 n.31 (S.D.N.Y. 2009) (Rule 37(e) did not apply because there

was no violation of a previous court order and sanctions were requested under the court's inherent authority);[16] *Johnson v. Wells Fargo Home Mortg., Inc.*, No. 3:05-CV-0321-RAM, 2008 WL 2142219, at *2, *3 n.1 (D. Nev. May 16, 2008) (relying on inherent authority to analyze sanctions because although the defendant brought the motion under Rule 37 and inherent authority, the plaintiff's conduct did not violate any discovery order under Rule 37 because it occurred before the filing of the motion to compel production of the hard drives at issue, and rejecting application of Rule 37(e) for the same reason); *Nucor Corp. v. Bell*, 251 F.R.D. 191, 196 n.3 (D.S.C. 2008) (imposing an adverse inference for intentional destruction of a USB thumb drive with relevant evidence and for allowing employees' continued use of a computer, which resulted in loss of relevant data, and noting that Rule 37(e) did not apply because sanctions were imposed pursuant to inherent authority, not the rules);[17] *see also* Allman, *The Impact of Rule 37(e)*, *supra*, at 27 ("Rule 37(e) applies only to mitigation of 'rule-based' spoliation sanctions, despite the fact that sanctions can also be imposed under the inherent power of courts. Some have concluded that this limitation implies approval to avoid the impact of the Rule by simply relying on a court's inherent powers." (footnote omitted)); *cf. Lee v. Max Int'l, LLC*, 638 F.3d 1318, 1321 (10th Cir. 2011) (affirming dismissal of plaintiff's action for "thrice repeated failure to produce materials that have always been and remain within its control" because such behavior was "strong evidence of willfulness and bad faith, and in

[16]Although Rule 37(e) did not apply, the court found it instructive in understanding the steps parties should take to preserve electronic evidence. *Arista Records*, 608 F. Supp. 2d at 431 n.31.

[17]The court stated: "Assuming arguendo that defendants[']conduct would be protected under the safe-harbor provision, Rule 37(e)'s plain language states that it only applies to sanctions imposed under the Federal Rules of Civil Procedure (e.g., a sanction made under Rule 37(b) for failing to obey a court order). Thus, the rule is not applicable when the court sanctions a party pursuant to its inherent powers." *Nucor*, 251 F.R.D. at 196 n.3.

any event is easily fault enough," as required under circuit law for severe spoliation sanction, but also noting that Rule 37(e) protects from sanctions those who have discard materials as a result of good-faith business procedures); *Northington v. H&M Int'l*, No. 08-CV-6297, 2011 WL 663055, at *12 (N.D. Ill. Jan. 12, 2011) ("[W]hether or not defendant's conduct is sanctionable under any subdivision of Rule 37 is an academic issue, as the analysis for imposing sanctions under that Rule or our inherent power is 'essentially the same.'" (citations omitted)); *Grubb v. Bd. of Trustees of the Univ. of Ill.*, 730 F. Supp. 2d 860, 865–66 (N.D. Il.. 2010) (denying sanctions where third party destroyed the relevant computer without the plaintiff's knowledge, and where the plaintiff inadvertently altered/destroyed ESI by simply using his computer, because there was no bad faith as required for sanctions in that circuit; the court noted that the request was brought pursuant to inherent authority, but was "mindful" of Rule 37(e), which also seemed to weigh in favor of denying sanctions).

One court explained that the reason many courts might look to inherent authority to impose sanctions for failure to preserve is that Rule 37 sanctions do not easily apply to pre-litigation conduct:

> Several courts have held that Rule 37 sanctions are available even where evidence is destroyed before the issuance of a discovery request, with a few going so far as to apply the rule to conduct that occurred before the lawsuit was filed, provided the party was on notice of a claim. But, the majority view—and the one most easily reconciled with the terms of the rule—is that Rule 37 is narrower in scope and does not apply before the discovery regime is triggered. *See Beil v. Lakewood Eng'g & Mfg. Co.*, 15 F.3d 546, 552 (6th Cir. 1994); *Dillon v. Nissan Motor Co.*, 986 F.2d at 268–69; *Unigard Sec. Ins. Co.*, 982 F.2d at 368; *see also* Iain D. Johnson, "Federal Courts' Authority to Impose Sanctions for Prelitigation or Pre-order Spoliation of Evidence," 156 F.R.D. 313, 318 (1994) ("it is questionable whether Rule 37 provides a federal court with authority to impose sanctions for spoliating evidence prior to a court order

> concerning discovery or a production request being served"). If that is true, the court must look to its inherent authority to impose, if at all, sanctions for evidence destruction that occurs between the time that the duty to preserve attaches and, at the least, the filing of a formal discovery request. But, this approach begs yet another question—what sort of intent requirement ought to apply in this non-rule context?

United Med. Supply Co. v. United States, 77 Fed. Cl. 257, 268 (Fed. Cl. 2007).[18] However, the court

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[18]The court described the complicated circuit split on the degree of culpability required for particular sanctions:

> [A]s startling[] as it might seem, the *mens rea* issue confronting this court appears to be an open question in this circuit. There is, in fact, a division of authority among the circuits on this issue. While the tendency is to view that split in terms of whether *vel non* a showing of bad faith is required, in fact, the diverging views cover a much broader spectrum. On one end of that spectrum, actually representing a distinct minority, are courts that require a showing of bad faith before any form of sanction is applied. Other courts expect such a showing, but only for the imposition of certain more serious sanctions, such as the application of an adverse inference or the entry of a default judgment. Further relaxing the scienter requirement, some courts do not require a showing of bad faith, but do require proof of purposeful, willful or intentional conduct, at least as to certain sanctions, so as not to impose sanctions based solely upon negligent conduct. On the other side of the spectrum, we find courts that do not require a showing of purposeful conduct, at all, but instead require merely that there be a showing of fault, with the degree of fault, ranging from mere negligence to bad faith, impacting the severity of the sanction. If this continuum were not complicated enough, some circuits initially appear to have adopted universal rules, only to later shade their precedents with caveats. Other times, the difference between decisions appear to be more a matter of semantics, perhaps driven by state law, with some courts, for example, identifying as "bad faith" what others would call "recklessness" or even "gross negligence."

United Med. Supply Co., 77 Fed. Cl. at 266–67 (footnotes omitted). The court noted that United States Court of Federal Claims Rule 37, which is modeled after Civil Rule 37, does not require bad faith to impose sanctions. *Id.* at 267. The court explained:

noted that many courts have taken a flexible approach to when Rule 37 sanctions can be triggered. *See id.* at 271 n.26 ("Courts have held that, for purposes of Federal Rule 37(b)(2), a party fails to obey a court 'order' whenever it takes conduct inconsistent with the court's expressed views regarding how discovery should proceed. As such, the court need not issue a written order compelling discovery for RCFC 37 to be triggered." (internal citations omitted)); *see also Domanus v. Lewicki*, --- F.R.D. ----, 2012 WL 2072866, at *4 (N.D. Ill. Jun. 8, 2012) ("'In other words, the Court may sanction a party pursuant to Rule 37 for discovery violations; however these sanctions are limited to circumstances in which a party violates a court order or discovery ruling.' 'Courts have broadly interpreted what constitutes an 'order' for purposes of imposing sanctions.'" (citations omitted));[19] Wright, *supra*, at 816 ("[W]hen a violation of the duty [to preserve] occurs before

> The omission of any *mens rea* requirement in this rule is not an oversight. Indeed, in 1970, FED.R.CIV.P. 37(d) was modified to eliminate the requirement that the failure to comply with a discovery request be 'willful,' with specific indication in the drafters' notes that, under the modified rule, sanctions could be imposed for negligence. Under the revised rule, wilfullness instead factors only into the selection of the sanction. As such, it is apparent that 'bad faith' need not be shown in order to impose even the most severe of the spoliation sanctions authorized by RCFC 37(b) and (d). And courts construing the Federal rule counterpart to this rule have so held.

Id. at 267–68 (internal citations and footnote omitted).

The court also noted that Rule 37(e)'s safe harbor's protection for good-faith preservation implies that sanctions are permitted under Rule 37 for conduct less culpable than bad faith. *See United Med. Supply Co.*, 77 Fed. Cl. at 270 n.24 ("That the Advisory Committee would need to adopt a limited 'good faith' . . . exception to the imposition of sanctions belies the notion such sanctions should be imposed only upon a more traditional finding of 'bad faith.'").

[19]Some courts note that while Rule 37 requires a court order, the difference between imposing sanctions under Rule 37 or under inherent authority is immaterial because the sanctions analysis is the same under either source of authority. *See Domanus*, 2012 WL 2072866, at *4 ("Nevertheless, the Court need not determine whether it is exercising its statutory or inherent authority. 'Under

litigation commences, it is less clear as to whether or not Rule 37(e) may be invoked. Therefore, Rule 37(e) is problematic in that it 'addresses only sanctions under the federal rules, which generally do not apply prior to commencement of litigation.'" (footnote omitted)).

Other courts have found the rule inapplicable because the conduct did not amount to "routine, good-faith operation of an electronic storage system." *See, e.g.*, *Domanus*, 2012 WL 2072866, at *6 & n.4 (Rule 37(e) did not apply because intentional destruction of a hard drive during litigation (after it crashed and the party had already allegedly recovered and produced what it could) was neither "routine" or "ordinary," and Rule 37(e) does not apply once a preservation duty arises);[20] *Bootheel Ethanol Invest., L.L.C. v. Semo Ethanol Coop.*, No. 1:08-CV-59 SNLJ, 2011 WL 4549626, at *4 (E.D. Mo. Sept. 30, 2011) (rejecting application of Rule 37(e) after the plaintiff threw away a hard drive because Office Depot said it would not start, explaining that "it cannot now be said that information was lost due to routine, good-faith operation of the computer" because it was not even known whether ESI was lost at all, since all that was known was that Office Depot confirmed that the computer would not boot up); *United States v. Universal Health Servs., Inc.*, No. 1:07cv00054,

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either Rule 37 or under the Court's inherent authority, the analysis for imposing sanctions is essentially the same.'" (citation omitted)).

[20]It seems clear that some courts believe that Rule 37(e) does not apply once a duty to preserve arises. This may not comport with the Committee's original intent in enacting Rule 37(e). Since sanctions are not generally available for failing to preserve before the duty to preserve arises, and since Rule 37(e) was meant to alleviate some of the concerns about excessive sanctions for lost ESI, presumably it was meant to apply in some respects after the duty to preserve arises. *See* Allman, *The Impact of Rule 37(e)*, *supra*, at 26 ("[S]ome courts 'have completely ignored the clear implication of Rule 37(e)—namely that it applies after the duty to preserve has arisen,' thereby 'render[ing] the rule largely superfluous.'" (second alteration in original) (footnote omitted)); *id.* at 30 ("The mere fact that the loss occurs after a preservation duty has already attached is, of course, not decisive."); Hebl, *supra*, at 84 ("Rule 37(e) creates a safe harbor for parties after the preservation obligation has arisen, whether it is due to a court order or a party's reasonable anticipation of litigation.").

2011 WL 3426046, at *5 (W.D. Va. Aug. 5, 2011) (Rule 37(e) did not apply when a party's electronic data became much less accessible due to its failure to implement a litigation hold until two years after the duty to preserve arose because this was negligent and not routine, good-faith operation of an electronic storage system);[21] *Wilson v. Thorn Energy, LLC*, No. 08 Civ. 9009(FM), 2010 WL 1712236, at *3 (S.D.N.Y. Mar. 15, 2010) (rejecting Rule 37(e) argument based on loss of flash drive after duty to preserve arose because the Advisory Committee notes explain that "'routine operation' relates to the 'ways in which such systems are designed, programmed, and implemented to meet the party's technical and business needs,'" but "the flash drive was not overridden [sic] or erased as part of a standard protocol; rather it was lost because the Defendants failed to make a copy"; also concluding that the failure to make a copy of the drive meant that the party failed to act in good faith, which also precluded application of Rule 37(e)); *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 642 (S.D. Tex. 2010) ("[A] policy put into place after a duty to preserve had arisen, that applies almost exclusively to emails subject to that duty to preserve, is not a routine, good-faith operation of a computer system"); *KCH Servs., Inc. v. Vanaire, Inc.*, No 05-777-C, 2009 WL 2216601, at *1 (W.D. Ky. Jul. 22, 2009) (after the plaintiff accused the defendant of misappropriating the plaintiff's software (pre-litigation), the defendant instructed employees to delete all such software from their computers; this, coupled with failure to put a litigation hold on any electronic correspondence, led the court to conclude there was not routine, good-faith operation, and to impose an adverse inference instruction); *Stratienko v. Chattanooga-Hamilton Cty. Hosp. Auth.*, No. 1:07-CV-258, 2009 WL 2168717, at *4 (E.D. Tenn. Jul. 16, 2009) (reimaging of employee's

[21]The court ordered the production of back-up tapes to remedy the failure to preserve, but it was not clear whether this was considered a "sanction" under Rule 37 or a determination that inaccessible data should be produced based on a finding of good cause under Rule 26(b)(2)(B).

hard drive after employee's retirement did not fall within Rule 37(e) because the defendant had been on notice that information on the hard drive could be at issue and the reimaging took place immediately after the employee's retirement); *Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc.*, 621 F. Supp. 2d 1173, 1191–92 (D. Utah 2009) (Rule 37(e) did not apply to destruction of evidence when the defendant had no document destruction/retention policy and left it to employees to save documents they thought important); *Tech. Sales Assocs.*, 2009 WL 728520, at *8 (one relevant computer had approximately 70,000 files deleted with a tool known as "Eraser" in just one month during the discovery period; another computer had email files moved into the "recycle bin" the day before a scheduled forensic examination; the court held Rule 37(e) "is intended to protect a party from sanctions where the routine operation of a computer system inadvertently overwrites potentially relevant evidence, not when the party intentionally deletes electronic evidence"); *Pandora Jewelry, LLC v. Chamilia, LLC*, No. CCB-06-3041, 2008 WL 4533902, at *8 n.7 (D. Md. Sept. 30, 2008) ("To the extent the lack of production results from deletion of emails, Chamilia's failure to prevent the loss does not fall within the routine, good faith exception of Rule 37(e), which protects parties 'for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.'");[22] *Meccatech, Inc. v. Kiser*, No. 8:05CV570, 2008 WL 6010937, at *9 (D. Neb. Apr. 2, 2008) (imposing severe sanctions for intentional and bad faith discovery conduct and noting that intentional destruction is "not 'lost as a result of the routine, good-faith operation of an electronic information system'" (citing FED. R. CIV. P. 37(e))); *Doe v. Norwalk*

[22]The court also implied that Rule 37(e) could not apply once the duty to preserve had arisen. *See Pandora Jewelry*, 2008 WL 4533902, at *8 n.7 ("[B]ecause Chamilia had a duty to preserve documents when it sent the January 8 and 15, 2007 communications and the October 2, 2007 communication, Chamilia's failure to preserve documents does not fall within the protective scope of Rule 37(e).").

Cmty. Coll., 248 F.R.D. 372, 378 (2007) ("[I]n order to take advantage of the good faith exception, a party needs to act affirmatively to prevent the system from destroying or altering information, even if such destruction would occur in the regular course of business. Because the defendants failed to suspend it at any time, . . . the court finds that the defendants cannot take advantage of Rule 37(f)'s good faith exception. . . . This Rule therefore appears to require a routine *system* in order to take advantage of the good faith exception, and the court cannot find that the defendants had such a system in place.");[23] *Peskoff v. Faber*, 244 F.R.D. 54, 60–61 (D.D.C. 2007) (sanctions were permitted for failure to turn off auto-delete features after the preservation duty arose and Rule 37(f) did not provide protection because that rule requires a litigation hold and turning off auto-delete features; sanctions were precluded for the period before notice of litigation because Rule 37(f) does not require auto-delete features to be disabled in that period and no exceptional circumstances were present);[24] *United States v. Krause* (*In re Krause*), 367 B.R. 740, 767–68 (Bankr. D. Kan. 2007) (Rule 37(f) did not apply because the installation of the GhostSurf program, a program designed to wipe or eradicate data or files, on one computer after the court ordered turning over electronic

[23]The court explained that at one point emails were backed up for one year, and at an earlier point were only backed up for six months or less. The defendants did not have "one consistent, 'routine' system in place," and did not follow a State Librarian's policy of retaining electronic documents for two years. Further, the defendants did nothing to stop the destruction of backup tapes after the duty to preserve arose. *Doe*, 248 F.R.D. at 378. Because the Rule 37(e) advisory committee notes indicate that "the Rule only applies to information lost 'due to the 'routine operation of an electronic information system'—the ways in which such systems are generally designed, programmed, and implemented to meet the party's technical and business needs,'" it could not apply in this case, where there was no routine system in place. *Id.*

[24]Although the court found that sanctions were precluded for continuing the auto-delete feature before notice of litigation was received, the court stated that "[n]onetheless, Rule 37(f) must be read in conjunction with the discovery guidelines of Rule 26(b)." *Peskoff*, 244 F.R.D. at 61. The court concluded that the balancing factors in Rule 26(b)(2)(C) authorized requiring the defendant to participate in a process to ascertain whether a forensic examination was justified. *Id.*

evidence and on another the day before turning it over, was not routine, good-faith operation of an electronic information system; there was an obligation to disable the wiping feature once the preservation duty arose and certainly to not reinstall and run the program, as the debtor did here);[25] *cf. Disability Rights Council of Greater Wash. v. Wash. Metro. Transit Auth.*, 242 F.R.D. 139, 145–46 (D.D.C. 2007) (defendant failed to stop its email system from automatically deleting all emails after 60 days until at least more than two years after suit was filed; court held that "it is clear that [Rule 37(e)] does not exempt a party who fails to stop the operation of a system that is obliterating information that may be discoverable in litigation"; court also found Rule 37(e) inapplicable because the plaintiffs did not seek sanctions but rather that the defendant be required to search backup tapes for discoverable information previously deleted).[26]

And other courts have found that sanctions were not appropriate without the need to specifically apply Rule 37(e). *See, e.g.*, *Denim N. Am. Holdings, LLC v. Swift Textiles, LLC*, 816 F. Supp. 2d 1308, 1311–12, 1328–30 (M.D. Ga. 2011) (refusing sanction of dismissal or adverse inference based on individual employees' practice of manually deleting emails because circuit law

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[25]The court noted that "[j]ust as a litigant may have an obligation to suspend certain features of a 'routine operation,' the Court concludes that a litigant has an obligation to suspend features of a computer's operation that are not routine if those features will result in destroying evidence." *In re Krause*, 367 B.R. at 768. The court held that in this case "that obligation required Krause to disable the running of the wiping feature of GhostSurf as soon as the preservation duty attached. And it certainly obligated Krause to refrain from reinstalling GhostSurf when his computers crashed and he restored them." *Id.*

[26]The court noted: "I am anything but certain that I should permit a party who has failed to preserve accessible information without cause to then complain about the inaccessibility of the only electronically stored information that remains. It reminds me too much of Leo Kosten's definition of chutzpah: 'that quality enshrined in a man who, having killed his mother and his father, throws himself on the mercy of the court because he is an orphan.'" *Disability Rights Council of Greater Wash.*, 242 F.R.D. at 147.

required bad faith, and citing Rule 37(e), but not seeming to rely on it in denying sanctions (and not mentioning Rule 37(e) in denying reconsideration)); *Bryden v. Boys and Girls Club of Rockford*, No. 09 C 50290, 2011 WL 843907, at *5 (N.D. Ill. Mar. 8, 2011) (the court denied a motion for sanctions without prejudice when the defendant's third-party contractor that hosted the defendant's domain and email accounts upgraded their server without the defendant's knowledge and deleted all prior emails, a year after the preservation duty began, but did so because it did not yet have enough information on prejudice to the plaintiff or on the defendant's efforts to preserve; the court cited Rule 37(e) in its description of the legal standard, but did not say whether it applied); *Viramontes v. U.S. Bancorp*, No. 10 C 761, 2011 WL 291077, at *3–5 (N.D. Ill. Jan. 27, 2011) (denying request for adverse inference as a sanction for the defendant's destruction of emails pursuant to its routine document retention policy because the emails were destroyed before the duty to preserve arose and there was no bad faith given the routine operation of the document destruction policy; mentioned Rule 37(e) in the statement of legal standards, but did not seem to directly apply it); *Sue v. Milyard*, No. 07-cv-01711-REB-MJW, 2009 WL 2424435, at *2 (D. Colo. Aug. 6, 2009) (after video footage of a strip search at issue was recorded over within five to seven days due to the normal operating process of the camera's computer system, and the request to retain it was not received until after the normal process deleted it, the court denied sanctions, but although Rule 37(e) was cited in the legal standards section of the opinion, there was no indication that it was actually applied and the court seemed to rely on lack of intentional destruction, as required for use of inherent authority); *cf. Northington v. H & M Int'l*, No. 08-CV-6297, 2011 WL 663055, *8–9, *14, *16, *21 (N.D. Ill. Jan. 12, 2011) (the defendant was grossly negligent and reckless in preserving ESI related to the discrimination claim, which eventually led to email accounts and other ESI being destroyed as part

of routine business operations; the court imposed some, but not all, requested sanctions and noted Rule 37(e) in the legal standards but did not seem to apply it); *Keithley v. Home Store.com, Inc.*, No. C-03-04447 SI (EDL), 2008 WL 383384, at *1, *4–5, *16 (N.D. Cal. Aug. 12, 2008) (discussing Rule 37(e) but not whether it applied; discovery misconduct included failure to properly administer a litigation hold on electronic documents; court imposed monetary sanctions and an adverse inference for what it described as reckless and egregious discovery misconduct, seemingly under both inherent authority and Rule 37); *Okla. ex rel. Edmondson v. Tyson Foods, Inc.*, No. 05-CV-329-GKF-SAJ, 2007 WL 1498973, at *6 (N.D. Okla. May 17, 2007) (advising the parties, without explanation, that "they should be very cautious in relying upon any 'safe harbor' doctrine as described in new Rule 37(f)").

II. Meaning of "routine, good-faith operation of an electronic storage system"

"Routine" has been described as "actions taken 'according to a standard procedure' or those which are 'ordinary.'" Allman, *Impact of Rule 37(e)*, *supra*, at 28. "The Committee Note to Rule 37(e) speaks of 'the ways in which such [electronic storage] systems are generally designed, programmed, and implemented' . . . ." *Id.* at 28–29; *see also* Davidovitch, *supra*, at 1136 (noting that the Rules Committees defined "routine" as "the 'ways in which such systems are generally designed, programmed, and implemented to meet the party's technical and business needs'" and that "'[s]uch features are essential to the operation of electronic information systems.'" (alteration in original)). Davidovitch argues that the Committee's "choice of language indicates that the Judicial [Conference] Committee believes that a system's 'routine' operation is more than just an operation which is periodic or habitual, but rather one that has a purpose linked to the party's particular 'technical and business needs.'" Davidovitch, *supra*, at 1136. "In essence, a determination of

whether a system is 'routine' should focus on how the system was operated generally, without regard to the particular facts surrounding the lost information in question." *Id.* Relatedly, some have pointed out that a document retention policy is critical to being able to take advantage of the rule. *See* Jacquelyn A. Caridad & Stephanie A. Blair, *Electronic Discovery Decisions Relating to the Amended Federal Rules*, 80 PA. B. ASS'N Q. 158, 171 (2009) (describing a case that "elevates the importance of establishing a thorough retention program with sufficient oversight," and that "indicates that organically derived retention and storage practices that almost solely rely on employees for retention of important company documents and data are no longer acceptable"); Rachel Hytken, Comment, *Electronic Discovery: To What Extent Do the 2006 Amendments Satisfy Their Purposes?*, 12 LEWIS & CLARK L. REV. 875, 893 (2008) ("In other words, to receive the benefits of a safe harbor, a party must have a functioning and enforced records management system.").

Another commentator has explained "routine operation" as used in Rule 37 as follows:

> Turning first to the Rule's requirement that the party lose the information during the "routine operation" of its electronic information systems, little debate exists regarding whether an individual's actions may fall within this provision. The routine operation of a computer system includes more than simply a "periodic or habitual" operation of an electronic system. In particular, the Judicial Conference suggests that to be routine, the operation must be "designed, programmed, and implemented to meet the party's technical and business needs." To this end, the court must examine the electronic system as a whole and determine whether the system operated to generally serve the technical and business needs of the party. As such, the court will evaluate the computer system as a whole and not consider how the system operated in the specific instance that resulted in the loss of responsive information.

Alexander B. Hastings, Note, *A Solution to the Spoliation Chaos: Rule 37(e)'s Unfulfilled Potential to Bring Uniformity to Electronic Spoliation Doctrine*, 79 GEO. WASH. L. REV. 860, 874–75 (2011)

(footnotes omitted).

There is some evidence that manual deletion of ESI would not qualify as routine operation under the rule. *See* John M. Barkett, *Help Has Arrived . . . Sort Of: The E-Discovery Rules*, SN082 ALI-ABA 201 (2008) ("Rule 37(e) does not seem to provide a safe harbor for the electronic storage habit of individuals . . . ."); Emily Burns, Michelle Greer Galloway & Jeffrey Gross, *E-Discovery: One Year of the Amended Federal Rules of Civil Procedure*, 64 N.Y.U. ANN. SURV. AM. L. 201, 220 (2008) (noting that in *Doe*, the court stated that Rule 37(e) requires a "routine system," which is "a system which is 'generally designed, programmed, and implemented to meet the party's technical and business needs,'" and that the court "suggested that the deletion of the defendant's emails was not the result of an established system, but rather of ad hoc deletions by individual custodians"); Favro, *supra*, at 326–27 ("The Safe Harbor only applied to data that was destroyed due to the ordinary functions of a computer system. It did not prevent sanctions when data was manually deleted. For example, the Safe Harbor afforded no protection to a company that relied on its individual employees to manually archive and delete electronic data." (footnotes omitted)); *see also* Favro, *supra*, at 333 (describing a case that held that programming server to automatically delete all mail not manually archived by employees was unreasonable because "'[w]hile a party may design its information management practices to suit its business purposes, one of those business purposes must be accountability to third parties'" (quoting *Philip M. Adams*, 621 F. Supp. 2d at 1191, 1195)) *cf. Coburn*, 2010 WL 3895764, at *3 ("The destruction of emails as part of a regular good-faith *function of a software application* may not be sanctioned absent exceptional circumstances." (emphasis added)).[27] The cases focus heavily on electronic systems and auto-delete functions, not

[27] *Coburn* also indicated that Rule 37(e) can apply to electronic information systems of any

on the involvement of individual decisions to delete, even if the individuals have a regular practice of deleting or preserving material. And the Advisory Committee seemed to contemplate automated functions that had little, if any manual involvement. *See* Civil Rules 2005 Report, *supra*, at 73 (explaining that the rule responds to "a distinctive feature of electronic information systems, the routine modification, overwriting, and deletion of information that attends normal use," and that "[e]xamples of this feature in present systems include programs that recycle storage media kept for brief periods against the possibility of a disaster that broadly affects computer operations; automatic overwriting of information that has been 'deleted'; programs that change metadata (automatically created identifying information about the history or management of an electronic file) to reflect the latest access to particular electronically stored information; and programs that automatically discard information that has not been accessed within a defined period or that exists beyond a defined period without an affirmative effort to store it for a longer period. . . . [T]he proposed rule recognizes that such automatic features are essential to the operation of electronic information systems.").

Nonetheless, there is some evidence that minimal individual intervention in an electronic system may not take a protected activity out of Rule 37(e)'s protections. *See Miller*, 2011 WL 1458491, at *3 (rejecting argument that denial of sanctions was erroneous because the recording device did not automatically overwrite previous videos but instead required a decision by the user to reformat the hard drive). As the *Miller* court pointed out, the committee notes state that routine operation "includes the alteration and overwriting of information, *often* without the operator's specific direction or awareness," FED. R. CIV. P. 37(e), Advisory Comm. Note (2006 Amendments)

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size. *Id.* at *3 n.3 ("While Rule 37(e) is more readily applicable to larger scale 'electronic information systems,' Coburn asserts, and Pulte does not dispute, that the Rule is also applicable to her home use of an electronic information system.").

(emphasis added), and this suggests that while the Advisory Committee contemplated that the routine operations covered by the rule would usually occur without the operator's direction, it was not limited to such situations and might also include instances of deletion at the operator's direction. *See Miller*, 2011 WL 1458491, at *3 n.1 ("Here, it was essential to the operation of Defendants' cameras that the user either save the recordings on the DVD or rewrite the information on it. Critically, by noting that routine operations 'often' occur without the operator's specific direction, the drafters acknowledge that 'routine operations' can still occur despite the direct involvement of a system user. Accordingly, Plaintiffs' contention that the activity of the camera user—which was extremely minimal in this case—takes the electronic information outside of Rule 37(e)'s safe harbor construes Rule 37(e) too narrowly."). Thus, a party has some basis for arguing that some manual intervention in an electronic system does not necessarily mean that the system is not operating "routinely," but given that Rule 37(e) has really only been applied in a handful of cases not involving the additional complication of manual intervention, it is safe to assume that the more manual intervention or individual decisionmaking involved, the less likely it is that the rule will be applied.

With respect to defining "good faith," Allman explains that "[t]he absence of 'bad faith' plays a decisive role in defining the presence of 'good faith.' The cases typically hold that 'bad faith' is 'when a thing is done dishonestly and not merely negligently.'" Allman, *Impact of Rule 37(e)*, *supra*, at 29 (footnotes omitted); *see also* Wright, *supra*, at 819 ("[A]s a general principle, ['good faith'] is commonly understood to be the absence of bad faith."). Clearly, "[a] party which utilizes a system involving routine destruction for the purpose of eliminating information believed to be disadvantageous is not operating in 'good faith.'" Allman, *supra*, at 31.

Another commentator has suggested that "the good faith standard limits the imposition of

spoliation sanctions for failure to provide electronically stored information to a showing of reckless or intentional conduct." Hebl, *supra*, at 83. Hebl suggests that "[g]ood faith is generally understood to be the absence of bad faith, so if a spoliating party can show that its actions were not in bad faith, it will have met the state of mind standard required by Rule 37(e)."[28] *Id.* at 96. According to Hebl, "it is well settled that 'bad faith' does in fact mean intentional or reckless conduct," and therefore the 'good faith' standard in Rule 37(e) requires acting without intentional or reckless conduct, despite the Advisory Committee's assertions that it was stopping short of an reckless standard by adopting an "intermediate standard." *Id.* at 97. Hebl concludes: "[A]lthough the Advisory Committee suggested that it was adopting an 'intermediate standard,' the adoption of language which already had a well-settled meaning in the spoliation context, in combination with the Advisory Committee's own statements, leads to the inevitable conclusion that Rule 37(e)'s good faith standard requires a showing of intent or recklessness." *Id.* at 98–99. He suggests several types of conduct that would constitute bad faith and take the party's conduct outside the scope of Rule 37(e):

> To summarize, if a party consciously and purposefully downloads software that targets and deletes relevant information from its storage system, bad faith is present and Rule 37(e)'s protection will be unavailable. Second, if a party is subjectively aware that its document deletion policy will result in the destruction of relevant

[28]The good-faith standard in Rule 37(e) may be more nuanced and flexible than just the absence of bad faith. Clearly a party cannot act in bad faith and take advantage of the safe harbor, but the rule seems to go further than that, requiring affirmative good-faith operation of an electronic information system. The *Cache La Poudre* case may illustrate this. In that case, the party did take some actions to ensure that ESI was not destroyed. But because the party relied on employees to implement most of its preservation obligations, the court imposed sanctions. The party most likely was not acting in bad faith, with the intent to hide information from the other side. But if the party clearly did not take sufficient actions to preserve, even if they were not intentionally hiding information, it seems there is a good argument that the party did not act in good faith. Perhaps the "good faith" standard was meant to provide courts with flexibility for dealing with situations somewhere between negligent and intentional or reckless conduct.

> evidence, and that party does not intervene to stop this policy, its conduct is willfully blind, the party is acting in bad faith, and Rule 37(e)'s protection will be unavailable. Finally, the intentional destruction of evidence in direct response to pending litigation does not, under any circumstances, receive Rule 37(e)'s protection.

Id. at 103.

Another commentator has noted that "by itself, . . . the good-faith clause does not reveal the level of mens rea at which a party may still claim protection under the safe harbor provision. . . . [T]he Judicial Conference intended the good-faith standard to serve as a middle ground between the alternative of a strict intentional or narrow reasonableness standard." Hastings, *supra*, at 875. He suggests that the good-faith standard represented a compromise between the "reasonableness" standard proposed in the proposal published for public comment and the intentional standards in the footnoted version of the published proposal. *Id.* at 876. As a result, he concludes that "[t]he hesitancy of the Judicial Conference to fully adopt an intentional or reasonableness standard demonstrates that the good-faith standard should not be read as a firm standard, but rather should be interpreted as a malleable approach to mens rea." *Id.* He also suggests that courts have "erred on the side of caution and have narrowly interpreted the protections of Rule 37(e)," but that "the varying interpretations of the Rule prevent parties from developing 'routine' computer systems that appropriately maintain and delete electronic information." *Id.*

The case law has also provided examples of certain actions that do not qualify as routine, good-faith operation of an electronic storage system. *See, e.g.*, *Bootheel*, 2011 WL 4549626, at *4 (throwing away computer that had crashed after Office Depot confirmed it would not reboot was not routine, good-faith operation of an electronic storage system); *Wilson*, 2010 WL 1712236 ("routine, good-faith operation" does not encompass failure to make a copy of relevant ESI, but rather is

directed to overwriting as part of standard protocol); *Rimkus*, 688 F. Supp. 2d at 642 (concluding that "a policy put into place after a duty to preserve had arisen, that applies almost exclusively to emails subject to that duty to preserve, is not a routine, good-faith operation of a computer system," and that the selective and manual deletion of emails was not covered by Rule 37(e)).[29]

III. Use of the "absent exceptional circumstances" clause

The courts have not defined this term and I did not find any cases in which the court utilized this exception to avoid application of Rule 37(e). As noted in the section above on the history of Rule 37(e), there is some evidence that the Advisory Committee intended this provision to apply to instances of severe prejudice, but it ended up leaving flexibility for courts to interpret the exception. The courts have not done so. *See* Hytken, *supra*, at 895 ("Neither the Committee nor the courts have attempted to define ['exceptional circumstances']; there is no sense of when, if, or how this term will take on meaning.").

According to one commentator, the exceptional circumstances exception "allows a party seeking sanctions to override the safe harbor if it can establish that the circumstances under which the information was lost necessitate sanctions, even though the party responsible for the loss has satisfied the three elements of Rule 37(e)." Davidovitch, *supra*, at 1140. Davidovitch indicates that although the Rules Committees did not specify what constitutes an exceptional circumstance, they did indicate that "it is one in which 'a court should provide remedies to protect an entirely innocent party requesting discovery against serious prejudice arising from the loss of potentially important

[29]For more examples, see the section above on cases declining to apply Rule 37(e) due to the lack of "routine, good-faith operation."

information.'"[30] *Id.*; *see also* Hardaway et al., *supra*, at 586 (concluding that the exception for "exceptional circumstances" "suggests that a showing of extreme prejudice to the requesting party's case might overcome the safe harbor"). Davidovitch predicted that "if courts choose to apply the 'exceptional circumstances' provision in the same way that the courts [have interpreted that language in other contexts], then they withhold the benefit of the rule from parties which are found to repeatedly lose information, without the appearance of bad faith, or from parties that have a history of dishonesty." Davidovitch, *supra*, at 1141.

IV. Litigation Holds

Many courts have held that a party must have implemented an adequate litigation hold in order to take advantage of the protection of Rule 37(e). *See, e.g.*, *Webb v. Jessamine Cty. Fiscal Court*, No. 5:09-CV-314-JMH, 2011 WL 3652751, at *6 (E.D. Ky. Aug. 19, 2011) ("Good-faith operation requires a party intervene to prevent the elimination of information on the system 'because of pending or reasonably anticipated litigation.'" (citing FED. R. CIV. P. 37 (2006 Advisory Committee's Note))); *Cannata v. Wyndham Worldwide Corp.*, No. 2:10-cv-00068-PMP-LRL, 2011 WL 3495987, at *3 (D. Nev. Aug. 10, 2011) ("The Advisory Committee's comments to Rule 37(e) provide that any automatic deletion feature should be turned off once a litigation hold is imposed."); *Point Blank Solutions, Inc. v. Toyobo Am., Inc.*, No. 09-61166-CIV, 2011 WL 1456029, at *11 (S.D. Fla. Apr. 5, 2011) (citing Rule 37(e) advisory committee note for proposition that "[a] party has an obligation to retain relevant documents, including emails, once litigation is reasonably anticipated");

[30]Davidovitch cites the GAP report included in the Civil Rules Committee's report, which was eventually attached to the Standing Committee's report to the Judicial Conference. However, as noted earlier in the section on the history of Rule 37(e), it appears that there was some concern at the Standing Committee level about the language relating to prejudice and it was removed from the committee note.

Coburn, 2010 WL 3895764, at *3 ("If the routine operation of the computer system is likely to destroy electronically stored information that is relevant and not otherwise available on another source, a party must place a litigation hold suspending the destruction."); *S.E. Mech. Servs.*, 2009 WL 2242395, at *2 (noting that Rule 37(e) contains a limited safe harbor, but that "[o]nce a party files suit or reasonably anticipates doing so, however, it has an obligation to make a conscientious effort to preserve electronically stored information that would be relevant to the dispute." (citing *Peskoff v. Faber*, 251 F.R.D. 59, 62 (D.D.C. 2008); FED. R. CIV. P. 37, advisory committee notes (2006 amendments))); *Kessler*, 2009 WL 2603104, at *18 ("The Advisory Committee notes [to Rule 37(e)] make clear, however, that '[w]hen a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system' is *required*." (emphasis added) (second alteration in original) (quoting Advisory Committee Note to the 2006 Amendment to Federal Rule of Civil Procedure 37(e))); *Major Tours, Inc. v. Colorel*, No. 05-3091, 2009 WL 2413631, at *4 (D.N.J. Aug. 4, 2009) ("The Advisory Committee comments to FED. R. CIV. P. 37(e) further prescribe that any automatic deletion feature should be turned off and a litigation hold imposed once litigation can be reasonably anticipated."); *KCH Servs.*, 2009 WL 2216601, at *1 (failure to implement litigation hold after notice fell "beyond the scope of 'routine, good faith operation of an electronic information system'"); *Arista Records*, 608 F. Supp. 2d at 431 n.31 ("The Advisory Committee notes make clear, however, that '[w]hen a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system' is required."); [31] *Peskoff*, 244 F.R.D. at 60 ("The

[31] The court did not apply Rule 37(e) because sanctions were requested pursuant to its inherent authority, but found Rule 37(e) instructive on the parties' duty to preserve ESI.

Advisory Committee comments to amended Rule 37(f) make it clear that any automatic deletion feature should be turned off and a litigation hold imposed once litigation can be reasonably anticipated."); *Disability Rights Council of Greater Wash.*, 242 F.R.D. at 146 ("[I]t is clear that this Rule does not exempt a party who fails to stop the operation of a system that is obliterating information that may be discoverable in litigation."); *see also* Burns et al., *supra*, at 220 ("Other courts have taken the producing party's 'shield' embodied in Rule 37(e) and turned it into a 'sword' to be used by the requesting party to prove spoliation of evidence. At least one well-respected e-discovery jurist has interpreted the advisory committee's notes to Rule 37(e) as actually imposing a separate affirmative obligation on parties to disable any routine systems that would eliminate discoverable information after the duty to preserve had attached."); Favro, *supra*, at 327 ("Most courts applying Rule 37(e) have issued sanctions for spoliation when a party has failed to suspend particular aspects of its computer systems after a preservation duty attached. Thus, the Advisory Committee did impose a duty to stop the routine destruction of electronic data in certain circumstances despite its earlier misgivings about doing so."); Hardaway et al., *supra*, at 585–86 ("Courts have generally concluded that, when the duty to preserve attaches to evidence, the safe harbor of Rule 37(e) does not apply because a party cannot, in good faith, delete this relevant evidence, even as part of a records management program. Indeed, once a party is aware of or should reasonably anticipate litigation, the party has a duty to implement a litigation hold. A party who fails to implement the litigation hold cannot take advantage of the safe haven." (footnotes omitted)); Joanna K. Slusarz, *No Fishing Poles in the Office*, 78 DEF. COUNS. J. 450, 461 (Oct. 2011) ("A party must show that it has modified or suspended the routine operation of computer systems to prevent loss of data that is subject to a preservation requirement" in order to take advantage of Rule 37(e).);

Wright, *supra*, at 814–15 ("Under Rule 37(e), good faith requires that a party adhere to its preservation obligation, whereby it *must* intervene with any document destruction policy and 'modify or suspend certain features of that routine operation to prevent the loss' of potentially relevant documentation when litigation is reasonably foreseeable." (emphasis added)); *cf.* Hytken, *supra*, at 892 ("The safe harbor discourages a judge from levying sanctions against a party who disposes of E.S.I. as part of their regular information management system in good faith and *before their litigation hold responsibilities arise*. A producing party benefits from Rule 37 when 1) acting in 'good faith', 2) *it implements a litigation hold*, and 3) the loss of E.S.I. resulted from 'the routine operation of . . . an electronic information system.'" (emphases added)).[32]

The courts that have indicated that Rule 37(e) requires a litigation hold often focus on the following language in the committee note:

> Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. . . . The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of any information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a "litigation hold."

FED. R. CIV. P. 37 Advisory Committee Note (2006 Amendment). The Advisory Committee's report submitting the final proposed rule to the Judicial Conference indicated that implementation of a

[32]Hytken argues that "[t]he second requirement of the safe harbor, implementing a proper litigation hold, has great importance because a court may presume when a party has taken proper steps to put a litigation hold in place that it has acted in good faith." Hytken, *supra*, at 893.

litigation hold would often bear on the court's determination of a party's good faith, but would not be dispositive: "As the Note explains, good faith *may require* that a party intervene to suspend certain features of the routine operation of an information system to prevent loss of information subject to preservation obligations. Such intervention is often called a 'litigation hold.'. . . The steps taken to implement an effective litigation hold *bear on good faith*, as does compliance with any agreements the parties have reached regarding preservation and with any court orders directing preservation." Civil Rules 2005 Report, *supra*, at 75 (emphases added). The Advisory Committee did not seem to put the same emphasis on a litigation hold as the courts subsequently interpreting the rule.

Although numerous cases have read the advisory committee notes to Rule 37(e) to require a litigation hold in order to take advantage of the rule's protections, at least some commentators have recognized that this is an inaccurate reading of the note. *See* Hebl, *supra*, at 105 (noting that the court's holding in *Peskoff* that the committee note requires a litigation hold "is not what the note says . . . . Rather the note merely provides that failure to turn off an automatic deletion feature may be one factor to consider in determining whether good faith is present and . . . , if the failure to turn this feature off is not the result of reckless or intentional conduct, a sanction cannot be imposed"); Douglas L. Rogers, *A Search for Balance in the Discovery of ESI since December 1, 2006*, 14 RICH. J. L. & TECH. 8, 22 (2008) (disagreeing with the conclusion reached by some courts that the advisory committee notes require the implementation of a litigation hold in all circumstances in order to take advantage of the rule).

V. What is a "sanction"?

Courts and commentators have not directly addressed what constitutes a "sanction" that

cannot be entered if a party's actions fall under the protections of Rule 37(e). The rule text limits its application to only sanctions provided for under the rules. The advisory committee notes reflects the same: "The protection provided by Rule 37(f) applies only to sanctions 'under these rules.' It does not affect other sources of authority to impose sanctions or rules of professional responsibility." FED. R. CIV. P. 37 Advisory Committee Note (2006 Amendment). Thus, a party who meets the requirements for applying Rule 37(e) would clearly be exempt from the specific sanctions under Rule 37(b), for example. Courts that have applied Rule 37(e) have precluded requested sanctions including dismissal or default, an adverse inference instruction, and monetary expenses. *See, e.g.*, *Kermode*, 2011 WL 2619096, at *2 (denying default judgment and an evidentiary hearing for an adverse inference); *Olson*, 2010 WL 2639853, at *3 (denying request for an order barring production of any evidence of an alleged theft and an award of expenses incurred in bringing the motion for sanctions).

The case law does not clearly indicate whether Rule 37(e) would preclude a separate category of curative measures, remedies, or discovery management tools, as opposed to punitive sanctions, but a couple of cases may be instructive. In *Disability Rights Council of Greater Wash.*, 242 F.R.D. at 146, the court found Rule 37(e) inapplicable in part because the plaintiffs did not seek sanctions, but instead requested that the defendant be ordered to search backup tapes for information that was deleted pursuant to the defendant's automatic email deletion policy, which had not been suspended during litigation. This seems to imply that requiring searching backup tapes for inaccessible information that might have been reasonably accessible had an appropriate litigation hold been put in place is not a "sanction" barred by Rule 37(e).[33] Relatedly, in *Peskoff*, 244 F.R.D. at 60–61, the

[33]However, the court found Rule 37(e) inapplicable anyway because of the party's failure to

court found that Rule 37(e) did not require disabling automatic deletion features before litigation is anticipated, but still utilized Rule 26(b)(2)(C) to require the defendant to participate in a process to ascertain whether a forensic examination was justified. The court explained that "Rule 37(f) must be read in conjunction with the discovery guidelines of Rule 26(b). . . . I find that balancing the factors in Rule 26(b)(2)(C) authorizes me to require Faber to participate in a process designed to ascertain whether a forensic examination is justified because the emails are relevant, the results of the search that was conducted are incomprehensible, and there is no other way to try to find the emails." *Id.* at 61. It was not clear that the court was directly considering sanctions, but instead, in the context of discovery deficiencies, the questions of "whether it is time to appoint a forensic analyst who can search the network server and the individual hard drives of [relevant people] to see if any additional information can be retrieved . . ." and "who shall pay for such a forensic examination." *Id.* at 59. But the court's discussion of Rule 37(e) and its potential interaction with Rule 26(b)(2)(C) may imply that Rule 37(e) may not preclude curative measures even if other "sanctions" are precluded.

In sum, there is not enough case law applying Rule 37(e) to determine whether application of the rule would preclude curative measures.

VI. Conclusion

Rule 37(e) was intended to provide a narrow protection for loss of ESI subject to a preservation duty. The history of the rule provision indicates that the Advisory Committee was

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stop its automatic email deletion feature during litigation. *See Disability Rights Council of Greater Wash.*, 242 F.R.D. at 146. If Rule 37(e) had come into play because of the routine, good-faith operation of an electronic storage system, perhaps ordering searching of backup tapes might have been precluded.

primarily concerned with ensuring that courts distinguish between the loss of information in the world of paper discovery and the loss of information in the electronic world. The Advisory Committee wanted to ensure that courts and parties understood that because of both the volume of ESI and the potential for inadvertent loss of ESI, both of which were exponentially greater than in the world of paper discovery, the loss of ESI could not be treated in the same manner as the loss of information kept in static form. The application of the rule has been extremely narrow. It has only been applied in a handful of cases, and even in those cases it is not clear that the court would have reached a different result without the rule. I did not find any cases where it was clear that Rule 37(e) precluded sanctions and that a different result would have been reached without the rule.

In addition, while the rule was intended to address a narrow set of circumstances, many courts may have interpreted the rule even more narrowly than intended, by, for example, finding it inapplicable once a duty to preserve arises, finding a strict requirement of a litigation hold in the advisory committee notes, or relying on inherent authority for sanctions analysis. Nonetheless, the rule's principles may have influenced even those courts analyzing sanctions under inherent authority. The rule seems to have been a first step in the direction of providing comfort to parties in their efforts to adequately preserve ESI, but it appears to only apply in a narrow set of circumstances.

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

December 4, 2012

The Honorable David G. Campbell
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The Honorable Paul Grimm
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Dear Judges Campbell and Grimm:

Pursuant to Judge Campbell's request and my offer at the November Rules Committee meeting, the Department of Justice respectfully submits its further thoughts regarding potential changes to the Federal Rules of Civil Procedure concerning preservation sanctions. As discussed at the meeting, while the Department continues to question how widespread preservation sanctions issues may be, the proposed revision to Federal Rule of Civil Procedure 37(e) makes substantial progress in addressing some of our concerns. We have now had time to consult further within the Department and with other agencies and we conclude that proposed FRCP 37(e) is more consistent with language the Department may be inclined to support with a few proposed changes.

We offer these comments to assist the Committee in finalizing the proposed revision to FRCP 37(e). We respectfully request that the Committee make the changes we suggest below before forwarding the language to the Standing Committee for its January meeting, and request that our comments be forwarded to the Standing Committee as well. We also urge the Committee to submit the proposed FRCP 37(e) to the Standing Committee for purposes of discussion – rather than a final vote – at the January meeting. The Duke Subcommittee

proposals may affect the final sanctions rule language. We believe it would be advisable and more efficient to have thorough discussion of proposed 37(e) in January, and then a final vote on all of the proposed amendments once the Standing Committee has considered the Duke Subcommittee proposals at the June Standing Committee meeting. This sequencing will permit the Committee to determine whether there is further information that should be taken into account before reaching a final decision on the proposed 37(e).

The federal government has many interests to weigh in considering this potential amendment, since we are a party in one-third of all civil litigation in the federal courts. At various times, we are plaintiffs, defendants, litigants in complex cases, and parties in small matters. We are thus uniquely affected by any change. We offer the Committee the following general and specific observations regarding proposed FRCP 37(e).

General Observations

We provide four general observations regarding proposed FRCP 37(e). First, the Department agrees that, if a rule is going to be promulgated, it should apply equally to electronic documents, paper, and tangible things. The notes to proposed FRCP 37(e) should make this scope and application clear. Second, we strongly support including the concept of proportionality, as phrased in proposed FRCP 37(e)(3)(E). Third, we continue to support the Committee's removal of FRCP 37(e)(3)(D), as decided at the November 2012 meeting.

Finally, the proposed removal of current FRCP 37(e) is a key change and warrants additional consideration. The proposed revision to FRCP 37(e) does not expressly provide a safe harbor or address the routine operation of a computer system. In the Department's experience, while the case law is sparse in the use of this subsection, current FRCP 37(e) is valuable because it is used and relied upon when creating document retention policies and proactive preservation plans. Current FRCP 37(e) has the desired effect, and was a "carrot" for organizations to move toward better electronic document and information management systems. If current FRCP 37(e) is removed, this incentive will no longer exist. Many of the executive branch agencies we have consulted do not support the removal of current 37(e). We strongly suggest that current FRCP 37(e) and its accompanying note be preserved. At the very least, current FRCP 37(e) and its accompanying note text should be expressly included in the notes to the revised rule.

Specific Concerns with Proposed FRCP 37(e) Language

In addition to our general observations, we have specific concerns and suggestions regarding portions of the language of the proposed rule, specifically: (1) the scope of discovery in proposed FRCP 37(e); (2) the undefined use of "willful" and "bad faith" in proposed FRCP 37(e)(2)(a); and (3) several of the factors listed in proposed FRCP 37(e)(3) (specifically FRCP 37 (3)(A), and (3)(F)). We also have several suggestions for additional language to address concerns raised by proposed FRCP 37(e)(2)(a).

1. Scope of "Discoverable Information" in Proposed FRCP 37(e) is Ambiguous

Proposed FRCP 37(e) is limited to addressing the preservation of "discoverable information." It is unclear from the text and the accompanying note what "discoverable information" entails. Is it broader, narrower, or different from the scope outlined in FRCP 26? Does "discoverable information" include privileged information? Does "discoverable information," for example, include data a party would consider inaccessible, such as information on disaster recovery tapes? This broad language may be interpreted to include any failure to preserve any information, no matter how trivial, redundant, or marginally relevant the information may be. We recommend that the note clarify that the scope of discovery a party anticipates should be consistent with the scope of FRCP 26(b)(1). We are concerned that, absent clarification, the rule revision will trigger ancillary litigation regarding the scope of "discoverable information."

2. The Terms "Willful" and "In Bad Faith" are Undefined in the Proposed Rule and Have Been Inconsistently Interpreted by Courts.

The Department is concerned by the undefined use of "willful or in bad faith" in proposed FRCP 37(e)(2)(a). While the Committee notes that courts have experience with these concepts, there is no consistency within or across circuits. The desire for predictability and a uniform national standard that in part motivated the Committee to consider amending the rule will not be achieved because key terms are not defined. As reflected in Judge Grimm's decision in *Victor Stanley II*, courts have adopted a wide variety of interpretations for "willful" and "bad faith." We understand the rule lists the factors to be considered, but we are concerned that this is not the same as setting a national standard that would define these terms.

For example, in some tax litigation, "willfulness" includes reckless disregard and in other cases, "willfulness" may include "willful blindness." *See e.g. Jefferson v. United States*, 546 F.3d 477, 481-482 (7th Cir. 2008); *Phillips v. United States*, 73 F.3d 939, 942-943 (9th Cir. 1996)(finding no error in trial court's use of a jury instruction on "willfulness" that quoted a "gross negligence" standard); *United States v. Vespe*, 868 F.2d 1328, 1335 (3d Cir. 1989); *United States v. Williams*, 2012 WL 2948569, at *3 (4th Cir. July 20, 2012); *United States v. McBride*, 2012 WL 5464955, at *18 (D. Utah Nov. 8, 2012).

We are concerned that there may be unintended confusion for litigants and the courts if the rule lacks clarity on these important terms. For example, will certain technology or process failures – such as not turning off email auto-deletion or failing to preserve inaccessible data or destroying disaster recovery tapes—be universally interpreted by the courts under the proposed rule? We question whether courts will consistently evaluate how the actions of, for example, a third party contractor or social media provider in control of the relevant data, might be imputed to a litigant when the "willful" or "bad faith" standard is undefined.

We suggest that "willful" and/or "bad faith" be defined or clarified, at least in the note, to provide uniform guidance to the courts and litigants. The Department does not propose a definition at this time but we welcome the opportunity to work with the Committee to define this crucial term.

3. Comments and Concerns with Three of the Factors Listed in proposed 37(e)(3)

a. Suggestions for Proposed FRCP 37(e)(3)(A)

The current draft of proposed FRCP 37(e)(3)(A) does not account for a situation where a party repeatedly "loses" data while claiming ignorance of its preservation obligations. The Department has confronted this defense in past cases. We believe changing "was on notice" to "reasonably should have known" or similar language in proposed FRCP 37(e)(3)(A) would allow a court to take into account prior instances of the same or similar conduct by the party that would put the party on notice that it had a duty to preserve. We propose the following revision in advance of the Committee forwarding the language to the Standing Committee:

> "(A) the extent to which the party ~~was on notice that~~ reasonably should have known that litigation was likely and that the information would be discoverable;"

b. Suggestions for Proposed FRCP 37(e)(3)(F)

We question whether the language of proposed FRCP 37(e)(3)(F) and the corresponding note create an expectation that parties would seek court guidance before dispositive motions are filed. We are concerned that, as currently phrased, (F) would be an invitation to parties to burden the courts with trivial disputes that the parties should work out on their own. If a party can only avoid sanctions by showing that it made timely and sufficient efforts to bring all discovery disputes to the attention of the court, then the rule may create incentives for parties to bring every disagreement to courts for resolution or fear being sanctioned under proposed FRCP 37(e)(3)(F). The results of this interpretation would obviously overtax the judiciary's already strained dockets and would create collateral litigation for the parties. We would ask the Committee to consider clarification of this language in advance of the Standing Committee's January meeting.

c. Suggestions for Proposed New Language

Finally, we recommend additional language to help clarify the use of "substantial prejudice" in proposed FRCP 37(e)(2)(a). The rule should provide guidance and consistency in how courts should interpret "substantial prejudice." In particular, we think that the court should consider the availability of reliable alternative sources of the lost or destroyed information and the materiality of the lost information to the claims and defenses in the case. Our proposed FRCP 37(e)(4) text is as follows:

Proposed FRCP 37(e)(4):

"(4) In determining whether a party has been substantially prejudiced by another party's failure to preserve relevant information, the court should consider all relevant factors, including:

(A) the availability of reliable alternative sources of the lost or destroyed information;

(B) the materiality of the lost information to the claims or defenses in the case."

We believe that the rule should elaborate on the factors the court should consider in evaluating "substantial prejudice," so that this key term is given context like other important aspects of the proposed rule.

Conclusion

We commend the Committee for its work and look forward to continuing the dialogue on these important issues, which will have significant effects on the federal government as the largest litigant in the civil justice system. We believe real progress has been made, but further modifications are needed. The pending and interrelated work of the Duke Subcommittee counsels in favor of waiting to move the proposed FRCP 37(e) for a final vote at the Standing Committee until it is clear how all of the potential rules changes interrelate.

We respectfully request that, in advance of the January Standing Committee meeting, the Committee revise proposed FRCP 37(e) as we suggest and forward our comments to the Standing Committee. We remain committed to assisting this process and thank the Committee for its consideration.

Sincerely,

Stuart F. Delery
Principal Deputy Assistant Attorney General

I.B. ACTION TO RECOMMEND PUBLICATION OF REVISED RULE 6(d)

ACTION ITEM: RULE 6(d)

The Committee recommends this revision of Rule 6(d) for publication at an appropriate time:

> (d) ADDITIONAL TIME AFTER CERTAIN KINDS OF SERVICE. When a party may or must act within a specified time after ~~service~~ being served and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

The purpose of the revision is to defeat the argument that a party who must act within a specified time after making service can extend the time to act by choosing a method of service that provides added time.

Before Rule 6(d) was amended in 2005 it provided the extra time to act when a party had a right or was required to act within a prescribed period after service "upon the party" if the paper or notice "is served upon the party" by the designated means. Only the party served, not the party making service, could claim the extra three days.

When Rule 6(d) was revised in 2005 for other purposes, it was restyled according to the conventions adopted for the Style Project. "[A]fter service" seemed a useful economy of words. The problem is that at least three rules allow a party to act within a specified time after making service.

Rule 14(a)(1) requires permission to serve a third-party complaint only if the third-party plaintiff files the complaint "more than 14 days after serving its original answer." Rule 15(a)(1)(A) allows a party to amend a pleading once as a matter of course "within * * * 21 days after serving it" if the pleading is not one to which a responsive pleading is required. Rule 38(b)(1) allows a party to demand a jury trial by "serving the other parties with a written demand * * * no later than 14 days after the last pleading directed to the issue is served."

A literal reading of present Rule 6(d) would, for example, allow a defendant to extend the Rule 15(a)(1)(A) period to amend once as a matter of course to 24 days by choosing to serve the answer by any of the means specified in Rule 6(d).

It seems worthwhile to correct this unintended artifact of drafting, although the reason may be no more than to undo an unintended change. Allowing the 3 extra days does not seem a matter of great moment. There is no sign that the present rule has caused any problems in practice; it was pointed out in a law

review article,[1] not by anguished courts or litigants. It is possible to read the present rule to allow 3 added days only after being served, looking back to the pre-2005 language. That possibility, however, may be the best reason to amend to make "being served" explicit. A defendant, for example, might read the present rule literally, and deliberately take 24 days to amend an answer. Reading "being served" into the rule might prove a trap for the wary. Even then, it seems unlikely that a court would deny leave to amend — or to implead, or demand jury trial — over a 3-day delay in presenting a plausible position.

I.C. ACTION TO RECOMMEND PUBLICATION: "FINAL" JUDGMENT

ACTION ITEM: RULE 55(c)

A latent ambiguity may be found in the interplay of Rule 55(c) with Rules 54(b) and 60(b). The question arises when a default judgment does not dispose of all claims among all parties to an action. Rule 54(b) directs that the judgment is not final unless the court directs entry of final judgment. Rule 54(b) also directs that the "judgment" "may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Rule 55(c) provides simply that the court "may set aside a default judgment under Rule 60(b)." Rule 60(b), in turn provides a list of reasons to "relieve a party * * * from a final judgment, order, or proceeding * * *."

Close reading of the three rules together establishes that relief from a default judgment is limited by the demanding standards of Rule 60(b) only if the default judgment is made final under Rule 54(b) or when there is a final judgment adjudicating all claims among all parties. Several cases described in a memorandum by Judge Harris, however, show that several courts have recognized the risk that unreflected reading of Rule 55(c) may lead a court astray. Judge Harris's memorandum is attached.

Rule 55(c) is easily clarified by adding a single word. If the question had been recognized at the time, the change would have been suitable for the Style Project. The change can be recommended now, although it may be better to schedule publication for comment with a suitable package of proposals. Remembering the distinction between a default and a default judgment, Rule 55(c) would be revised:

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[1] James J. Duane, *The Federal Rule of Civil Procedure That Was Changed by Accident: A lesson in the Perils of Stylistic Revision*, 62 S.C.L. Rev. 41 (2010).

(c) SETTING ASIDE A DEFAULT OR A DEFAULT JUDGMENT. The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

Committee Note

Rule 55(c) is amended to make plain the interplay between Rules 54(b), 55(c), and 60(b). A default judgment that does not dispose of all of the claims among all parties is not a final judgment unless the court directs entry of final judgment under Rule 54(b). Until final judgment is entered, Rule 54(b) allows revision of the default judgment at any time. The demanding standards set by Rule 60(b) apply only in seeking relief from a final judgment.

Early drafts of the Committee Note offered a bit of further advice: "In many circumstances it is inappropriate to enter final judgment because proceedings that remain among other parties may show that there is no claim against the party subjected to the default judgment. See *Frow v. De La Vega*, 15 Wall. (82 U.S.) 552 (1872)." The Committee decided that this sort of advice is generally inappropriate for a Committee Note, and is particularly inappropriate when a modest amendment is made for a modest purpose.

MEMORANDUM

To: Professor Edward H. Cooper, Reporter
Advisory Committee on Civil Rules

cc: Honorable David G. Campbell, Chair
Advisory Committee on Civil Rules

Professor Richard Marcus, Reporter
Advisory Committee on Civil Rules

From: Arthur I. Harris, U.S. Bankruptcy Judge and Liaison from Bankruptcy Rules Advisory Committee to Civil Rules Advisory Committee

Date: December 14, 2011

Re: Motions to set aside nonfinal default judgments under Fed. R. Civ. P. 55(c), 54(b), and 60(b)

This memorandum follows up on an issue I raised during the "mailbox" portion of the meeting of the Advisory Committee on Civil Rules on Nov. 8, 2011. At the meeting, I flagged a potential conflict in the way the Federal Rules of Civil Procedure address motions to set aside nonfinal default judgments. Under Rule 55(c) a court "may set aside a default judgment under Rule 60(b)," however, a nonfinal default judgment (where claims remain pending against one or more parties) is an interlocutory order that is arguably governed by Rule 54(b), which does not carry the same restrictions as Rule 60(b).

As I explain in more detail below, Sixth Circuit precedent permits me to use the more lenient standard in Rule 54(b) for setting aside nonfinal default judgments. On the other hand, it may be worth considering an amendment to Rule 55(c) to clarify to judges and attorneys that motions to set aside nonfinal default judgments, like all other interlocutory judgments, are not governed by Rule 60(b). In any event, the exercise of writing this memo has helped me better understand these issues and, I hope, is worthy of sharing with my former teacher and longtime rules committee reporter.

In re Brown

Confusion as to whether Rule 60(b) governs relief from nonfinal default judgments is illustrated in an adversary proceeding and two appeals that arose from a bankruptcy case called *In re Brown*. In this case, everyone involved – including the party seeking Rule 60(b) relief, the bankruptcy court, the Bankruptcy Appellate Panel (BAP), and the Sixth Circuit – apparently assumed that the motion to set aside the nonfinal default judgment was governed by Rule 60(b).[1] Had the courts applied the more lenient standard for reconsidering interlocutory orders under the last sentence of Rule 54(b), the outcome in all likelihood would have been different.

In *Brown*, the bankruptcy trustee filed an adversary complaint seeking to avoid a mortgage and obtain other relief under the Bankruptcy Code because of an alleged defect in the acknowledgement of the debtor's mortgage. The alleged defect was that the notary who notarized the mortgage was not authorized to be a notary because the notary's application was incomplete, even though the State of Kentucky had approved the notary's application. The trustee obtained a default judgment against defendant Countrywide, but claims remained pending in the same adversary proceeding against another defendant, First Liberty.

Ten weeks after entry of a default judgment against Countrywide, Countrywide moved to set aside the default judgment under Rule 60(b)(1), (b)(4), and (b)(6). At the time, cross motions for summary judgment remained pending as to the trustee's claims against defendant First Liberty. Countrywide argued that

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[1] Although this matter arose in the context of an adversary proceeding – essentially a civil action within a bankruptcy case – the situation is essentially the same as one arising in a civil case in district court. Rule 7055 of the Federal Rules of Bankruptcy Procedure incorporates Fed. R. Civ. P. 55; Rule 7054 of the Federal Rules of Bankruptcy Procedure incorporates Fed. R. Civ. P. 54(a)-(c); and Rule 9024 of the Federal Rules of Bankruptcy Procedure generally incorporates Fed. R. Civ. P. 60. In addition, the more pragmatic concept of finality in bankruptcy cases generally does not apply to appeals from adversary proceedings. *See, e.g.*, *Millers Cove Energy Co. v. Moore* (*In re Millers Cove Energy Co.*), 128 F.3d 449, 451-52 (6th Cir. 1997) (noting that adversary proceedings can be viewed as "stand-alone lawsuits").

under a Kentucky statute, a trustee cannot collaterally attack a notarized document simply because the notary's application to be a notary should not have been approved.

The bankruptcy court held a hearing on Countrywide's Rule 60(b) motion. At the hearing, Countrywide abandoned its Rule 60(b)(1) argument and specifically stated that it was focusing its request for relief under Rule 60(b)(4) and (b)(6). At the hearing, the bankruptcy court stated:

> The Court will grant the motion to vacate the order under Rule 60(b)(6). I don't think 60(b)(4) applies. . . . Countrywide has not offered any particular reason why they can't seem to get their act together, didn't get their act together in this case. But, it does appear that there is a meritorious defense and maybe a winning defense. And there will not be prejudice to the plaintiff in this case because the case is ongoing. And with respect to culpable conduct and whether or not that's applicable here, we just don't know. The switch of service of process agents may have, in fact, contributed to the problem that's before the Court today. But, I think it's a matter of, in this case, because the really driving concern is the question of the likelihood of a meritorious defense in this case.

Bankr. Ct. Tr. at 14-15. The bankruptcy court later entered summary judgment in Countrywide's favor, upholding the validity and enforceability of the mortgage, and dismissed the Trustee's claims against all remaining defendants. The Trustee appealed the order granting summary judgment and the order vacating the default judgment to the BAP.

The BAP reversed the decision of the bankruptcy court after concluding that the bankruptcy court abused its discretion in setting aside the default judgment. *See Rogan v. Countrywide Home Loans, Inc.* (*In re Brown*), 413 B.R. 700 (B.A.P. 6th Cir. 2009). The BAP noted that Countrywide had abandoned its arguments under Rule 60(b)(1) and (b)(4) and held that Countrywide had not met its burden of showing "extraordinary circumstances" for relief under Rule 60(b)(6). 413 B.R. at 705 (citing *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. P'ship.*, 507 U.S. 380, 393 (1993)). Countrywide appealed the decision to the Sixth Circuit.

In an unpublished decision, the Sixth Circuit affirmed the decision of the BAP. *Countrywide Home Loan, Inc. v. Rogan (In re Brown),* No. 09-6198, Document: 006110766206 (6th Cir. Oct. 21, 2010)(unpublished Order). The Sixth Circuit held:

> In the absence of evidence demonstrating "exceptional and extraordinary circumstances," the bankruptcy court abused its discretion in vacating the default judgment. Contrary to Countrywide's argument on appeal, the existence of a meritorious defense and the avoidance of its mortgage does not satisfy the "exceptional and extraordinary circumstances" requirement of Rule 60(b)(6).

Id. at 4 (citation omitted).[2]

In none of these decisions, did any of the courts consider the possibility that a standard other than Rule 60(b) should apply to a motion to set aside a nonfinal default judgment.[3]

Discussion

The decisions by the bankruptcy court, the BAP, and the Sixth Circuit in the *Brown* case illustrate the possible confusion created by the language in Rule 55(c) that a court "may set aside a default judgment under Rule 60(b)." It is true that Rule 60(b) indicates in several places that it addresses *final* judgments:

- the adding of the word "final" to the heading of Rule 60(b) in the 2007 restyling;
- the adding of the word "final" before "judgment" in the 1948 amendment;
- the language in the 1946 committee note explaining that Rule 60(b) affords relief from *final* judgments; "and hence interlocutory judgments are not brought within the restrictions of the rule, but rather they are left subject to

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[2] A copy of the Sixth Circuit's unpublished Order in *Brown* is attached.

[3] Although I was initially assigned to the panel hearing the appeal to the BAP, that appeal was later reassigned to a randomly drawn reconstituted panel that did not include me.

the complete power of the court rendering them to afford such relief from them as justice requires."

And it is true that the last sentence of Rule 54(b) provides that nonfinal orders may be revised at any time before entry of final judgment. Nevertheless, there appear to be many judges and attorneys who read the literal language of Rule 55(c) as directing them to consider or draft motions to set aside all default judgments, even nonfinal ones, within the restrictions of Rule 60(b).

Proposed Amendment to Fed. R. Civ. P. 55(c)

I have included a proposed amendment to Rule 55(c) to clarify that Rule 60(b) affords relief from *final* judgments. The added word is *italicized*.

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Rule 55

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(c) **Setting Aside a Default or a Default Judgment**.
The court may set aside an entry of default for good cause, and it may set aside a *final* default judgment under Rule 60(b).

Possible Committee Note

The qualifying word "final" is added to clarify that Rule 60(b) affords relief from *final* judgments. Consistent with the last sentence of Rule 54(b) and the 1946 Advisory Committee Note to Rule 60(b), interlocutory judgments, including nonfinal default judgments, are not subject to the restrictions of Rule 60(b), "but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires."

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Serendipitously, on December 13, 2011, the Sixth Circuit issued a new opinion that addressed almost exactly the same issue. *See Dassault Systemes, SA v. Childress*, 663 F.3d 832 (6th Cir. 2011).[4] The only difference was that in the *Dassault* case the default judgment was not final because the amount of damages had yet to be determined when the motion to set aside the default judgment was filed. Judge Karen Nelson Moore, writing for the Sixth Circuit, explained:

> Because of the initial grant of default judgment and the timing of Childress's motion to set aside entry of default judgment, it is not immediately clear which rule should have been applied. At first blush, the district court's grant of Dassault's motion for default judgment suggests that Rule 60(b) should apply. But, because final judgment was not entered until after Childress filed his motion to set aside entry of default judgment, applying the Rule 60(b) standard to a motion challenging a not-yet-final default judgment seems premature.
>
> . . . .
>
> An order granting default judgment without any judgment entry on the issue of damages is no more than an interlocutory order to which Rule 60(b) does not yet apply. . . . Thus, absent entry of a final default judgment, the more lenient Rule 55(c) standard governs a motion to set aside a default or default judgment.

Id. at *6-8 (citations omitted).

My nonexhaustive review of relevant case law indicates several other circuit courts hold, or at least suggest, that Rule 60(b) does not apply to motions to set aside nonfinal default judgments. *See Swarna v. Al Awadi*, 622 F.3d 123, 140 (2d Cir. 2010) (default judgment that left open the issue of damages was a nonfinal order for purposes of appeal); *FDIC v. Francisco Inv. Corp.*, 873 F.2d 474, 478 (1st Cir. 1989); *Jackson v. Beech*, 636 F.2d 831, 835-36 & n.7

[4] A copy of the Sixth Circuit's slip opinion in *Dassault* is attached.

(D.C. Cir. 1980); *see also*; *O'Brien v. R.J. O'Brien & Assoc., Inc.*, 998 F.2d 1394, 1401 (7th Cir. 1993) (declining to state whether Rule 60(b) standard or less restrictive standard applied to motion to set aside a default judgment that had not become final and appealable).

Among these additional cases, the First Circuit's *FDIC v. Francisco* decision provides perhaps the most definitive analysis:

> A cursory reading of [Rule 55(c)] seems to mandate the application of the stricter standards of Rule 60(b) to all requests to set aside default judgments. However, the Rule 60(b) standards were tailored for setting aside *final* judgments. In the case at bar, when the court denied defendants' motion to set aside default judgment, it had not become final. Fed.R.Civ.P. 54(b).
>
> Thus, the more liberal "good cause" standard should be applied. . . . Generally, non-final judgments can be set aside or otherwise changed by the district court at any time before they become final. Fed.R.Civ.P. 54(b). If we were to apply the 60(b) standard to non-final default judgments we would have the anomaly of using the strict standard envisioned for final judgments to non-final default judgments and the more liberal standard of Rule 54(b) to other non-final judgments. This result would be inconsistent with the purposes underlying the Federal Rules of Civil Procedure, especially considering that when deciding whether to set aside entries of default and default judgments courts favor allowing trial on the merits.

873 F.2d at 478 (citations omitted) (emphasis in original).

Whether this is a problem that warrants discussion as a possible amendment to the Civil Rules is for you and the civil rules committee to decide. Certainly there is case law to support the proposition that Rule 60(b) does not apply to motions to set aside nonfinal default judgments, even absent any amendment to the Civil Rules. On the other hand, the fact that attorneys and lower courts continue to apply the more restrictive Rule 60(b) standard to nonfinal default judgments suggests that an amendment to clarify Rule 55(c) may be in order.

I.D. ACTION TO RECOMMEND PUBLICATION: CROSS-REFERENCE

ACTION ITEM: RULE 77(c)(1)

The Committee recommends adoption without publication of the following technical amendment of Rule 77(c)(1) to correct a cross-reference to Rule 6(a) that should have been amended when Rule 6(a) was amended in the Time Project amendments of 2009:

RULE 77. CONDUCTING BUSINESS; CLERK'S AUTHORITY; NOTICE OF AN ORDER OR JUDGMENT

* * *

(c) CLERK'S OFFICE HOURS; CLERK'S ORDERS.

(1) *Hours.* The clerk's office — with a clerk or deputy on duty — must be open during business hours every day except Saturdays, Sundays, and legal holidays. But a court may, by local rule or order, require that the office be open for specified hours on Saturday or a particular legal holiday other than one listed in Rule 6(a)(~~4~~6)(A).

Before the Time Computation Project amendments, Rule 6(a)(4)(A) defined "legal holiday" to include ten days set aside by statute. Rule 77(c)(1) incorporated this definition by cross-reference. The Time Project amended Rule 6(a) in many ways. The definition of statute-designated legal holidays remained unchanged, but became Rule 6(a)(6)(A). Present Rule 6(a)(4)(A) defines the end of the "last day" for computing a time period for electronic filing. The cross-reference in Rule 77(c)(1) no longer makes sense. It is easily corrected by revising it to refer to Rule 6(a)(6)(A).

No arguable issue of policy is involved. This amendment is a clear example of a technical or conforming amendment that can be recommended for adoption without publication. See §440.20.40(d) of the Procedures for the Conduct of Business.

PART II: DISCUSSION ITEMS

II.A. DUKE CONFERENCE RULES DRAFTS

The rules sketches shown here are presented for discussion to guide further development looking toward a package that may be ready to advance at the June meeting with a recommendation for

publication. The sketches have been developed through countless conference calls, a miniconference held in Dallas on October 8, 2012, and discussions in the Advisory Committee. The goal is to find ways to reduce cost and delay, increasing realistic access to the courts and furthering the goals of Rule 1.

The current sketches grow out of the conference held at the Duke University School of Law in May, 2010. The most prominent themes developed at the Conference are frequently summarized in two words and a phrase: cooperation, proportionality, and "early, hands-on case management." Most participants felt that these goals can be pursued effectively within the basic framework of the Civil Rules as they stand. There was little call for drastic revision, and it was recognized that the rules can be made to work better by renewing efforts to educate lawyers and judges in the opportunities already available. It also was recognized that many possible rules reforms should be guided by empirical work, both in the form done by the Federal Judicial Center and other investigators and also in the form of pilot projects. Many initiatives have been launched in those directions. Rules amendments remain for consideration. Some of them are being developed independently. The Discovery Subcommittee has come a long way in considering preservation of information for discovery and possible sanctions. Pleading standards remain on the Committee’s agenda. Other rules, however, can profitably be considered for revision. Early stages of the Subcommittee’s work generated a large number of possible changes, both from direct suggestions at the Conference and from further consideration of the broad themes. More recently the Subcommittee has started to narrow the list, discarding possible changes that, for one reason or another, do not seem ripe for present consideration.

The proposals presently being considered are grouped in three roughly defined sets. They involve several rules and different parts of some of those rules. The proposals have been developed as part of an integrated package, with the thought that in combination they may encourage significant reductions in cost and delay. The package can survive without all of the parts, although greater effects can be expected if most parts remain.

The first topics look directly to the early stages of establishing case management. These changes would shorten the time for making service after filing an action; reduce the time for issuing a scheduling order; and emphasize the value of holding an actual conference of court and parties before issuing a scheduling order. They also would look toward encouraging an informal conference with the court before making a discovery motion. The last item in this set would modify the Rule 26(d) discovery moratorium by allowing Rule 34 requests to be served at some interval after the action is begun, but setting the time to respond to start at the Rule 26(f) conference.

The next set of changes look more directly to the reach of

discovery. They begin with shifting the Rule 26(b)(2)(C)(iii) proportionality factors into Rule 26(b)(1). Rule 26(b)(1) is further changed by limiting the scope of discovery to matter relevant to any party's claim or defense and by modifying the provision for discovery of information not admissible in evidence. More specific means of encouraging proportionality are illustrated by models that reduce the presumptive number of depositions and interrogatories, and for the first time incorporate presumptive limitations on the number of requests to produce and requests for admissions. Another approach is a set of provisions to improve the quality of discovery objections and the clarity of responses. Finally, modest changes would serve as reminders of the need to consider preservation of electronically stored information and the value of considering agreements under Evidence Rule 502 by adding these topics to Rules 16(b)(3)(B)(iii) and (iv) as well as 26(f)(3)(C) and (D).

The last proposal would revise Rule 1 to direct that the rules be employed by the court and parties to secure the canonical goals of Rule 1.

A few variations on the sketches are presented in footnotes, at times to note ideas that have been considered and put aside.

Other topics considered by the Subcommittee have been deferred for possible future work. The value of Rule 26(a)(1) initial disclosures is regularly debated by various groups. The Subcommittee decided that any consideration of this subject should await developing experience with various state-court models that provide expanded initial disclosures. The timing of contention discovery under Rules 33 and 36 was considered by drafts that would encourage postponement to the conclusion of other discovery, but some observers urged that early contention discovery can be useful. This subject has been deferred indefinitely, in part because adoption of presumptive numerical limits on Rule 36 requests to admit and reducing the presumptive limit on the number of Rule 33 interrogatories would likely reduce the occasional over-uses of contention discovery. And a major topic, cost sharing in discovery, is addressed only by a sketch that revises Rule 26(c) to make explicit the authority to provide for cost sharing by a protective order. Broader cost-sharing issues have been referred to the Discovery Subcommittee. Cost sharing is so important as to require in-depth study that would unduly delay the other proposals in the package.

These sketches have advanced a long way from their beginnings. But work remains, both in expression and in resolving some details. More importantly, the list of topics is not closed. Time remains to permit development of new proposals. Suggestions for new topics will be welcomed.

If possible, it will be desirable to publish these proposals together with the proposed revision of Rule 37(e) on preservation and spoliation. There is always a hope that the frequency of

publication for comment can be reduced. And a substantial package of proposals may well provoke greater interest and more thorough comments on all parts than would happen with separate publication.

1. Scheduling Orders and Managing Discovery

a. Rules 16(b) and 4(m): Scheduling Order Timing & Conference

These proposals attack delay directly by shortening the time for service allowed by Rule 4(m) and by advancing the time to issue a scheduling order. In addition, Rule 16(b)(1)(B) is revised to encourage an actual scheduling conference.

Rule 4(m)

(m) ***Time Limit for Service.*** If a defendant is not served within ~~120~~ 60 days after the complaint is filed, the court * * * must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause * * *.

The proposal to shorten the time for service set by Rule 4(m) has been approved by consensus.

Shortening the time to issue the scheduling order provoked conflicting reactions. The special concerns expressed by the Department of Justice are noted below. More generally, some participants worried that setting the time too early could mean that under-prepared lawyers are unable to support an effective conference. At the same time, many thought the present 120- and 90-day periods are too long. This draft reflects a modest reduction, to 90 and 60 days, and adds permission to delay the order for good cause.

Rule 16(b)

(b) SCHEDULING.

(1) Scheduling Order. Except in categories of actions exempted by local rule,[2] the district judge — or a

[2] Earlier sketches sought to integrate the exemptions from Rule 16(b)(1) with the exemptions from initial disclosure requirements listed in Rule 26(a)(1)(B). The disclosure exemptions apply to the parties' conference under Rule 26(f) and to the discovery moratorium under Rule 26(d)(1). It would be attractive to have a single set of exemptions for all of these related rules. This possibility remains under consideration. The next step will be to survey local rules to determine what categories of actions are frequently made exempt from Rule 16(b)(1). The survey may suggest additional categories that might be added to 26(a)(1)(B). It also might support a determination whether to continue to recognize exemptions

magistrate judge when authorized by local rule — must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference ~~by telephone, mail, or other means~~.

(2) Time to Issue. The judge must issue the scheduling order as soon as practicable, but ~~in any event~~ unless good cause is found for delay must issue the order within the earlier of ~~120~~ 90 days after any defendant has been served with the complaint or ~~90~~ 60 days after any defendant has appeared.[3]

The revision of Rule 16(b)(1)(B) emphasizes the value of holding an actual conference, at least by telephone, before issuing a scheduling order. This change has not proved controversial in itself. But there have been conflicting suggestions that Rule 16(b)(1)(A) should be eliminated so that there always must be a conference apart from the exempted categories of cases, or that the court should have authority to dispense with any conference.

Eliminating Rule 16(b)(1)(A) would foreclose entry of a scheduling order based on the parties' Rule 26(f) report without a scheduling conference. Subcommittee members believe a conference should be held in every case. "Effective management requires a conference." Even if the parties agree on a scheduling order, the court may wish to change some provisions, and it may be important to address issues not included in the report. But there are counter-arguments that the court should be free, if it finds it appropriate, to dispense with the conference. The thought is that although in most cases there are important advantages to having a conference even after the parties have presented an apparently sound discovery plan, there may be cases in which the court is satisfied that an effective management

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by local rule from scheduling order requirements.

[3] The 90 and 60 day periods have been adopted only for illustration. Each period has an impact on timing the Rule 26(f) conference. Rule 26(f)(1) sets the conference "as soon as practicable — and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b)." If reducing the time to enter the scheduling order seems to deprive the parties of sufficient time to prepare for the 26(f) conference, Rule 26(f) could be amended to set the time for the conference, and for the 26(f) report, closer to the time for the scheduling order.

order can be crafted without a conference.[4]

Some participants have suggested the court also should have authority to dispense with any scheduling conference. On this view, many cases on the federal docket are not particularly complicated, and a conference may impose significant burdens without any corresponding benefit. This concern would be addressed in part if the rule carries forward authority to exempt categories of actions by local rule. And the sketch continues to authorize issuance of a scheduling order without a conference after receiving the parties' report under Rule 26(f).

The Department of Justice is concerned with the proposals to accelerate the time for issuing a scheduling order. It advances the reasons for allowing it 60 days to answer under Rule 12(a)(2) and (3). After a complaint is served "it takes time to find the right lawyer, and for the right lawyer to identify the right people in the right agency" to figure out what an action really involves. The Subcommittee, however, believes that the alternative 90- and 60-day periods suggested in the sketch should suffice for the Department's needs in most cases.

Resetting the time to issue the scheduling order invites trouble when the time comes before all defendants are served. Later service on additional defendants may lead to another conference and order. Revising Rule 4(m) to shorten the presumptive time for making service reduces this risk. Shortening the Rule 4(m) time may also be desirable for independent reasons, encouraging plaintiffs to be diligent in attempting service and getting the case under way. There may be some collateral consequences — Rule 15(c)(1)(C) invokes the time provided by Rule 4(m) for determining relation back of pleading amendments that change the party against whom a claim is asserted. But that may not deter the change.

b. Uniform Exemptions: Rules 16(b), 26(a)(1)(B), 26(d), 26(f)

There has been considerable support for adopting a single set of exemptions that would remove cases from the requirements for a scheduling order, initial disclosures, the parties' conference, and the discovery moratorium. See footnote 2 above. The topic will be deferred, however, unless relatively easy research into the local rule exemptions authorized by Rule 16(b)(1) shows either that there is no reason to expand the

[4] The judge may not see any need for a conference, particularly if the Rule 26(f) report is prepared by attorneys known to be reliable and seems sound. The judge might ignore a requirement that a conference be held in all cases, or might hold a pro forma conference. The dockets in some courts may not permit scheduling conferences in all cases.

categories of actions exempted from initial disclosure or that a sensible number of categories can be added without risking serious loss.

c. Informal Conference With Court Before Discovery Motion

Participants at the Duke Conference repeated the running lament that some judges — too many from their perspective — fail to take an active interest in managing discovery disputes. They repeated the common observation that judges who do become involved can make the process work well. Many judges tell the parties to bring discovery disputes to the judge by telephone, without formal motions. This prompt availability to resolve disputes produces good results. There are not many calls; the parties work out most potential disputes knowing that pointless squabbles should not be taken to the judge. Legitimate disputes are taken to the judge, and ordinarily can be resolved expeditiously. Simply making the judge available to manage discovery disputes accomplishes effective management. A survey of local rules showed that at least a third of all districts have local rules that implement this experience by requiring that the parties hold an informal conference with the court before filing a discovery motion.

It will be useful to promote the informal pre-motion conference for discovery motions. The central question is whether to encourage it or to make it mandatory. Encouragement is not likely to encounter significant resistance. Making it mandatory, even with an escape clause, is likely to encounter substantial resistance from some judges. In the end, the Subcommittee has concluded that there is likely to be too much resistance to justify a mandatory provision. The proposal adds the conference to the Rule 16(b)(3) list of subjects that may be included in a scheduling order. This reminder could serve as a gentle but potentially effective encouragement, particularly when supplemented by coverage in judicial education programs.

Rule 16(b)(3)(B)(v)

(3) * * *

(B) *Permitted Contents.* The scheduling order may: * * *

(v) direct that before filing a motion for an order relating to discovery the movant must request an informal conference with the court.

[present (v) and (vi) would be renumbered]

d. Discovery Before Parties' Conference

The parties' Rule 26(f) conference may work better if the parties have actual discovery requests to consider. But Rule 26(d)(1) imposes a moratorium on discovery "before the parties have conferred as required by Rule 26(f)." Early sketches considered by the Subcommittee would have allowed all forms of discovery to be pursued before the Rule 26(f) conference. One approach imposed an initial waiting period, while another would have allowed requests to be made at any time after the action is commenced. The time to respond would run from the Rule 26(f) conference. These sketches have been narrowed to a draft that applies only to requests under Rule 34(a), and that imposes a 21-day waiting period.

Rule 26(d)(1)

(1) **Timing**. A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except:

(A) in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B)~~,~~;

(B) that more than 21 days after service of the summons and complaint on any defendant a party may deliver to [any party][that defendant] requests under Rule 34(a), to be considered as served at the [first] Rule 26(f) conference; or

(C) when authorized by these rules, by stipulation, or by court order.

The proposal has been limited to Rule 34 requests for several reasons. Rule 34 is a major source of discovery difficulties. Depositions may also be a source of problems, but there is little reason to believe that much will be gained by advance lists of people who may be deposed, nor even by designating the matters for examination by deposing an entity under Rule 30(b)(6). Any need for early depositions is protected by Rule 30(a)(2)(A)(iii). Advance models of interrogatories and requests to admit also seem less important, and relief from the moratorium is already available under Rule 26(d)(1). Rule 35 examinations require a court order or agreement.

The waiting period has been retained. To be sure, there is little reason to fear a return to the problems encountered in prior practice that allowed a plaintiff to launch discovery before a defendant could get started, and then accorded a presumptive priority that allowed the plaintiff to complete discovery before the defendant could begin. But at least two practical concerns have emerged. One is that early requests may

be drawn in broad terms that, given need to reflect, may be narrowed. Another is that even though the time to respond is set from the Rule 26(f) conference, legitimate requests for additional time will encounter inappropriate skepticism based on the opportunity to begin to prepare before the time formally began to run.

This proposal is not without complications. Several miniconference participants said that they would serve early discovery requests if the Rule 26(d) discovery moratorium were relaxed. Most of them regularly represent plaintiffs, but at least one corporate counsel said he would welcome the opportunity to receive early requests. In addition, there are signs that at least some lawyers simply ignore the Rule 26(d) moratorium, perhaps because of ignorance or possibly because of tacit agreement that it is unnecessary. But doubts also were expressed about the probability that many parties will take advantage of an opportunity for early discovery. Most lawyers seem to delay discovery as long as possible, and are unlikely to serve requests before the Rule 26(f) conference. The discovery rules are complicated now. Further complications should be introduced only for reasons better than providing the possibility of early discovery requests. There also is a possible ambiguity in calculating time from the Rule 26(f) conference because conferences often are informal, providing occasions for disputes about the time of the conference.

It may be desirable to amend the time-to-respond provisions of Rule 34 by adding a cross-reference to the provision that considers an early Rule 34 request to be served at the time of the Rule 26(f) conference. Experience shows that lawyers do not always keep in mind the often intricate interactions among the rules, and indeed sometimes fail to follow through express cross-references. It may prove difficult to draft an elegant cross-reference. This draft is a tentative illustration:

Rule 34(b)(2)(A)

(2) ***Responses and Objections.***

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served <u>or — if the request was delivered under Rule 26(d)(1)(B) — within 30 days after the parties' [first] Rule 26(f) conference.</u> A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

Rule 45

The Subcommittee has not thought it worthwhile to provide an exemption from the Rule 26(d)(1) moratorium for nonparty subpoenas to produce under Rule 45. Rule 45 subpoenas addressed to nonparties seem to be more clearly focused than the broad or overbroad requests that sometimes characterize Rule 34 practice.

And Rule 45 specifically protects a nonparty who objects against significant expense resulting from compliance. It is better to avoid complications that promise little real advantage.

2. Other Discovery Issues

a. Proportionality: Rule 26(b)(1)

Both at the Duke Conference and otherwise, laments are often heard that although discovery in most cases is conducted in reasonable proportion to the nature of the case, discovery runs out of control in an important fraction of all cases. It is difficult to resist the proposition that discovery should be confined to limits reasonably proportional to the needs of the case. The rules provide for this in many ways. Rule 26(c), for example, provides for an order that protects against "undue burden or expense." In 1983 the underlying concept of proportionality was adopted in Rule 26(b)(2) and also Rule 26(g), with the expectation that the new cost-benefit calculus would solve most problems of excessive discovery. That expectation has not been realized. More recently still, Rule 26(b)(1) was amended in 2000 to distinguish between lawyer-managed discovery of material relevant to the parties' "claims or defenses" and court-managed discovery of material relevant only to a more broadly conceived "subject matter involved in the action." In part the hope was to provide a stimulus to more active involvement in discovery by judges who had been holding aloof. The optimistic assessment is that the 2000 amendment had some slight effect. However that may be, and however well discovery works in a high percentage of all cases as measured by total docket numbers, serious, even grave problems persist in enough cases to generate compelling calls for further attempts to control excessive discovery. The geometric growth in potentially discoverable information generated by electronic storage adds still more imperative concerns. And these concerns are exacerbated by the problem of preserving information in anticipation of litigation, a problem addressed by the proposed revisions of Rule 37(e) that are presented separately.

Early Subcommittee sketches sought to bolster these earlier attempts by expressly limiting the scope of discovery under Rule 26(b)(1) to what is "proportional to the reasonable needs of the case." But substantial concern was expressed that even a shared pragmatic understanding of proportionality does not provide sufficiently definite meaning to enshrine "proportionality" in rule text. The initial sketches and post-Dallas attempts to sketch alternative ways to incorporate "proportional" into Rule 26(b)(1) failed to allay these concerns.

Those who expressed concern with adding "proportional" to Rule 26(b)(1) without further refinement also commonly expressed support for the cost-benefit limits on discovery mandated by Rule 26(b)(2)(C)(iii). These provisions were seen to provide suitably nuanced guidance to avoid interminable wrangling in contentious discovery cases.

The inability to control excessive discovery by revising the scope of discovery in 2000, and the substantial support for Rule 26(b)(2)(C)(iii), have combined to suggest that it would be desirable to transfer the calculus of (iii) to become part of the Rule 26(b)(1) definition of the scope of discovery. This transfer is illustrated by the sketch set out below.

The sketch makes further changes as well. Discovery is confined to matter relevant to any party's claim or defense, eliminating the present provision that, on finding good cause, allows a court to expand discovery to the subject matter involved in the action. It is difficult to see why discovery that is not relevant to any party's claim or defense should be allowed. Substantial limits are placed on the present third sentence: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The concern is that the "reasonably calculated" concept has failed in practice. Too many lawyers, and perhaps judges, understand the rule to mean that there are no limits on discovery, because it is always possible that somehow, somewhere, a bit of relevant information may be uncovered.

In all, this sketch reflects a determination that it is important to attempt once more to adopt effective controls on discovery while preserving the core values that have been enshrined in the Civil Rules from the beginning in 1938. Reducing the burdens of discovery also enhances access to the courts by reducing what can be a daunting obstacle. There are increasing demands to make far more dramatic changes.

The current sketches of Rule 26(b)(1) and 26(b)(2)(C)(iii) look like this:

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information [within this scope of discovery]{sought} need not be admissible in evidence to be discoverable. ~~— including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of~~

~~any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

Other revisions would be made in Rule 26(b)(2). Subparagraph (A) would incorporate references to proposed limits on the numbers of discovery requests and to the length of depositions, as illustrated below. Subparagraph (B) would be amended to refer to the scope of discovery under (b)(1) rather than to subparagraph (C). And subparagraph (C) would be revised to reflect the transfer of (iii) to (b)(1):

(C) When required. On motion or on its own, the court must limit the frequency or extent of discovery ~~otherwise allowed by these rules or by local rule~~ if it determines that: * * *

(iii) the ~~burden or expense of the~~ proposed discovery is outside the scope permitted by Rule 26(b)(1) ~~outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.~~

This approach would require revising many of the cross-references to Rule 26(b)(2) in other rules, substituting Rule 26(b)(1). For example, Rule 30(a)(2) would begin: "A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1)~~(2)~~: * * *."

b. Limiting the Number of Discovery Requests

The Duke Conference included observations about approaching proportionality indirectly by tightening present presumptive numerical limits on the number of discovery requests and adding new limits. These sketches illustrate lower limits for Rule 33 interrogatories and new limits for Rule 36 requests to admit that have stirred little controversy. Lower limits on the numbers and length of depositions have been studied and are carried forward to test further the doubts that have been expressed with some force. Similarly, possible limits on the number of Rule 34 requests are sketched to prompt further discussion.

An important common feature of all of these sketches is that the limits are merely presumptive. They can be set aside by agreement of the parties or by court order.

Many studies over the years, several of them by the FJC, show that most actions in the federal courts are conducted with a modest level of discovery. Only a relatively small fraction of cases involve extensive discovery, and in some of those cases extensive discovery may be reasonably proportional to the needs of the case. But the absolute number of cases with extensive discovery is high, and there are strong reasons to fear that many of them involve unreasonable discovery requests. Many reasons may account for unreasonable discovery behavior — ineptitude, fear of claims of professional incompetence, strategic imposition, profit from hourly billing, and other inglorious motives. It even is possible that the presumptive limits now built into Rules 30, 31, and 33 operate for some lawyers as a target, not a ceiling.

Various proposals have been made to tighten the presumptive limits presently established in Rules 30, 31, and 33, and to add new presumptive limits to Rule 34 document requests and Rule 36 requests to admit. The actual numbers chosen for any rule will be in part arbitrary, but they can reflect actual experience with the needs of most cases. Setting limits at a margin above the discovery actually conducted in most cases may function well, reducing unwarranted discovery but leaving appropriate discovery available by agreement of the parties or court order.

Beginning with a proposal that has generated little controversy, Rule 33(a)(1) could be revised:

> **(1)** *Number.* Unless otherwise stipulated or ordered by the court, a party may serve on another party no more than ~~25~~ 15 interrogatories, including all discrete subparts.

(This could be made more complicated by adding a limit for multiparty cases — for example, no more than 15 addressed to any single party, and no more than 30 in all. No one seems to have suggested that. The complication is not likely to be worth the effort.)

Adding similar limits to Rule 36 for the first time also has generated little controversy. A clear version would add a new 36(a)(2), building on present (a)(1):

> **(1)** *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:
>
> (A) facts, the application of law to fact, or opinions about either; and
>
> (B) the genuineness of any described document.
>
> **(2)** *Number.* Unless otherwise stipulated or ordered by the court, a party may serve no more than 25 requests to admit under Rule 36(a)(1)(A) on any other party,

including all discrete subparts.

Things are not so simple for Rule 34. Many participants at the Dallas miniconference questioned the wisdom of adopting limits, even if limits could be enforced with little difficulty. They believe that Rule 34 burdens are reduced if the requesting party frames a larger number of narrowly and sharply focused requests than if forced to frame a smaller number of broadly diffuse requests. And one participant suggested that the problem is not the number of requests but the number of sources that must be searched. Questions of implementation supplement these reservations. It may not be easy to apply a numerical limit on the number of requests; "including all discrete subparts," as in Rule 33, may not work. This question ties to the Rule 34(b)(1)(A) requirement that the request "must describe with reasonable particularity each item or category of items to be inspected." Counting the number of requests could easily degenerate into a parallel fight over the reasonable particularity of a category of items. But concern may be overdrawn. Actual experience with scheduling orders that impose numerical limits on the number of Rule 34 requests suggests that parties can adjust to counting without any special difficulty. If this approach is followed, the limit might be located in the first lines of Rule 34(a):

> **(a) In General**. A party may serve on any other party ~~a~~ no more than [25] request**s** within the scope of Rule 26(b):
> * * *
>
> **(3)** Leave to serve additional requests may be granted to the extent consistent with Rule 26(b)(1).

This form applies to all the various items that can be requested — documents, electronically stored information, tangible things, premises. It would be possible to draft a limit that applies only to documents and electronically stored information, the apparent subject of concern. But either way, there is a manifest problem in setting numerical limits. If a car is dismembered in an accident, is it only one request to ask to inspect all remaining parts? More importantly, what effect would numerical limits have on the ways in which requests are framed? "All documents, electronically stored information, and tangible things relevant to the claims or defenses of any party?" Or, with court permission, "relevant to the subject matter involved in this action"? Or at least "all documents and electronically stored information relating to the design of the 2008 model Huppmobile"? For that matter, suppose a party has a single integrated electronic storage system, while another has ten separate systems: does that affect the count? Still, the experience of judges who adopt such limits in scheduling orders suggests that disputes about counting seldom present real problems.

(The Subcommittee has concluded there is no apparent need to attempt to revise Rule 45 to mirror the limits proposed for Rule 34.)

For depositions, the sketches discussed at the Dallas miniconference reduced the presumptive limits from 10 depositions per side to 5, and reduced the presumptive duration of a deposition to 4 hours. The sketch encountered mixed reactions. The main argument against the proposal was that the present limits — 10 depositions per side, lasting up to 7 hours — work well. Some cases legitimately need more than 5 depositions per side, and there is no point in requiring the parties to seek the court's permission. So for the length of a deposition, although a reduction to 6 hours might be appropriate. On the other hand, FJC data show that most cases involve fewer than 5 depositions. A limit that reflects common practice should work well. In Professor Gensler's memorable phrase, "it is easier to manage up from a lower limit than to manage down from a higher limit." The sketches are carried forward for continuing discussion:

Rules 30(a)(2)(A)(i) and 30(d)(1):

(a) When a Deposition May Be Taken. * * *

(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2[1]):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than ~~10~~ 5 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants; * * *

(d) Duration; Sanction; Motion to Terminate or Limit

(1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to [~~one day of 7~~ 4 hours in a single day][one day of ~~7~~ 4 hours].

A parallel change would be made in Rule 31(a)(2)(A)(i) as to the number of depositions. Rule 31 does not have a provision parallel to the "one day of 7 hours" provision in Rule 30(d).

The authority to change any of these limitations would be repeated in revised Rule 26(b)(2)(A):

(2) *Limitations on Frequency and Extent.*

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions, ~~and~~ interrogatories, requests [to produce][under Rule 34], and requests for

admissions, or on the length of depositions under Rule 30. ~~By order or local rule, the court may also limit the number of requests under Rule 36.~~

c. Discovery Objections and Responses

The common laments about excessive discovery requests are occasionally met by protests that discovery responses often are incomplete, evasive, dilatory, and otherwise out of keeping with the purposes of the rules. Several proposals have been made to address these problems. One, which would add "not evasive" to the certifications attributed by Rule 26(g)(1) to a discovery request, response, or objection met vigorous opposition at the miniconference. Many participants felt this addition is unnecessary and might promote additional litigation. The Subcommittee has decided to withdraw this sketch, in part because the certifications already stated in Rule 26(g)(1)(B) can be used to reach evasive responses.

RULE 34: SPECIFIC OBJECTIONS

Two proposals have been advanced to improve the quality of discovery objections. The first would incorporate in Rule 34 the Rule 33 requirement that objections be stated with specificity. The second would require a statement whether information has been withheld on the basis of the objection. These proposals have won general support.

Rule 33(b)(4) begins: "The grounds for objecting to an interrogatory must be stated with specificity." Two counterparts appear in Rule 34(b)(2). (B) says that the response to a request to produce must state that inspection will be permitted "or state an objection to the request, including the reasons." (C) says: "An objection to part of a request must specify the part and permit inspection of the rest." "[I]ncluding the reasons" in Rule 34(b)(2)(B) may not convey as clearly as should be a requirement that the reasons "be stated with specificity." If the objection rests on privilege, Rule 26(b)(5)(A) should control. But for other objections, it is difficult to understand why specificity is not as important for documents, tangible things, and entry on premises as it is for answering an interrogatory. Even if the objection is a lack of "possession, custody, or control," the range of possible grounds is wide.

This sketch revises Rule 34(b)(2)(B) to parallel Rule 33(b)(4):

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state [the grounds for

objecting {to the request} with specificity] [an objection to the request, including the specific reasons.]

RULE 34: STATE WHAT IS WITHHELD

Many Conference participants, both at the time of the Conference and since, have observed that responding parties often begin a response with a boilerplate list of general objections, and often repeat the same objections in responding to each individual request. At the same time, they produce documents in a way that leaves the requesting party guessing whether responsive documents have been withheld under cover of the general objections. (The model Rule 16(b) scheduling order in the materials provided by the panel on Eastern District of Virginia practices reflects a similar concern: " * * * general objections may not be asserted to discovery demands. Where specific objections are asserted to a demand, the answer or response must not be ambiguous as to what if anything is being withheld in reliance on the objection.)

Broad support has been expressed for addressing this problem by adding a new sentence to Rule 34(b)(2)(C):

(C) *Objections*. An objection to part of a request must specify the part and permit inspection of the rest. An objection [to a request or part of a request] must state whether any responsive [materials]{documents, electronically stored information, or tangible things <or premises?>} are being withheld [under]{on the basis of} the objection.[5]

RULES 34 AND 37: FAILURE TO PRODUCE

Rule 34 is somewhat eccentric in referring at times to stating that inspection will be permitted, and at other times to "producing" requested information. Common practice is to produce documents and electronically stored information, rather than make them available for inspection. Two amendments have been proposed to clarify the role of actual production, one in Rule 34, the other in Rule 37.

Earlier sketches revising Rule 34(b)(2)(B) have been improved in response to observations offered at the Dallas miniconference. The changes address the time for producing, recognizing that frequently production cannot be made all at once at the time for the response, but also recognizing that the time for production should not be open-ended. "Rolling production" is a common and necessary mode of compliance:

(B) Responding to Each Item. For each item or category, the

[5] Could this be simplified: "An objection must state whether anything is being withheld on the basis of the objection"?

response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons. If the responding party elects to produce copies of documents or electronically stored information instead of permitting inspection, the response must state that copies will be produced, and the production must be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response.

Rule 37(a)(3)(B)(iv) would be amended to provide that a party seeking discovery may move for an order compelling an answer if:

(iv) a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.

d. Preservation and Evidence Rule 502 in Rules 16(b), 26(f)

Quite modest suggestions have been made to expand Rules 16(b) and 26(f) to add reminders of subjects already covered in the rules. Many observers continue to lament that preservation obligations are too often overlooked in Rule 26(f) conferences and in scheduling orders. And the Evidence Rules Committee is concerned that the advantages of Evidence Rule 502(e) agreements on the effect of disclosure are still not widely known. There has been little discussion of these sketches, but some good might come of adding these topics to Rules 16(b) and 26(f):

Rule 16(b)(3)(B)(iii), (iv)

(B) *Permitted Contents.* The scheduling order may:

(iii) provide for disclosure, ~~or~~ discovery, or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Rule 502(e) of the Federal Rules of Evidence;

Rule 26(f)(3)(C), (D)

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

(C) any issues about disclosure, ~~or~~ discovery, or

preservation of electronically stored information, including the form or forms in which it should be produced;[6]

(D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order under Rule 502(d) and (e) of the Federal Rules of Evidence;[7]

e. Initial Disclosures

Questions about the value of initial disclosures under Rule 26(a)(1)(A) have persisted for many years. Divergent views were expressed at the Duke Conference. The Subcommittee has concluded that this topic is not yet ripe for consideration. Practices in some states require more expansive disclosures than Rule 26 requires. Empirical studies are being made of some of these practices. It is better to wait to see what they reveal.

f. Cost Shifting (Discovery only)

Both at the Duke Conference and otherwise, suggestions continue to be made that the discovery rules should be amended to include explicit provisions requiring the requesting party to bear the costs of responding. Cost-bearing could indeed reduce the burdens imposed by discovery, in part by compensating the responding party and in part by reducing the total level of requests. But any expansion of this practice runs counter to deeply entrenched views that every party should bear the costs of sorting through and producing the discoverable information in its possession. These proposals deserve serious development. But they require careful work that cannot be rushed. And they can readily be severed from the other proposals that make up the present package. They will remain on the Committee agenda, but are no

[6] Note that Rule 26(f)(2) deliberately requires discussion of issues about preserving "discoverable information"; it is not limited to electronically stored information. The (f)(3) discovery plan provisions are more detailed than the (f)(2) subjects for discussion, so the discontinuity may not be a problem.

[7] This drafting assumes that any request to adopt the agreement in a court order should mean that it is a Rule 502(e) agreement, and that the order should be governed by Rule 502(d).

longer part of the "Duke Rules" package. What remains is a more modest approach through Rule 26(c).

Rule 26(c) authorizes "an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *." The list of examples does not explicitly include cost shifting. Paragraph (B) covers an order "specifying terms, including time and place, for the disclosure or discovery." "Terms" could easily include cost shifting, but may be restrained by its association with the narrow examples of time and place. More importantly, "including" does not exclude — the style convention treats examples as only illustrations of a broader power. Rule 26(b)(2)(B), indeed, covers the idea of cost shifting when the court orders discovery of electronically stored information that is not reasonably accessible by saying simply that "[t]he court may specify conditions for the discovery." The authority to protect against undue expense includes authority to deny discovery unless the requesting party pays part or all of the costs of responding. Courts in fact exercise this authority now, particularly in addressing electronic discovery issues.

Notwithstanding the conclusion that Rule 26(c) now authorizes cost shifting in discovery, this authority is not prominent on the face of the rules. Nor does it yet figure prominently in reported cases. If it is desirable to encourage greater use of cost shifting, a more explicit provision could be useful. Rule 26(b)(2)(B) recognizes cost shifting for discovery of electronically stored information that is not reasonably accessible from concern that Rule 26(c) might not be equal to the task. So it may also be desirable to supplement Rule 26(c) with a more express provision.

The more conservative approach does no more than add an express reference to cost shifting in present Rule 26(c)(1)(B):

> **(1)** *In General.* * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *
>
> **(B)** specifying terms, including time and place <u>or the allocation of expenses</u>, for the disclosure or discovery; * * *

3. Cooperation: Rule 1

The wish for reasonable proportionality in discovery overlapped with a broader theme explored at the Duke Conference. Cooperation among the parties can go a long way toward achieving proportional discovery efforts and reducing the need for judicial

management. But cooperation is important for many other purposes. Discovery is not the only arena for tactics that some litigants lament as tactics in a war of attrition. Ill-founded motions to dismiss — whether for failure to state a claim or any other Rule 12(b) ground, motions for summary judgment, or other delaying tactics are examples.

It is easy enough to draft a rule that mandates reasonable cooperation within a framework that remains appropriately adversarial. It is difficult to know whether any such rule can be more than aspirational. Rule 11 already governs unreasonable motion practice, and there is little outcry for changing the standards defined by Rule 11.[8] And there is always the risk that the ploy of adding an open-ended duty to cooperate will invite its own defeat by encouraging tactical motions, repeating the sorry history of the 1983 Rule 11 amendments.

The sketch considered at the Dallas miniconference revised Rule 1 to impose duties on the parties in two ways. The first, which survives on the agenda, provided that the rules should be "employed by the court and parties" to achieve the iconic Rule 1 aspirations. The second would have added "and the parties should cooperate to achieve these ends." This second provision encountered substantial opposition. The opposition extended to a suggested softening that would say only that the parties "are expected to cooperate to achieve these ends." Much of the opposition rested on concern that cooperation is an open-ended concept that, if embraced in rule text, could easily lead to less cooperation and an increase in disputes in which every party accuses every other party of failing to cooperate. Additional concerns have been expressed that anything imposing new duties on lawyers will become entangled with rules of professional responsibility. This provision has been abandoned. The concept of cooperation could be spelled out in the Committee Note once it is clear that Rule 1 applies to lawyers and not simply the court.

The surviving Rule 1 sketch is:

> * * * [These rules] should be construed, ~~and~~ administered, and employed by the court and parties to secure the just, speedy, and inexpensive[9] determination

[8] Nor is there any sense that the 1993 amendments softening the role of sanctions should be revisited, despite the continuing concern reflected in proposed legislation currently captioned as the Lawsuit Abuse Reduction Act.

[9] Here the ACTL/IAALS proposal would ratchet down the expectations of Rule 1: "~~speedy, and inexpensive~~ timely, efficient, and cost-effective determination * * *."

of every action and proceeding.[10]

If this proposal moves forward, it will be important to frame the Committee Note with care. Descriptions of cooperation as a duty or obligation will encounter the same reactions as explicit rule text.

Appendix

Various parts of the same rules are affected by proposals made for different purposes. This appendix lays out the full set of changes rule by rule.

Rule 1

* * * [These rules] should be construed, ~~and~~ administered, and employed by the court and parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

Rule 4

(m) TIME LIMIT FOR SERVICE. If a defendant is not served within ~~120~~ 60 days after the complaint is filed, the court * * * must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause * * *

Rule 16(b)

(b) SCHEDULING.

(1) Scheduling Order. Except in categories of actions exempted by local rule, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference ~~by telephone, mail, or other means~~.

(2) Time to Issue. The judge must issue the scheduling order as soon as practicable, but ~~in any event~~ unless good cause is found for delay must issue the order: within the earlier of ~~120~~ 90 days after any defendant

[10] The ACTL/IAALS version is much longer. The court and parties are directed to "assure that the process and costs are proportionate to the amount in controversy and the complexity and importance of the issues. The factors to be considered by the court * * * include, without limitation: needs of the case, amount in controversy, parties' resources, and complexity and importance of the issues at stake in the litigation."

has been served with the complaint or ~~90~~ 60 days after any defendant has appeared.

(3) * * *

(B) *Permitted Contents.* The scheduling order may:

(iii) provide for disclosure, ~~or~~ discovery, or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Rule 502(e) of the Federal Rules of Evidence;

(v) direct that before filing a motion for an order relating to discovery the movant must request an informal conference with the court;

[present (v) and (vi) would be renumbered] * * *

Rule 26

(b) Discovery Scope and Limits.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information [within this scope of discovery]{sought} need not be admissible in evidence to be discoverable. ~~— including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~ * * *

(2) *Limitations on Frequency and Extent.*

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of

depositions, ~~and~~ interrogatories, requests [to produce][under Rule 34], and requests for admissions, or on the length of depositions under Rule 30. ~~By order or local rule, the court may also limit the number of requests under Rule 36.~~

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery ~~otherwise allowed by these rules or by local rule~~ if it determines that: * * *

(iii) the ~~burden or expense of the~~ proposed discovery is outside the scope permitted by Rule 26(b)(1) ~~outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.~~

* * *

(c) Protective Orders

(1) *In General.* * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; * * *

(d) Timing and Sequence of Discovery.

(1) Timing. A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except:

(A) in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B)~~,~~;

(B) that more than 21 days after service of the summons and complaint on any defendant a party may deliver to [any party][that defendant] requests under Rule 34(a), to be considered as served at the [first] Rule 26(f) conference; or

(C) when authorized by these rules, by stipulation, or by court order.

(2) Sequence. Unless the parties stipulate, or~~, on motion,~~ the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence;

and

(B) discovery by one party does not require any other party to delay its discovery.

* * *

(f)(1) *Conference Timing.* Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or * * *"

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

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

(D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order under Rule 502(d) and (e) of the Federal Rules of Evidence;

Rule 30

(a)(2) ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1~~2~~)[11]:

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than ~~10~~ 5 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants; * * *

(d) Duration; Sanction; Motion to Terminate or Limit

(1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to [~~one day of 7~~ 4 hours in a single day][one day of ~~7~~ 4 hours].

Rule 31

(a)(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule

[11] This change from (b)(2) to (b)(1) illustrates a number of cross-references to present (b)(2) that would have to be changed to conform to the proposed transposition of (b)(2) to become part of (b)(1)'s definition of the scope of discovery.

26(b)(2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than ~~10~~ 5 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants; * * *

Rule 33

(a)(1) *Number.* Unless otherwise stipulated or ordered by the court, a party may serve on another party no more than ~~25~~ 15 interrogatories, including all discrete subparts.

Rule 34

(a) In General. A party may serve on any other party ~~a~~ no more than [25] request**s** within the scope of Rule 26(b): * * *

(3) Leave to serve additional requests may be granted to the extent consistent with Rule 26(b)(1).

(b)(2) *Responses and Objections.* * * *

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(1)(B) — within 30 days after the parties' [first] Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state [the grounds for objecting {to the request} with specificity] [an objection to the request, including the specific reasons.] If the responding party elects to produce copies of documents or electronically stored information instead of permitting inspection, the response must state that copies will be produced, and the production must be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response.

(C) *Objections*. An objection to part of a request must specify the part and permit inspection of the rest. An objection [to a request or part of a request] must state whether any responsive [materials]{documents, electronically stored information, or tangible things <or premises?>} are being withheld [under]{on the basis

of} the objection.

Rule 36

(a) SCOPE AND PROCEDURE.

(1) *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:

(A) facts, the application of law to fact, or opinions about either; and

(B) the genuineness of any described document.

(2) *Number.* Unless otherwise stipulated or ordered by the court, a party may serve no more than 25 requests to admit under Rule 36(a)(1)(A) on any other party, including all discrete subparts. * * *

Rule 37

(a)(3)(B)(iv) [A party seeking discovery may move for an order compelling an answer if:] a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.

II.B. RULE 84 FORMS

Uncertainties about the impact of the Supreme Court's still recent decisions on pleading standards on the Rule 84 official pleading forms led the Committee to broader questions about Rule 84 and the Rule 84 Forms. These questions led to comparisons with the other bodies of rules. Official forms are attached to the Appellate, Bankruptcy, and Civil Rules. The Appellate and Civil Forms have been generated through the full Enabling Act Process. The Bankruptcy Forms are developed through the Enabling Act committees, but the final step is approval by the Judicial Conference without going on to the Supreme Court or Congress. The Administrative Office produces forms for use in criminal prosecutions, but these forms are not "official." A subcommittee formed of representatives of the advisory committees examined these differences. It reported that forms play different roles in the different types of litigation, and that there is no apparent reason to adopt a uniform approach across the different sets of rules and advisory committees.

With this reassurance of independence, the Rule 84 Subcommittee was formed to study Rule 84 and the Rule 84 forms. It gathered information about the general use of the forms by informal inquiries that confirmed the initial impressions of Subcommittee members. Lawyers do not much use these forms, and

there is little indication that they often provide meaningful help to pro se litigants. And as discussed further below, the pleading forms live in tension with recently developing approaches to general pleading standards.

From this beginning, the Subcommittee considered several alternative approaches. The simplest would be to leave Rule 84 and the Rule 84 forms where they lie. The most burdensome would be to take on full responsibility for maintaining the forms in a way that ensures a good fit with contemporary practice and needs, and perhaps developing additional forms to address many of the subjects that are not now illustrated by the forms. The work required to maintain the forms through the full Enabling Act process would divert the energies of all actors in the process from other work that, over the years, has seemed more important. Other approaches also were considered.

After some initial hesitation, the Subcommittee has come to believe that the best approach is to abrogate Rule 84 and the Rule 84 forms. Several considerations support this conclusion. One important consideration is the amount of work that would be required to assume full responsibility for maintaining the forms. Another consideration is that many alternative sources provide excellent forms. One source is the Administrative Office.

A further reason to abrogate Rule 84 is the tension between the pleading forms and emerging pleading standards. The pleading forms were adopted in 1938 as an important means of educating bench and bar on the dramatic change in pleading standards effected by Rule 8(a)(2). They — and all the other forms — were elevated in 1946 from illustrations to official status by adding to Rule 84 the present provision that the forms "suffice under these rules." Whatever else may be said, the ranges of topics covered by the pleading forms omit many of the categories of actions that comprise the bulk of the federal docket. And some of the forms have come to seem inadequate, particularly the Form 18 complaint for patent infringement. Attempting to modernize the existing forms, and perhaps to create new forms to address such claims as those arising under the antitrust laws (*Twombly*) or implicating official immunity (*Iqbal*), would be very difficult considering the case-specific pleading required by *Twombly* and *Iqbal*.

Abrogation need not remove the Enabling Act committees entirely from forms work. The Administrative Office has a working group on forms that includes six judges and six court clerks. They have produced a number of civil forms that are quite good. The forms are available on the Administrative Office web site, some of them in a format that can be filled in, and others in a format that can be downloaded for completion by standard word-processing programs. The working group is willing to work in conjunction with the Advisory Committee. If Rule 84 is abrogated, a conservative initial approach would be to appoint a liaison

from the Advisory Committee to work with the working group. New and revised forms could be reviewed, perhaps by a Forms Subcommittee. Experience with this process would shape the longer-term relationships. The forms for criminal prosecutions have been developed successfully with only occasional review by the Criminal Rules Committee. Similar success may be hoped for with the Civil Rules. The Administrative Office forms, moreover, would have to win their way by intrinsic merit, unaided by official status. A court dissatisfied with a particular form would not be obliged to accept it.

One and perhaps two particular forms require special consideration. Rule 4(d)(1)(D) requires that a request to waive service of process be made by Form 5. The Form 6 waiver is not required, but is closely tied to Form 5. It would be possible simply to remove this requirement, perhaps substituting a recital in the rule of the elements that must be included in the request and in the waiver. The corresponding Administrative Office forms are identical to Form 5 and virtually identical to Form 6. But without something in Rule 4(d) to mandate their use, the Administrative Office forms might not be uniformly employed. An alternative would be to adopt a request form, and perhaps a waiver form, as part of Rule 4. These forms were carefully developed as part of creating Rule 4(d), and might be carried forward into Rule 4 without change. It also would be possible to consider some revisions, even to Rule 4(d) itself, but it is not clear whether there is a need for change that justifies further delay in the Rule 84 project.

The Committee and Subcommittee ask this question: Does the Standing Committee have concerns about the possible abrogation of Rule 84 and its official forms?

II.C. CLASS ACTIONS: RULE 23

The Rule 23 Subcommittee Report to the Committee in November said that "[t]houghtful observation and fact-gathering, rather than immediate action, seem the order of the day." It will be some time before proposals to revise Rule 23 are made, if any are to be made by this Subcommittee.

At least three concerns account for the Subcommittee’s approach of "watchful waiting." The work of the Discovery and Duke Conference Subcommittees continues to command much of the Committee’s resources, and the work of at least the Discovery Subcommittee seems never to be done. In addition to the remaining uncertainties about the ways in which recent Supreme Court class-action decisions will play out in practice, the Court has granted certiorari in at least three class-action cases; one of them raises questions that bear directly on one of the central issues the Subcommittee thinks deserves attention. And it will be

important to gain broader input to identify which issues should be considered — and perhaps addressed — without attempting a complete review of all possible Rule 23 issues.

The tentative lists of potential issues reported in November are copied here in the hope of eliciting reactions and guidance as to the importance of these issues and, perhaps more important, as to other issues that also deserve attention. The lists are tentative not only in identifying issues but also in allocating them between "front burner" and "back burner" status. All observations are welcome.

"Front burner" issues

(1) Settlement class certification

(2) Class certification and merits scrutiny

(3) Issues classes under Rule 23(c)(4)

(4) Refining or improving criteria for settlement review under Rule 23(e)

(5) Rule 23(b)(2) and monetary relief

"Back burner" issues

(1) Fundamental revision of Rule 23(b)

(2) Revisiting Rule 23(a)(2)

(3) Requiring court approval for "individual" settlement of cases filed as putative class actions

(4) Revisiting the "predominance" or "superiority" language in Rule 23(b)(3)

(5) Revising the notice requirements of Rule 23(c), and considering notice by means other than U.S. mail

(6) Responding to the Supreme Court's *Shady Grove* decision by confirming district court discretion in deciding whether to certify a class

(7) Addressing choice of law in Rule 23

(8) Revisiting Rule 23(h) and standards for attorney-fee awards in class actions

(9) Addressing the binding effect of a federal court's denial of certification or refusal to approve a proposed class-action settlement

(10) Addressing the propriety of aggregation by consent.

(Another issue may be added in conjunction with the Appellate Rules Committee, which has begun consideration of a proposal to require court approval when an objector seeks to dismiss an appeal from a class-action judgment. Both Committees

recognize that these questions implicate both the Appellate and Civil Rules.)

II.D. PLEADING STANDARDS

Pleading standards were included in the agenda materials for the Committee's meetings in March and November, as they have been included in the materials for every meeting since the 2007 decision in the *Twombly* case. Discussion at the March meeting was brief. There was no discussion at the shortened November meeting.

The Committee has been provided many alternative approaches to revising pleading standards. Some focus directly on pleading standards. Others look to integrating discovery with practice on motions to dismiss, spurred in part by concerns about the difficulty plaintiffs face in pleading cases with "asymmetrical information." Expansion of the motion for a more definite statement also has been sketched.

The Committee feels that it should await further development of the case law and the results of a pending FJC study before considering whether amendments to the pleading rules are warranted. The lower courts continue to engage in an essentially common-law process of refining pleading practices, and new lessons remain to be learned from this process. The Federal Judicial Center is launching a project to study all Rule 12 motions, not only 12(b)(6) motions to dismiss for failure to state a claim, and will include motions for summary judgment as well.

The time to take up these topics may come when the FJC study is complete. Or it may come when there is a sense that lower courts have come about as far as can be, if the outcomes seem to be substantial disuniformity among courts or general pleading standards that seem too relaxed or too demanding. It might even be that the cases show a need to develop specific pleading standards for particular categories of cases, generalizing on the models provided by Rule 9. The Committee will continue to monitor developments and will keep the Standing Committee apprised of its thinking.

II.E. DELAYED RULINGS ON MOTIONS TO REMAND REMOVED ACTIONS

Jim Hood, Attorney General of the State of Mississippi, wrote to this Committee to propose two amendments to the Federal Rules of Civil Procedure. The proposals are prompted by frustration with delays in ruling on motions to remand actions brought "to protect citizens from corporate wrongdoing," often

presenting a need for immediate protection. In one case the court of appeals issued mandamus to direct a prompt ruling on a motion to remand that had been pending for three years. In another case it took 15 months to get a ruling on the motion to remand.

General Hood proposed two new rules provisions. One would require "automatic remand of cases in which the district court takes no action on a motion to remand within 30 days." The second would require the removing party to pay all actual expenses, including attorney fees, incurred as a result of removal when remand is ordered.

It is easy to understand a litigant's sense of frustration with what seem undue delays in ruling on remand. Without knowing the detailed circumstances of these two cases — apart from the fact that relief was granted by extraordinary writ in one of them — it may be assumed that the district court should have managed its docket and the complexities of the motions in a way that provided prompter rulings.

Interesting questions could be identified in fleshing out the details of these proposals. The Committee concluded, however, that each is a matter calling for action by Congress, not by Rules Enabling Act committees. The automatic remand rule would at times result in surrendering federal subject-matter and removal jurisdiction over an action properly brought to the federal court. Congress controls subject-matter jurisdiction. The Civil Rules do not. Rule 82, indeed, expressly provides that the rules "do not extend or limit the jurisdiction of the district courts." The award of expenses and attorney fees on remand is addressed by 28 U.S.C. § 1447(c), which makes the award discretionary. The Supreme Court has confirmed that there are circumstances in which there are good reasons to deny an award of expenses and fees. Whatever else might be thought of Enabling Act authority to address this question, it is more fitting to submit this question to Congress.

Judge Sutton has conveyed to Attorney General Hood the Committee's response.

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 2, 2012

The Civil Rules Advisory Committee meeting scheduled for November 1 and 2, 2012, was held on November 2 at the Administrative Office of the United States Courts. The meeting was shortened in order to adjust to the transportation difficulties caused by Storm Sandy. Many participants and observers gathered at the Administrative Office. Others participated by video- or audio-conference systems. Participants included Judge David G. Campbell, Committee Chair, and Committee members John Barkett, Esq.; Elizabeth Cabraser, Esq.; Hon. Stuart F. Delery; Judge Paul S. Diamond; Judge Paul W. Grimm; Peter D. Keisler, Esq.; Dean Robert H. Klonoff; Judge John G. Koeltl; Judge Michael W. Mosman; Judge Solomon Oliver, Jr.; and Judge Gene E.K. Pratter. Justice Randall T. Shepard and Anton R. Valukas, Esq., whose second terms as Committee members concluded on October 1, also participated. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge Jeffrey S.Sutton, Chair, Judge Diane P. Wood, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Theodore Hirt, Jonathan F. Olin, and Allison Stanton. Joe Cecil and Emery Lee participated for the Federal Judicial Center. Peter G. McCabe, Jonathan C. Rose, Benjamin J. Robinson, and Julie Wilson represented the Administrative Office. Observers included Henry D. Fellows, Jr., Esq. (American College of Trial Lawyers); Joseph D. Garrison, Esq. (National Employment Lawyers Association); Rachel Hines, Esq. (Department of Justice); Brittany K.T. Kauffman, Esq. (Institute for the Advancement of the American Legal System); John K. Rabiej (Duke Center for Judicial Studies); Jerome Scanlan (EEOC);Alfred W. Cortese, Jr., Esq., and Alex Dahl (Lawyers for Civil Justice); John Vail, Esq. (American Association for Justice); Thomas Y. Allman, Esq.; William P. Butterfield, Esq., Richard Braman, Esq., Conor R. Crowley, Esq., John J. Rosenthal, and Kenneth J. Withers, Esq. (Sedona Conference); Zviad V. Guruli, Esq.; and Jonathan M. Redgrave, Esq.

All participants' statements were recorded by audio means.

Judge Campbell opened the meeting by thanking all participants for joining the meeting in this unusual format. The meeting is just that, the meeting that was formally noticed for this day and place. Business will be conducted as usual, just as if all participants were physically present at the Administrative Office. Observers will be afforded opportunities to speak in the usual routine.

Judge Campbell also noted the death of Mark R. Kravitz, former chair of this Committee, who died on the last day of his first year

as chair of the Standing Committee. He was a beloved friend and leader. The Committee's thoughts and prayers are with his family. A memorial service will be held on November 17 in New Haven. Memorial funds have been established in Mark's name.

Judge Campbell introduced Judge Sutton as the new chair of the Standing Committee. He will make as formidable a team with Reporter Coquillette as former chairs have made.

This is the last meeting for outgoing members Shepard and Valukas, who have completed their terms. Judge Colloton has moved over to chair the Appellate Rules Committee, taking the position vacated by Judge Sutton. All three have made substantial contributions to the Committee. Lawyer Valukas brought rich experience, great expertise, and solid common sense to bear, particularly in his unstinting contributions to the work of the Discovery Subcommittee. Chief Justice Shepard has been a pillar of the judiciary for many years before serving on this Committee, serving prominently in the Conference of Chief Justices among many other positions, and regularly contributed the broad perspectives of state courts. Judge Colloton will fare well in the Appellate Rules Committee; if past experience is a guide, there is a strong prospect that joint projects will bring the Appellate and Civil Rules Committees together during his term.

The Judicial Conference approved the proposed amendments to Rule 45 at its September meeting. Rule 45 was on the consent calendar, suggesting that the Conference believes that the proposals are good. Rule 45 is headed next to the Supreme Court.

March 2012 Minutes

The draft minutes of the March 2012 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Meeting Format

Judge Campbell described the format for the meeting. The meeting is scheduled for four hours. The Discovery Subcommittee proposal for a revised Rule 37(e) on preservation and sanctions will be discussed first. If full discussion can be had in the time available, the goal will be to take a vote on the Subcommittee proposal to present the revised rule to the Standing Committee at its January meeting with a recommendation to approve publication in the summer of 2013. The sketches prepared by the Duke Subcommittee will come next. The proposal of the Rule 84 Subcommittee will follow, with the expectation that it will not require lengthy discussion. If time remains, two other matters will be presented

for a vote. First are the proposals advanced by Attorney General Hood, of Mississippi, to adopt a rule requiring speedy disposition of motions to remand removed actions to state court and a rule requiring that the removing party pay all costs, including attorney fees, incurred by removal of an action that is remanded. The second is a proposal to correct a potential style misadventure in Rule 6(d).

The procedure for the proposals of the Discovery Subcommittee, Duke Conference Subcommittee, and Rule 84 Subcommittee will begin with presentations by the Subcommittee chairs and the Reporter with first-line responsibility for each. Then each Committee member and liaison will be called on in turn for comments and advice. If time allows, observers will be invited to participate. Voting, when a matter requires a vote, will be by polling each member unless discussion shows apparent agreement that can be confirmed by asking whether there is any disagreement with the seeming consensus.

Comments on other matters reflected in the agenda materials, and also on matters that are discussed at the meeting, can be sent to Judge Campbell as committee chair and to the chairs of the Subcommittees.

New Rule 37(e)

Judge Grimm introduced the Rule 37(e) proposal. The materials begin at page 121 of the agenda materials; the draft rule begins at page 127, followed by the draft Committee Note.

The proposal reflects nearly two and a half years of Subcommittee work, beginning soon after the Duke Conference and building on the unanimous recommendation of the panel that a preservation rule be adopted. A miniconference on advanced drafts was held in Dallas in November, 2011. Further work developed drafts that were presented to the Committee for discussion in March, 2012. The Subcommittee work continued through a series of seven conference calls held from July 5 through the end of September, each lasting for at least an hour. Subcommittee members accomplished an extraordinary amount of work. Submissions were received from the Sedona Conference in the form of a not-yet-final draft that included model rule language; from John Vail, who raised questions about the relationship between federal rules and state spoliation law as mediated through the Erie doctrine, issues that are being considered; Lawyers for Civil Justice has from the beginning provided helpful guidance and suggestions; Tom Allman has offered observations about local rules that might affect preservation of electronically stored information.

The recommendation is to adopt the new provisions as a

replacement for present Rule 37(e). Earlier drafts had been framed as a new Rule 37(g), but they have evolved to a point that protects everything that has been protected by present Rule 37(e) and protects much else as well.

The draft lists factors to aid in determining what is reasonable preservation, and what curative measures or sanctions to employ. The Subcommittee did not reach consensus on the factors listed in draft 37(e)(3)(C)(requests to preserve) and (D)(a party's resources and sophistication in litigation). Some feared that listing these factors might unintentionally increase burdens in litigation. Guidance will be asked on that.

Guidance also will be sought on Note language set out in brackets at lines 123-128 on page 131 of the agenda materials. This paragraph says that even an intentional attempt to destroy information does not support sanctions under the rule if the attempt fails. It does no more than state one of the things that is clear from the rule text — the rule applies only when a party fails to preserve information.

Several key features of proposed Rule 37(e) deserve note.

Unlike present Rule 37(e), the proposed rule applies to all forms of information, not only electronically stored information.

As compared to some threads in present case law, the rule provides more comprehensive protection for those who inadvertently and in good faith lose information.

The limitations of consequences for losing information are reflected in the distinction between proposed paragraphs (1) and (2). A distinction is drawn between remedies — curative measures — and sanctions. Remedies include such tools as additional discovery, restoring lost information or developing substitute information, and paying expenses (including attorney fees) caused by the failure to preserve. Sanctions are available under paragraph (2) only if the failure to preserve caused substantial prejudice in the litigation and was willful or in bad faith.

Rule 37(e) is intended to create a uniform national standard. Both at the Duke conference and the miniconference many participants complained that disuniformity among federal courts leads to vast over-preservation as they feel a need to comply with the most onerous standard identified by any one court.

Proposed 37(e)(2) authorizes use of any of the sanctions listed in Rule 37(b)(2) even though there is no order to preserve. But substantial prejudice plus willfulness or bad faith must be

shown, except for the very limited circumstances described in (c)(2)(B) where the failure irreparably deprives a party of any meaningful opportunity to present a claim or defense. The working example of this category is destructive testing of a product that makes it impossible for other parties to perform their own tests.

Present Rule 37(e) is limited to regulating sanctions "under these rules." That limit is discarded in the proposal. The purpose is to make it unnecessary to resort to inherent authority. There is a lot of loose language in the cases about inherent authority. (e)(2)(A), requiring substantial prejudice and bad faith or willfulness, encompasses all the circumstances in which it would be appropriate to rely on inherent authority.

The several factors listed in proposed Rule 37(e)(3) stress reasonableness and proportionality. They apply only when there is a failure to preserve.

Professor Marcus added that the Subcommittee went through many issues at length. Andrea Kuperman provided an excellent memorandum on reported uses of current Rule 37(e), supporting the conclusion that the proposal does not take away any protection that has been important. He further noted that Judge Harris has suggested some possible wording changes in proposed (e)(3) that will be considered by the Subcommittee. And there was a high level of consensus in the Subcommittee on the proposal. Even as to the items that failed to achieve consensus there was not much dissent.

Judge Grimm reiterated that the Subcommittee is proposing that Rule 37(e) be recommended to the Standing Committee for publication. It seeks a Committee vote, subject to the Subcommittee's further consideration of the argument that there may be Erie problems in relating to state spoliation law, and to reviewing the wording suggested by Judge Harris. If the Subcommittee concludes that any significant change should be made in the proposal, it will seek a Committee vote by e-mail.

Judge Campbell summarized the most prominent issues for discussion: Should subparagraphs (e)(3)(C) and (D) go forward? Should the Note language about unsuccessful attempts to destroy information be omitted? If a draft proposal is approved by Committee vote, it will go to the Standing Committee at the January meeting with a recommendation to publish next summer. This schedule will be particularly helpful if a package of Duke Subcommittee proposals can be approved at the April meeting, so that both sets of recommendations can be published at the same time.

Committee members and liaisons spoke in order.

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The first member expressed concern that (e)(3)(C) and (D) "are not necessary." They are simply elaborations of factor (B), looking to the reasonableness of the party's efforts to preserve information. And for that matter, (B) should be cut short: "the reasonableness of the party's efforts to preserve the information; ~~including the use of a litigation hold and the scope of the preservation effort;~~ There is no need to elaborate the reasonableness requirement in (C) and (D), and there is a potential for mischief. Apart from these matters, the proposal "is fine."

The next Committee member offered "only a brief editorial. We will continue to face problems, but the rule will advance the courts' ability to solve the problems." It will not constrain desirable solutions. Sanctions will be focused.

Support was then offered for factor (C), dealing with requests to preserve. Participants in the miniconference focused on over-preservation resulting from a lack of guidance. It is wrong to assume that lawyers cannot talk to each other. We should encourage them to talk about preservation, to substitute dialogue for "gotcha" tactics. Factor (D), on the other hand, is a "rabbit hole." How should a court determine whether a lawyer or a party is "sophisticat[ed] in litigation"? This serves no purpose.

A judge tended to agree that (C) and (D) are not necessary, but thought that the package could be supported even if they are included.

Another member thought this is a "nicely constructed rule," that offers good answers to difficult questions. An initial reaction that factor (C) on requests to preserve should be dropped has been discarded in favor of the arguments that lawyer dialogue should be encouraged. Factor (D) is an additional concern. As (e)(3) is framed, a party's resources and sophistication are considered both in determining what is reasonable preservation and in determining whether there is bad faith or willfulness. But resources and sophistication are relevant to bad faith or willfulness only in rare circumstances. If (D) is retained, courts may be misled to think it is relevant to bad faith or willfulness. The Note language on unsuccessful efforts to lose information is unnecessary; it should be dropped. Finally, the introductory language of (e) begins: "If a party fails to preserve discoverable information that reasonably should be preserved * * *." The problem is that no one is a party until an action is filed. It would be better to say information "that reasonably <u>should have been</u> preserved."

The next member thought it difficult to determine which of factors (A) through (F) in (e)(3) bear on reasonableness, which on

bad faith or willfulness. The Sedona Conference draft teases out factors that relate to good faith. Should we attempt to disaggregate the factors in (e)(3)? (It was noted that the Subcommittee had considered this problem and had been afraid that "more precision would generate unhelpful arguments." A further response was a reminder that these factors "are illustrative, not exhaustive." A court can find that some of them are irrelevant in a particular case, and can consider factors not listed. It is desirable to avoid complexity.)

A further note on drafting history observed that the Subcommittee began with the thought of attempting to define precise triggers for the duty to preserve. Draft (e)(3) is designed to suggest the things that bear both on the criteria for litigants and potential litigants to consider in undertaking preservation and on thinking when the duty to preserve arises.

The next member in the rotation supported both factors (C) and (D). (C) concerns, and will encourage, discussion among the lawyers. (D) reflects concern individual parties lack sophistication on questions of preservation, frequently have little concept of what electronically stored information they have, and are particularly vulnerable to losing data from social media. But the note language on unsuccessful efforts to lose information should be deleted.

Continuing along the Committee roster, another member supported factor (C) in order to encourage discussions among the lawyers. Factor (D) is important not only for individuals, but also in dealing with the increasing frequency of litigation that involves municipalities and counties that are financially strapped. And it is good that the rule has been drafted in technologically neutral terms that are likely to survive the advances of technology over time.

A judge member reported that his initial view was that factors (C) and (D) should be deleted, but that the discussion had persuaded him otherwise. He had been worried about which of the factors address which issues, but (D) — sophistication and resources — goes to bad faith as well as reasonableness, and should be retained. The rule "seems slanted toward big litigation," as illustrated by the reference to "holds," but it will apply to all litigation. It is the normal-scale litigation that (D) will serve. The Note language on failed attempts to destroy information should be deleted.

The next judge member commended the draft as ready to take the next step to the Standing Committee. Shorter rules are better than longer rules. Factors (C) and (D) should be dropped for this

reason, and (B) should be shortened by deleting the references to litigation holds and the scope of preservation. The value of encouraging professional cooperation can be served by putting factor (C) into the Committee Note. There is a drafting change that would improve (2)(a). A recent long argument about the possible ambiguity of antecedents in dealing with "and" "or" sequences points to the need to at least insert a comma, or better to rearrange it to read: "that the failure caused substantial prejudice in the litigation and was willful or in bad faith." This will make it clear that both willful or bad faith failures warrant sanctions only if there was substantial prejudice. The Note language on unsuccessful attempts to delete information should be omitted.

The Department of Justice recognized that much hard work has gone into developing proposed Rule 37(e), vigorously grappling with the issues. The draft make progress. The Department has doubts about how widespread the sanctions problems are. And there are several reasons to conclude that it would be premature to vote on the proposal today. The Department has not had time to do a full review, nor have the agencies the Department represents. It must be remembered that the Department appears on all sides of all the varieties of litigation that come to federal courts — it is involved in about one-third of the civil actions. It has not yet come to a position on the proposal. Despite the real progress that has been made in the proposed draft, the Department is not in a position to vote for taking it forward with a recommendation for publication.

At the same time, The Department can make some observations. (1) It is right to address loss of all forms of information, not just electronically stored information. (2)Invoking proportionality as one of the factors to measure reasonable preservation is strongly supported. (3) Present Rule 37(e) should be preserved. It provides a safe harbor that has guided information technology professionals in addressing some of these issues. Still, the same considerations could be taken into account under the proposed rule. (4) The proposed rule refers to failure to preserve "discoverable information"; the Note should say expressly that Rule 26(b) defines the scope of what is discoverable. (5) Willfulness and bad faith can make sense as a concept for a standard, but achieving uniformity may be advanced by providing a better developed explanation in the Note. Without guidance, different courts will interpret these words in different ways. (6) Proposed (e)(3)(A) looks to "the extent to which the party was on notice that litigation was likely," etc. This should include "should have known"; a prospective party may "lose" information and claim lack of actual knowledge. (7) Both factors (C) and (D) should be omitted. (C), looking to requests to preserve, may encourage

premature or very broad preservation demands early in the process. Government agencies already are receiving such demands, often early in the administrative process. "Dialogue is good, but this gets in the way." So factor (D),looking to a party's resources and sophistication in litigation, could be used against the government because it has what seem to be vast resources and has a high level of sophistication in litigation. (8) Factor (F), asking whether the party sought timely guidance from the court, raises a question of the relationship to dispositive motions. Is it expected that a party will ask the court for guidance on preservation obligations before rulings on dispositive motions, at a time when the scope of discovery may seem broader than it will be after the motions are resolved? (9) The Rule does not include a list of factors bearing on the determination of "substantial prejudice" in (e)(2)(A). It would help to describe such elements as materiality, the availability of information from alternative sources, and so on. (10) The note language on a failed attempt to destroy information should be deleted — it is not necessary, even while it is not objectionable.

Another Committee member expressed admiration for the work. Factors (e)(3)(C) and (D) seem useful. And it is wise to include factor (E), proportionality. Courts too often overlook the need for proportionality, both in preservation and in discovery.

A liaison expressed ambivalence about retaining factors (C) and (D), but suggested that "generally, shorter is better." The note language on failed attempts to destroy information should be removed. It is not clear which of the (e)(3) factors bear on determining reasonable preservation, which on determining willfulness or bad faith. Nor is it clear how they relate to the choice of remedies under (e)(1) or sanctions under (e)(2). The rule text might be studied further to see whether clarification is feasible.

Another liaison said that the note language on unsuccessful attempts to destroy information should be dropped.

A third liaison applauded the distinction between remedies, (e)(1), and sanctions, (e)(2). The questions raised by factor (C), requests for preservation, and (D), resources and sophistication, stem from the fact that many problems can be resolved without considering all of the suggested factors, and may require consideration of others. The text should be clear that the court is not required to consider all factors in every dispute. Perhaps "the court should consider all relevant factors <u>where appropriate</u> * * *." Public comments may help in considering these questions. And the Note language on thwarted spoliation attempts should be deleted.

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Judge Sutton lauded the draft rule as a terrific product. He remained agnostic on factors (C) and (D) — they could be moved to the Note as illustrations of what is reasonable preservation. The Note language on extreme bad faith efforts that fail to lose information should be expunged. And as a matter of caution, one word might be added to (e)(2)(B): the failure to preserve, although not willful or in bad faith, "irreparably deprived a party of any meaningful opportunity to present a cognizable claim or defense * * *."

Reporter Coquillette observed that "This is a long Note. Delete anything you're not sure is necessary."

An observer agreed with the suggestion that (e)(3)(B) should be shortened by deleting "~~including the use of a litigation hold and the scope of the preservation efforts~~." A hold is a technical means of implementing preservation; probably it is not needed in less complex litigations. (C) and (D) could be relegated to the Note.

Another observer thought the draft "almost right." The distinction between remedies and sanctions "is key." This distinction is not well reflected in the case law, which generally is under-reasoned. But (e)(2) raises a serious concern. It precludes use of an adverse-inference instruction as a curative measure by treating it as a sanction. This conflicts with the law in many states. Under these state laws, preservation is a duty owed not only to the court but to other parties. In some of them an adverse inference instruction is available for a negligent failure to preserve. This is a substantive state duty, and a substantive state remedy. Erie doctrine and the limits of § 2072 forbid invoking the proposed rule to limit the remedy provided by state law when the federal court is resolving a state-law claim.

Yet another observer approved the drafting as "technology agnostic," so it can survive through the continual changes of technology. And it is good to cover all forms of information, not only electronically stored information. But explicit reference to a litigation hold as a factor in measuring reasonable preservation "is too detailed." There is a risk that some parties or courts may read this factor to require a written notice, when oral notice might suffice. This can be relegated to the Note. Factor (C), looking to requests to preserve, will generate overbroad — even form — demands to preserve. We do need to encourage dialogue between the parties, but this should be put in the Note on factor (A), looking to the extent to which the party was on notice that information would be discoverable in likely litigation. It also could bear on factor (F), whether the party sought guidance from the court. Factor (D), looking to a party's sophistication, may be

misapplied as courts mistakenly attribute sophistication in litigation to small and medium-size companies that in fact are not sophisticated. Again, this can be explored in the Note, but does not belong in the rule. Still, there is room to be concerned that individual litigants will be "hammered" for ignorantly doing things that a business would not do. It is right to replace present 37(e) with the new provisions, but the Note should carry forward the protection for automatic processes that routinely destroy information. And the Note language on unsuccessful bad-faith attempts to destroy information is unnecessary.

Observers from the Sedona conference noted that the working group had submitted a draft proposal in response to the Advisory Committee's interest in receiving comments. A committee was formed. It has considered not only Rule 37 but other topics addressed by the Duke Subcommittee. The Rule 37 committee was formed as a balance of those who primarily represent plaintiffs, or primarily represent defendants, and corporate counsel. It did not achieve complete consensus. The draft is a compromise. It has four main characteristics: it provides a uniform sanctions standard; it is not a tort-based duty; it requires heightened culpability for more serious sanctions; and it avoids a false distinction between sanctions and remedies.

The Sedona views were amplified. The distinction drawn between remedies, proposed (e)(1), and sanctions, proposed (e)(2), is false. Most courts view as sanctions the measures that (e)(1) would characterize as remedies. Tying remedies to loss of evidence limits courts in the future. Remedies can be appropriate even when there is no loss of evidence. The focus in (e)(2)(A) on bad faith and willfulness "will perpetuate confusions the courts exhibit now." Bad faith is not the same as willfulness. The Sedona proposals take a better approach in providing a list of factors that bear on "good faith," moving away from a tort standard. Is the information available from other sources? Is there material prejudice? Is the motion for court action timely? The aim is to incentivize good behavior, to consider "intent" as bearing on the weight of the sanctions. For the "Silvestri" problem addressed by (e)(2)(B), Sedona relies on "absent exceptional circumstances." That is better than looking for irreparably depriving a party of any meaningful opportunity to present a claim or defense, a concept that will generate huge litigation. How does this differ from the "substantial prejudice" invoked in (e)(2)(A)?

The Sedona group also moved away from rule text addressing requests to preserve, the (e)(3)(C) factor, for reasons expressed by other participants. So too it rejected (D), looking to a party's sophistication and resources, because that will be unfair to corporations: consider the preservation burdens that might be

imposed on a corporation with such far-flung activities as to be involved in 15,000 litigations, generating great sophistication. Factor (F), seeking guidance from the court, raises problems with information claimed to be privileged: how does the party seek, and the court give, meaningful guidance?

Finally, the Sedona draft approaches sanctions differently. Rather than incorporate Rule 37(b)(2), they specifically enumerate sanctions. Spoliation sanctions are available only on showing intent. And the rule text should incorporate a "least severe sanction" provision. Proportionality does not bear on choosing the "weight" of the sanction. It does bear on determining the degree of prejudice.

One of the Sedona observers added that speaking for himself, it would be useful to step back from the present Rule 37(e) draft. It will generate "a lot of litigation."

Judge Campbell suggested that the Committee needs to move toward a conclusion. The discussion has provided many helpful comments. There would be still more helpful comments if the discussion were continued for another three or four years. The Subcommittee has worked hard for two and a half years, including a miniconference. It would be useful to take this to the Standing Committee in January with a recommendation to approve publication. The Subcommittee will continue to polish the proposal for submission to the Standing Committee. Presenting a proposal for publication will support a thorough discussion in the Standing Committee. The Standing Committee can judge whether it is ready for publication. Of course the proposal could be deferred for further work at the April Advisory Committee meeting, to present it to the Standing Committee for the first time at its spring meeting. Perhaps the better course is to aim for the January meeting.

Judge Sutton noted that the Rule 37(e) proposal interacts with the Duke Conference Subcommittee drafts. The Standing Committee can devote more time to thorough discussion of the 37(e) proposal in January than can be found in the more crowded spring agenda. The Subcommittee can continue to work on the draft that will go to the January agenda. It makes sense to vote now.

Four Committee votes were taken. By vote of 7 to 4, the Committee voted to retain Rule 37(e)(3)(C), listing requests for preservation among the factors to be considered in determining what is reasonable preservation and whether there is bad faith or willfulness. By vote of 6 to 5, the Committee voted to delete the next factor, (D), looking to a party’s resources and sophistication in litigation. The Committee voted unanimously to delete the draft Note language discussing a deliberate but unsuccessful effort to

spoil discoverable information. The Department of Justice voted against sending the proposal to the Standing Committee in January; all other members voted in favor.

Duke Conference Subcommittee

Judge Koeltl introduced the report of the Duke Conference Subcommittee. The report to be considered is not the version that appears in the original agenda materials but a revised version circulated a week before this meeting. The revised version includes new sketches that reflect a Subcommittee conference call held after the October 8 miniconference in Dallas. The rules amendments sketched in the report constitute a package. Some are more important than others. Some still will be discarded, and perhaps others will be added. As a whole, the package is aimed to reduce expense and delay, to promote access to the courts, to serve the goals of Rule 1. "We have come far."

The sketches will be described in three groups, but there is no priority among the groups. And they will be discussed together.

The first group begins with a set of changes that would accelerate the first stages of an action. The time to serve process set out in Rule 4(m) would be reduced from 120 days to 60 days. The alternative times for issuing the scheduling order would be reduced. Rule 16(b) now sets the time as the earlier of 120 days after any defendant has been served or 90 days after any defendant has appeared. The proposals would reduce the 120-day period to 60 days, or possibly 90; the 90-day period would be reduced to 45, or possibly 60. The extent of the reduction will be determined after hearing more advice. Discussion at the miniconference suggested that two further proposals be considered — carrying forward the authority for local rules that exempt categories of cases from the scheduling-order requirement, and allowing exceptions to the timing requirement for good cause.

The next change in the first group would change the scope of discovery defined by Rule 26(b)(1). Discovery would be limited to what is proportional to the needs of the case as measured by the cost-benefit calculus now required by Rule 26(b)(2)(C)(iii). Participants in the miniconference expressed ready acceptance of these factors. Further changes would delete the present authority to order discovery extending to the subject matter of the action, confining all discovery to what is relevant to the claims or defenses of the parties. In addition, the sentence allowing discovery of information that appears reasonably calculated to lead to the discovery of admissible evidence is shortened, so as to provide only that information need not be admissible in evidence to be discoverable. This change reflects experience, shared by the

miniconference participants, that in operation many lawyers and judges read the "reasonably calculated" phrase to obliterate all limits on the scope of discovery; any information may lead to other evidence that is relevant and admissible. These changes result in a shorter, clearer rule that incorporates a concept of proportionality made workable by adopting the (b)(2)(C)(iii) factors.

The third set of changes in the first group look to limits on the numbers of discovery requests that are allowed. The presumptive number of Rule 33 interrogatories would be reduced from 25 to 15. A new limit of 25 Rule 36 requests for admissions would be added, with an exception for requests to admit the genuineness of documents. Another new limit would set 25 as the number of Rule 34 requests; this limit has encountered objections that it would lead to a smaller number of broader requests, while other participants in the miniconference thought that real experience shows this is not a problem. The number of depositions allowed per side would be reduced from 10 to 5, and the time limit for each would be reduced from 7 hours to 4 hours. There was support for the deposition limits, but also some resistance from those who think the reduction is both unnecessary and unrealistic. But there seemed to be general agreement that a reduction of the presumptive time from 7 hours to 6 hours per deposition would work.

The second group starts with a sketch that would allow discovery requests to be served before the parties' Rule 26(f) conference; the time to respond would run from the close of the conference. This sketch in part responds to a perception that the Rule 26(d) moratorium barring service of discovery requests before the parties have conferred is often ignored or not even known. Pre-conference requests would enhance both the parties' conference and the scheduling conference with the court by providing a specific focus on actual discovery requests. It may be wise to impose some hiatus after filing before the requests can be served.

The next set of proposals in the second group focuses on objections to Rule 34 requests to produce. Objections would become subject to the same specificity requirement as Rule 33 imposes on objections to interrogatories. An objecting party would be required to state whether any documents are being withheld under the objections. If a party elects to produce documents rather than permit inspection, the response must state a reasonable time when production will be made; this sketch recognizes the value of "rolling" production.

The third proposal in the second group focuses on encouraging cooperation among the parties. The Subcommittee favors a more modest sketch that would amend Rule 1 to make clear that the rules

should be employed by the parties to achieve the Rule 1 goals of just, speedy, and inexpensive determination of the action. The Subcommittee feared the collateral consequences of a more aggressive sketch that would add to Rule 1 a new final sentence stating that the parties should cooperate to achieve these ends.

The third group of proposals includes some that have proved uncontroversial. One would add to the list of subjects suitable for a scheduling order a direction to seek a conference with the court before filing a discovery motion. Related sketches would expand the topics for the scheduling order, and for the parties' Rule 26(f) conference, to include preservation of electronically stored information and entry of court orders under Evidence Rule 502(e). Other sketches in the third group are likely to be deferred. One would adopt a uniform set of exemptions from Rule 26(a)(1) initial disclosures and from mandatory scheduling conferences. This topic will benefit from further research. Another set would defer the time to respond to contention discovery under Rules 33 and 36. The questions posed by initial disclosures under Rule 26(a)(1) reflect a significant difference of views about the practice that may be illuminated by developing practice in some states. Some sketches deal with cost-shifting in discovery; more work is required, but there is a consensus that the allocation of costs should be added as a possible provision of a protective order.

Professor Cooper added two points. A sketch that would amend Rule 26(g) to state specifically that a discovery objection or response is not evasive has been put aside in deference to the fears of many miniconference participants who thought this provision would generate much litigation as a "sanctions tort." The general certifications imposed by Rule 26(g) should embrace evasive responses and objections in any event. And it may be worthwhile to consider further a sketch that, omitting depositions, would allow discovery requests under Rules 33, 34, 35, and 36 to be served (or a Rule 35 motion to be made) at any time after the action is filed. The old practice that enabled a plaintiff to get a head start and claim priority in all discovery has been abandoned and, in light of Rule 26(d)(2), should not be a problem. This approach would avoid the awkward choices that must be made in drafting an initial no-discovery hiatus, to be followed by requests served before the Rule 26(f) conference. Time to respond still would be measured from the Rule 26(f) conference. Some concerns would remain — it may not always be clear when the first 26(f) conference has been held, and the advance notice might make it more difficult for a responding party to persuade the court that it needs still more time to respond.

These multiple questions were again submitted to the Committee for a sequential "roll call" of the members.

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The first member thought that shortening the time for service and accelerating the timing of the scheduling conference makes sense. This will get the litigation going. Far more important, the proposal to make proportionality an express limit on the scope of discovery under Rule 26(b)(1) is right on target. More and more judges rely on proportionality in applying the cost-benefit analysis of Rule 26(b)(2)(C)(iii). The other changes in (b)(1) also are OK. There is no apparent problem with the present Rule 33 presumptive limit to 25 interrogatories, but there also is likely to be no problem if the limit is reduced to 15. Adding numerical limits to Rule 36, with an exception for requests to admit the genuineness of documents, also is appropriate. Imposing a presumptive limit of 25 requests to produce under Rule 34 is not obviously right; it will be difficult, however, to define the right number. But it is clear from practice, and experience in mediating and arbitrating, that "Rule 34 can be handled in a smart way." As for the number of depositions, most cases now involve 5 or fewer per side; a reduction from 7 hours to 6 hours would be fine. Allowing discovery requests before the Rule 26(f) conference is good, but setting the time to respond from the conference may be difficult because it may not be clear when the conference has ended. It is good to require that Rule 34 objections be specific and that the responding party state whether anything is being withheld under the objections. Requiring the responding party to state a reasonable time when production will be made is good. Bringing the parties into Rule 1 is a good idea. But it may be better to refer to "collaboration" rather than "cooperation.

The next member said that it can work to reduce the presumptive limits on the number of discovery requests so long as it is clear that they are only presumptive, that the parties and court should be alert to the need for flexibility in making exceptions. Allowing discovery requests before the Rule 26(f) conference will be good — it will eliminate confusion about the Rule 26(d) discovery moratorium. Adding the concept of party cooperation to Rule 1 is good, but "collaboration" may be a better concept to use. "Anything that promotes Evidence Rule 502 is good."

Applauding the package, the next member said that it is important to keep within the § 2072 limit that bars abridging, enlarging, or modifying any substantive right. Many outside observers want changes that would violate that limit. These proposals do not. Litigation will, gas-like, expand to fill the available volume; the proposed acceleration of the first steps in an action reflect the reality of the smaller cases that are the staple of federal litigation and that do not need so much time. "The attempt to eliminate boilerplate objections is worthy." The Evidence Rules Committee believes that Evidence Rule 502 is underused by the bar; amending the Civil Rules to draw attention to

it is good.

Another member expressed support for the package.

Two more members noted support for the package in the terms used by the earlier speakers. One suggested support for the "Utah" model that would set limits on depositions by allocating a finite number of hours per party or side, leaving it to the parties to divide the total time budget among depositions — one might be held to a single hour, while another might run far longer.

The next member offered comments in supporting the general package. The "not controversial" proposals are good. Requiring that Rule 34 objections be specific is good. Asserting that lawyers are responsible for achieving the goals of Rule 1 is good. As for allowing discovery requests to be served before the Rule 26(f) conference, "I haven't seen any problems, but if the Subcommittee sees them," the proposal is OK. Moving up the time for the 16(b) scheduling conference is attractive, but perhaps it should be 90 days after any defendant is served or 60 days after any defendant appears. Limiting the presumptive number of discovery requests is appropriate if it is made clear that there is room for flexibility through judicial discretion. Incorporating proportionality into the Rule 26(b)(1) scope of discovery is good.

A Subcommittee member noted the need to focus on the "philosophical" question posed by the risk of making rules so specific as to interfere with the judge's case-management discretion. Should some of these issues be dealt with by educating the bench and bar, one of the initial efforts launched by the Subcommittee after the Duke Conference? That could reduce the need to incorporate numerical and time limits in the rules. But shortening the time periods for serving process and holding the first scheduling conference is obviously right.

The Department of Justice thinks the package is impressive, but is still thinking about some of the components. The Department wholeheartedly endorses incorporating the concept of proportionality in Rule 26(b)(1). There are practical problems for the Department in accelerating events at the beginning of an action. Federal government defendants are given more time to answer for reasons that also apply here. It takes time to get the case to the right lawyers, and then for the lawyers to get to the right people with the right information. Early discovery requests cut against the value of an initial conference with the court on what the scope of the case actually will be, and seem inconsistent with the values of initial disclosures. Accelerating the time when requests are actually reduced to writing "may make things worse." The question is how best to focus discovery on what the actual

issues in the case will be. (In response to a question about the importance of initial disclosures in this process, it was repeated that they are helpful in the early discussions about what discovery is needed. Writing detailed requests before the initial discussion will lead to broader requests, or requests based on misinformation or misperception.) As to the presumptive numerical limits on discovery, "there is a bit of a division within the Department." It will be essential to ensure that courts understand their flexible authority to set appropriate parameters.

Another member thought it very attractive to permit discovery requests to be served before the initial conference, running the time to respond from the conference.

The last Committee member to speak said that the broad slate of proposals promises a good cumulative effect on the way discovery is conducted. "There is a possibility of significant improvement."

A liaison reminded the Committee that adoption of these proposals would create a need to make conforming amendments to the Bankruptcy Rules that incorporate the Civil Rules. Bankruptcy Rule 1001, for example, incorporates Civil Rule 1.

The clerks-of-court liaison stated that shortening the Rule 4(m) time for service to 60 days makes sense from the clerks' perspective. It is not clear whether it is feasible to shorten the time for the initial scheduling conference and order.

Another liaison thought the package "an amazing distillation of the Duke Conference." A cap on the total number of hours for all depositions seems attractive. As Professor Gensler observed, it is easier to manage up from a floor than to manage down. It is important that case-management discretion remain, and be well recognized.

Reporter Coquillette observed that any addition to Rule 1 that affects attorney conduct must confront the consequent impact on the rules of professional responsibility. These are matters of state law that present big issues.

Judge Campbell observed that the package of proposals remains a work in progress. The Subcommittee and Committee remain open to further suggestions.

An observer underlined the concern that applying Rule 1 to the parties "raises a vast array of questions that may be inconsistent with the adversary system of justice." Even speaking of "cooperation" among the parties in a Committee Note "is only slightly less objectionable" than putting it in a rule text. He

further suggested that discovery requests before the Rule 26(f) conference are premature. The conference should be mostly about defining the issues in the action.

Another observer suggested that cooperation among the parties should be addressed in the Committee Note, not in rule text. The Sedona committee proposal is to amend Rule 1 to provide that the rules "should be construed, complied with, and administered" to achieve the Rule 1 goals.

Judge Koeltl expressed appreciation for all of these contributions. The Subcommittee will continue to work on the drafts. Further comments will be welcomed. "We have had a lot of supporters as we have gone forward." Detailed models will be helpful in addressing such matters as the number of depositions, the length of depositions, allowing discovery requests before the Rule 26(f) conference (including whether there should be a hiatus between initial filing and serving the requests), and other topics. The Subcommittee expects to have a package of proposals ready for consideration at the April Advisory Committee meeting. All proposals and comments will advance the work. The Subcommittee believes the package will have a significant beneficial effect on the conduct of litigation. But it is expected, and desirable, that there will be still more comments and suggestions as the package is scrutinized during the period for public comment. Earlier versions of the package put aside many initial drafts, and the package has been still further pruned. Detailed rule text and Committee Notes will be prepared. The Subcommittee hopes they will win as much enthusiastic response as the current drafts.

Rule 84

Judge Pratter introduced the report of the Rule 84 Subcommittee by stating that the Subcommittee hopes to ask approval in April of a recommendation to the Standing Committee to publish a specific proposal on what, if anything, to do with Rule 84. The purpose today is to revisit the discussion at the March Advisory Committee meeting. The discussion then seemed to show interest in abrogating Rule 84. But later exchanges suggest some concern that all competing considerations should be carefully weighed once more, to ensure that we not move too fast.

Responding to this concern, the Subcommittee reached out to find out who uses the Forms, and for what purposes. This effort confirmed what had been suspected. Very few professionals or practitioners use the Rule 84 Forms. Some think the forms cause problems — the patent bar is agitated about the serious problems they find in the Form 18 complaint for patent infringement. Many of the lawyers who were contacted responded: "I don’t use the Forms;

perhaps someone else does." Lawyers instead use their own forms, their firms' forms, Administrative Office forms, local forms, forms provided by treatises, and forms from like sources.

The Forms have not received frequent attention from the Advisory Committee. There is little enthusiasm for taking on the task that would follow from assuming active responsibility for the Forms. Meanwhile, the Administrative Office working group on forms, composed of six judges and six court clerks, is doing a great deal of attentive and conscientious work on AO forms. They deal with a host of forms, including forms for civil actions. "They are really good."

Judge Colloton has expressed concern that abrogation of the pleading forms would bedevil the bench and bar in working out the impact on pleading practice. He is concerned that the forms will live on through the influence of decisions rendered while they stood as official guides to pleading practice.

Many options are open. The Committee could do nothing, leaving Rule 84 and the Forms to carry on as they are. Or it could undertake a complete overhaul of the Forms. Or it could retain Rule 84 but shed all responsibility for ongoing maintenance and revision — but it is questionable whether it would be either legal or wise to delegate this Enabling Act responsibility. Or we could "defang" Rule 84 by deleting the provision that the Forms suffice under the rules, leaving them as mere illustrations. Or, as the Subcommittee currently prefers, Rule 84 can be abrogated. The Subcommittee asks advice on which direction it should pursue.

Judge Campbell elaborated Judge Colloton's concern that decisions that have relied on the Forms in developing pleading standards will live on, giving the Forms renewed life in the common law. Or courts might view the Forms, no longer official, as still a form of legislative history that illuminates the continuing meaning of Rule 8 pleading standards. But Judge Colloton also believes that the draft Committee Note does a good job of addressing these questions; his concern is to make sure that the Committee considers these things.

Reporter Cooper offered a few additional remarks. First, some of the lawyers surveyed by the Subcommittee reported that they do not use the Rule 84 Forms, but speculated that the Forms might be helpful to pro se parties. But there seems to be little indication that pro se parties often find the forms, much less use them. Some courts are making attempts to aid pro se litigants by developing local forms for common types of litigation, a process that may work better than attempting to fill the need through the Enabling Act. Second, abrogating the pleading Forms does not mean that none of

them should remain adequate under developing pleading standards. Form 11, for example, may well suffice as a complaint for an automobile accident case even though it would not do as a complaint for negligence in more complicated settings. Finally, if Rule 84 is abrogated, the Committee will need to establish a system for coordinating with the Administrative Office working group. It may be wise to begin with a relatively conservative approach that establishes a close connection, so that the Committee monitors the process and is enabled to participate when that seems desirable. This is one of the subjects that should be addressed when a proposal for publication is advanced next spring.

Discussion began with support for abrogating Rule 84. The goal should be to remove the Forms from the Enabling Act process. The process takes too long. "We're not nimble."

The next member noted the concern about carrying forward the validity of the common law that depended on the pleading forms, but agreed that there is no profit in attempting to revamp the process to force greater Advisory Committee involvement.

Another member asked how far back the forms go. It was noted that the original pleading forms were developed in 1938; Judge Clark explained that it is difficult to capture the intended new pleading practice in rule text, "but at least you can paint pictures." The forms were illustrative in the beginning, but in 1946 Rule 84 was amended to state that they suffice under the rules. All of the forms were restyled as part of the Style Project that culminated in 2007, but much less attention was lavished on them than on the rules themselves. A few forms have been carefully developed by the Committee. Forms 5 and 6 were developed to implement the Rule 4(d) waiver-of-service provisions when the waiver procedure was created. Form 52, the Report of the Parties' Planning Meeting, was carefully revised in conjunction with Rule 26(f) amendments. But for the most part the Forms have languished in benign neglect. With this background, the member observed that "too many subjects of federal litigation are missing" from the pleading forms. Either there should be wholesale revisions to make them reflect the forms of litigation that dominate the docket or they should be abrogated. "They will live on, but the half-life will be short." And the courts have had sufficient time to adjust to the pleading decisions in *Twombly* and *Iqbal*; abrogation of the pleading forms will not be seen as taking sides on pleading standards.

Several more members expressed support for abrogation. One summarized that the alternatives are clearly set out, and "the trail leads back to abrogation." A liaison supported abrogation, noting that the next-best alternative would be to divorce the

Advisory Committee from the process of maintaining and revising the forms. The Administrative Office working group provides strong support and produces very good forms.

It was noted that further thought should be given to preserving the Form 5 request to waive service — Rule 4(d)(1)(D) specifically requires that it be used. Form 6, the waiver itself, is not required by Rule 4, but it too might be preserved, perhaps by incorporating it into Rule 4 as Form 5 is now incorporated. Some members urged that Form 6 be carried forward. The Subcommittee will consider the manner of preserving and perhaps revising Form 5, and also will consider possibly preserving Form 6.

And it was suggested that the Committee should not worry about the effect of abrogation on pleading precedents. The precedents may carry forward, but they will be treated in the same way as other precedents developed under the aegis of subsequently repealed statutes. These issues should not be addressed directly in the Committee Note since any comments might be read as comments on what the Committee thinks pleading standards should be. Another member agreed with this view.

Another member supporting abrogation noted that there is no sense that pro se plaintiffs are using the pleading forms. The courts that are working to help pro se plaintiffs are not using Rule 84 Forms for the purpose.

Turning to the Committee Note, it was suggested that it is too narrow to refer only to Administrative Office forms. It should be recognized that there are other excellent sources of forms as well. Another suggestion was that the draft Note is, as the agenda materials suggest, too long. It should be shortened.

Judge Campbell concluded the discussion by reminding observers that comments on Rule 84 can be sent to him and to Judge Pratter.

Speedy Remand of Removed Actions

Jim Hood, the Attorney General of Mississippi, has proposed that rules be adopted to deal with "the use of removal to federal court as a dilatory defense tactic" to interfere with the need for immediate protection of citizens "from corporate wrongdoing." The problem is aggravated by delays in ruling on motions to remand. In one recent case in his office the Fifth Circuit granted mandamus to compel prompt disposition of a remand motion that had languished for three years on the district court docket. In another case it took fifteen months to get a final ruling from the district court.

Two remedies are proposed. The first rule would require

automatic remand if the district court fails to act on a motion to remand within 30 days. The second rule would provide that whenever a case is remanded the removing party must pay just costs and actual expenses, incurring attorney fees.

The long delays described by Attorney General Hood are cause for genuine sympathy and concern. But there are countervailing considerations that make each proposal ill-suited for cure by rules adopted under the Rules Enabling Act. Although the agenda materials do not make specific recommendations, the Reporter offered a summary of the reasons why each proposal is more properly considered in the legislative process than in the rulemaking process.

The automatic remand proposal encounters at least three obstacles. The first and most profound is that it would require remand for want of timely decision even though the action was properly removed and lies in the subject-matter jurisdiction of the federal court. The Rules Enabling Act should not be used to expand or to limit subject-matter jurisdiction. This point is emphasized by Rule 82: "These rules do not extend or limit the jurisdiction of the district courts." It is for Congress, not the courts — not even with the participation of Congress at the culmination of the Enabling Act process — to define subject-matter jurisdiction.

Another difficulty with the automatic remand period is that 30 days often will not be enough to act responsibly on a motion to remand. Complicated questions of law or fact may arise. The court may be hard-pressed by many conflicting obligations. These difficulties would be reduced if the period were made longer, although even 90 or 120 days — still within the 6-month reporting period — may not be long enough, particularly in courts with especially crowded dockets. These concerns reflect a third obstacle. The Judicial Conference has long opposed statutory or rules requirements that give some disputes priority over others on the court's docket. This policy is reflected in 28 U.S.C. § 1657, which directs that "each court of the United States shall determine the order in which civil actions are heard and determined," with exceptions that are not relevant to the present question.

The mandatory imposition of expenses, including attorney fees, encounters at least two obstacles. The more fundamental is that it would amend 28 U.S.C. § 1447(c), which makes the award of expenses and fees a matter for district court discretion. Congress considered these questions not so long ago, and opted for discretion. Supersession by an Enabling Act rule should be attempted only for compelling reasons, and even then might better be left to a request by the Judicial Conference that Congress take up the matter. A similar issue is presented by § 1446(a), which

requires that a notice of removal be signed pursuant to Civil Rule 11. The long-drawn battle over the choice between discretionary and mandatory sanctions under Rule 11 is familiar; the choice for discretion is relatively recent and firm.

The second obstacle to making an award of expenses and fees mandatory is that it is bad policy. Some removals may indeed be dilatory. Others present legitimate arguments for federal jurisdiction, even if in the end the arguments fail. It is not only that the rules committees should defer to Congress. It is that Congress got it right.

A third but less important obstacle also was noted. Although § 1447(d) bars review of most remand orders by appeal or otherwise, the award of fees and expenses incident to remand is an appealable final judgment. Review of the award commonly entails review of the remand. The result may be reversal of the award because the remand was wrong — nothing can be done about the remand, but the court of appeals has been put the work of deciding the issue.

Judge Campbell summarized these concerns from additional perspectives. It is easy to understand Attorney General Hood's frustration. But we should be reluctant to base rules amendments on extreme cases. The 30-day automatic remand would in effect amend the federal subject-matter jurisdiction statutes and the removal statutes. That does not seem a sensible subject for the rulemaking process. His own experience is that expenses and attorney fees are often awarded on remanding an action; some removal attempts present no colorable basis for removal or are dilatory. But other cases present valid arguments; that the argument fails at the last point of fine analysis does not mean that the removing party should have to pay.

Committee discussion reflected unanimous agreement that these proposals are not proper subjects for consideration in the Rules Enabling Act process. It was noted that extreme events should not be brushed off. Sometimes the system fails, and the system should attempt to do something to correct the failures. Whatever the circumstances of the cases that Attorney General Hood has encountered, however, resolution should be found in other sources. Mandamus from the Fifth Circuit finally provided relief in one of these cases. At least extraordinary cases may be subject to correction by that process. It was agreed that Judge Sutton would respond to Attorney General Hood.

Rule 6(d): "After Service"

Rule 6(d) was rewritten two years before the Style Project, but in keeping with Style Project precepts. Before the revision, it

provided an additional 3 days to respond when service is made by various described means. It provided the three extra days following service "upon the party." The spirit of economy in style led to a subtle change, allowing 3 extra days when a party must act within a specified time "after service." The problem is that no one thought of the rules that allow a party to act within a specified time after making service, Rules 14(a)(1)(service of a third-party complaint more than 14 days after serving the original answer); 15(a)(1)(A)(leave to amend a complaint once as a matter of course "within * * * 21 days after serving it); and 38(b)(1)(jury demand no more than 14 days after the last pleading is served). Time to act "after service" could easily be read to include time to act after making service. Thus a party who serves an answer could extend the time to amend once as a matter of course from 21 days to 24 days by electing to make service by any of the means eligible for the 3 added days.

For reasons described in the agenda materials, this misadventure does not seem grave. But it can be fixed easily:

> When a party may or must act within a specified time after ~~service~~ being served and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added * * *.

The only reason for going slow is that Rule 6(d) may soon require attention for other reasons. The question whether it is appropriate to add 3 days after each of the various means of service described in Rule 5(b)(2)(C), (D), (E), and (F) has lingered for some time. The most pointed question may be whether service by electronic means has matured to a point that warrants treating it in the same way as direct personal service. This question, however, is related to more general questions about electronic filing and service that involve the other advisory committees and that will take some time for further work.

A recommendation to approve the "being served" amendment to Rule 6(d) for publication as part of the next package of Civil Rules published for comment was approved unanimously. It can be paired with an earlier-approved amendment of Rule 55 and presented to the Standing Committee for approval, with publication to await a package of more important amendments. That can be next summer if the Rule 37(e) proposal and perhaps the Duke Conference Subcommittee proposals are approved for publication then.

Technical Cross-Reference Fix

The Administrative Office has just received a suggestion that the cross-reference to Rule 6(a)(4)(A) in Rule 77(c)(1) is an apparent oversight, probably made in the Time Computation Project.

November 4 version

The holidays defined in former 6(a)(4)(A) are now defined in Rule 6(a)(6)(A). It was agreed that if study of the suggestion proves it to be as simple an oversight as it seems, the technical correction can be made without publication for comment.

Closing

The meeting closed with a reminder that the next meeting will be on April 11 and 12, 2013, in Norman, Oklahoma, hosted by the University of Oklahoma Law School. Judge Koeltl thanked the Administrative Office for making such successful arrangements to carry on the meeting by electronic means. Judge Campbell thanked all participants.

Respectfully submitted

Edward H. Cooper
Reporter

November 4 version

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TAB 3A

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MEMORANDUM

TO: **Honorable Jeffrey S. Sutton, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Honorable Sidney A. Fitzwater, Chair**
Advisory Committee on Evidence Rules

DATE: **November 26, 2012**

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

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on October 5, 2012 in Charleston, South Carolina at the Charleston School of Law. The meeting was preceded by a Symposium on Federal Rule of Evidence 502 that the Charleston School of Law hosted at the Committee's request. The Committee is not proposing any action items for the Standing Committee at its January 2013 meeting. It continues to monitor the need for rule changes necessitated by the Supreme Court's decision in *Crawford v. Washington* and its progeny. The Committee's work also includes four proposed amendments that have been published for comment—Rules 801(d)(1)(B) and 803(6)-(8)—and a continuous study of the Evidence Rules.

II. Action Items

No action items.

III. Information Items

A. Symposium on Rule of Evidence 502

Prior to commencement of the fall meeting, at the request of the Committee, the Charleston School of Law hosted a Symposium on Rule of Evidence 502. The purpose of the Symposium was to review the current use (or lack of use) of Rule 502 by courts and litigants, and to discuss ways in which the Rule can be better known and understood so that it can fulfill its original purposes. According to the Committee note, Rule 502 has two major purposes. The first is to "resolve[] some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product—specifically those disputes involving inadvertent disclosure and subject matter waiver." The second purpose of Rule 502 is to "respond[] to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information." The Committee note points out that "[t]his concern is especially troubling in cases involving electronic discovery." Accordingly, "[t]he rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection." Despite these salutary purposes, Rule 502 has not been used as anticipated.

The Symposium consisted of an in-depth panel discussion moderated by Committee Reporter Professor Daniel J. Capra. Panelists included judges, lawyers, and academics with pertinent expertise and experience in the subject matter of the Rule, many of whom are veterans of the rulemaking process. The judge participants were Lee H. Rosenthal, Paul Grimm, Paul S. Diamond, John Facciola, and Geraldine Soat Brown. The lawyer participants were John Barkett, Chilton Varner, Ariana Tadler, Maura R. Grossman, Steven Morrison, Daniel Smith, and Edwin Buffmire. The academic participants were Kenneth S. Broun, Allyson Haynes Stuart, Rick Marcus, Ann Murphy, and Liesa Richter. After the Symposium concluded, the participants collaborated in drafting a model Rule 502(d) order. The Symposium proceedings and the model Rule 502(d) order will be published in the March 2013 issue of the *Fordham Law Review*. A copy of the model order is attached to this report.

Although the model order has been approved by the Symposium participants, neither the Committee nor the Standing Committee will be asked to approve the model order. The Committee did conclude, however, that, with Standing Committee approval, it would be helpful to draw attention to the benefits of Rule 502 by sending a letter from the Committee to each chief judge highlighting Rule 502, the Symposium, and the model order. The Committee also concluded that the Federal Judicial Center should be strongly encouraged to develop judicial education and training materials addressing Rule 502.

B. Proposed Amendment to Rule 803(10)

The amendment to Rule 803(10) that the Standing Committee approved at its June 2012 meeting for transmittal to the Judicial Conference of the United States was approved by the Judicial Conference on the consent calendar at its September 2012 meeting. If approved by the Supreme Court and not abrogated by the Congress, it will take effect on December 1, 2013.

C. Proposed Amendments to Rules 801(d)(1)(B) and 803(6)-(8)

The Standing Committee approved for publication at its June 2012 meeting proposed amendments to Rules 801(d)(1)(B) and 803(6)-(8). The Committee has scheduled two public hearings on these proposals. The first is scheduled in conjunction with the Standing Committee's January 4, 2013, meeting in Boston, Massachusetts. The second is scheduled for January 22, 2013, in Washington, D.C. As of the date of this report, no public comments have been received concerning any of the proposed amendments. It is therefore uncertain whether either or both hearings will be necessary.

D. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Supreme Court's most recent *Crawford* decision came last Term in *Williams v. Illinois*, a plurality decision. At the fall meeting, the Committee heard a roundtable discussion involving Committee Reporter Professor Daniel J. Capra, Committee consultant Professor Kenneth S. Broun, and Committee member Paul Shechtman, a practicing attorney who also teaches evidence. The panelists concluded—as did the Committee—that the result of *Williams* is so murky that it will take the courts some time to determine its impact on the relationship between the Confrontation Clause and the Federal Rules of Evidence. Accordingly, the Committee determined that it would be inappropriate at this time to propose any amendments designed to prevent one or more of the Federal Rules from being applied in violation of the Confrontation Clause.

E. "Continuous Study" of the Evidence Rules

The Committee is responsible for engaging in a "continuous study" of the need for any amendments to the Federal Rules of Evidence. The grounds for possible amendments include (1) a split in authority about the meaning of a rule; (2) a disparity between the text of a rule and the way that the Rule is actually being applied in courts; and (3) difficulties in applying a rule, as experienced by courts, practitioners, and academic commentators.

Under this standard, the Reporter has raised the following possible amendments for the Committee's consideration: (1) amending Rule 106 to provide that statements may be used for completion even if they are hearsay; (2) clarifying that Rule 607 does not permit a party to impeach its own witness if the only reason for calling the witness is to present otherwise inadmissible evidence to the jury; (3) clarifying that Rule 803(5) can be used to admit statements made by one person and recorded by another; (4) clarifying the business duty requirement in Rule 803(6); and (5) resolving a dispute in the courts over whether prior testimony in a civil case may be admitted against one who was not a party at the time the testimony was given. The Committee has previously

resolved to continue its continuous study of the Evidence Rules without recommending action on any particular possible amendment.

F. Symposium on Technology and the Federal Rules of Evidence

As noted in a prior report, the Committee plans to convene a symposium in conjunction with its fall 2013 meeting to consider the intersection of the Evidence Rules and emerging technologies. The Committee will examine whether the Evidence Rules should be amended to accommodate technological advances in the presentation of evidence. This Symposium will follow the same process as the previous symposia on the Restyled Rules of Evidence and Rule 502. The Committee intends to invite outstanding members of the bench, bar, and legal academy to make presentations, and the proceedings will be published in a law review.

G. Privileges Report

At the fall 2012 meeting, Professor Kenneth S. Broun, the Committee's consultant on privileges, presented his analysis of the journalist's privilege. His work for the Committee on privileges is informational. It neither represents the work of the Committee itself nor suggests explicit or implicit approval by the Standing Committee or the Committee.

IV. Minutes of the Fall 2012 Meeting

The draft of the minutes of the Committee's fall 2012 meeting is attached to this report. These minutes have not yet been approved by the Committee.

APPENDIX A.1

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Model Draft of a Rule 502(d) Order

Symposium on Rule 502

[To be attached to the Symposium Transcript to be published in the Fordham Law Review, and to be sent to District Chief Judges for purposes of local rulemaking.]

Form of Order Implementing Rule 502(d) of the Federal Rules of Evidence When Information Protected by the Attorney-Client Privilege or as Attorney Work-Product is Produced by a Party.

(a) No Waiver by Disclosure. This order is entered pursuant to Rule 502(d) of the Federal Rules of Evidence. Subject to the provisions of this Order, if a party (the "Disclosing Party") discloses information in connection with the pending litigation that the Disclosing Party thereafter claims to be privileged or protected by the attorney-client privilege or attorney work product protection ("Protected Information"), the disclosure of that Protected Information will not constitute or be deemed a waiver or forfeiture — in this or any other action — of any claim of privilege or work product protection that the Disclosing Party would otherwise be entitled to assert with respect to the Protected Information and its subject matter.

(b) Notification Requirements; Best Efforts of Receiving Party. A Disclosing Party must promptly notify the party receiving the Protected Information ("the Receiving Party"), in writing, that it has disclosed that Protected Information without intending a waiver by the disclosure. Upon such notification, the Receiving Party must —unless it contests the claim of attorney-client privilege or work product protection in accordance with paragraph (c) — promptly (i) notify the Disclosing Party that it will make best efforts to identify and return, sequester or destroy (or in the case of electronically stored information,

delete) the Protected Information and any reasonably accessible copies it has, and (ii) provide a certification that it will cease further review, dissemination, and use of the Protected Information. Within five business days of receipt of the notification from the Receiving Party, the Disclosing Party must explain as specifically as possible why the Protected Information is privileged. [For purposes of this Order, Protected Information that has been stored on a source of electronically stored information that is not reasonably accessible, such as backup storage media, is sequestered. If such data is restored, the Receiving Party must promptly take steps to delete or sequester the restored privileged information.]

(c) Contesting Claim of Privilege or Work Product Protection. If the Receiving Party contests the claim of attorney-client privilege or work product protection, the Receiving Party must — within five business days of receipt of the claim of disclosure— move the Court for an Order compelling disclosure of the information claimed as unprotected (a "Disclosure Motion"). The Disclosure Motion must be filed under seal and must not assert as a ground for compelling disclosure the fact or circumstances of the disclosure. Pending resolution of the Disclosure Motion, the Receiving Party must not use the challenged information in any way or disclose it to any person other than those required by law to be served with a copy of the sealed Disclosure Motion.

(d) Stipulated Time Periods. The parties may stipulate to extend the time periods set forth in paragraphs (b) and (c).

(e) Attorney's Ethical Responsibilities. Nothing in this order overrides any attorney's ethical responsibilities to refrain from examining or disclosing materials that the attorney knows or reasonably should know to be privileged and to inform the Disclosing Party that such materials have been produced.

(f) Burden of Proving Privilege or Work-Product Protection. The Disclosing Party retains the burden — upon challenge pursuant to paragraph (c) — of establishing the privileged or protected nature of the Protected Information.

(g) In camera Review. Nothing in this Order limits the right of any party to petition the Court for an *in camera* review of the Protected Information.

(h) Voluntary and Subject Matter Waiver. This Order does not preclude a party from voluntarily waiving the attorney-client privilege or work product protection. The provisions of Federal Rule 502(a) apply when the Disclosing Party uses or indicates that it may use information produced under this Order to support a claim or defense.

(i) Rule 502(b)(2). The provisions of Federal Rule of Evidence 502(b)(2) are inapplicable to the production of Protected Information under this Order.

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Advisory Committee on Evidence Rules

Minutes of the Meeting of October 5, 2012

Charleston, South Carolina

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 5, 2012, at the Charleston School of Law, in Charleston, South Carolina.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Brent R. Appel
Hon. Anita B. Brody
Hon. William Sessions
Hon. John A. Woodcock, Jr.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

William T. Hangley, Esq., departing member of the Committee
Marjorie A. Meyers, Esq., departing member of the Committee
Hon. Richard Wesley, Liaison from the Standing Committee
Hon. Paul Diamond, Liaison from the Civil Rules Committee
Hon. John F. Keenan, Liaison from the Criminal Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
Timothy Reagan, Esq., Federal Judicial Center
Peter McCabe, Esq., Secretary to the Standing Committee
Jonathan Rose, Chief, Rules Committee Support Office
Benjamin Robinson, Esq., Rules Committee Support Office

Julie Albert, Fordham Law School
Alfred W. Cortese, Jr., Esq., Lawyers for Civil Justice
Alexander R. Dahl, Esq. Lawyers for Civil Justice
Professor Ann Murphy, Gonzaga University School of Law
Professor Liesa Richter, University of Oklahoma College of Law
Hon. Lee H. Rosenthal, Former Chair of the Standing Committee
Dan Smith, Esq., Department of Justice
John Vail, Esq., Center for Constitutional Litigation, P.C.

I. Opening Business

Welcoming Remarks and Departing Members

Judge Fitzwater, the Chair of the Committee, greeted the members and thanked Dean Andrew Abrams and the Charleston School of Law for hosting the Committee. Dean Abrams welcomed the members and observers, and expressed his thanks for holding the committee meeting at the law school. He highlighted the school's commitment to developing practical lawyering skills and the significant pro bono contributions of his students.

Judge Fitzwater recognized several current and departing members of the Committee. He congratulated Paul Schectman on his recent election to the American Law Institute. He welcomed former Committee member Judge Joseph F. Anderson, Jr., who traveled from Columbia, South Carolina to observe the meeting. Judge Fitzwater thanked Judge Anderson for his many contributions to the restyling effort, and Judge Anderson in turn thanked the Committee members for their service and applauded the success of the restyled rules.

Judge Fitzwater recognized the distinguished service of two departing members, William T. Hangley and Marjorie Myers. He highlighted their significant contributions to the Committee stretching back before his tenure as Chair. Mr. Hangley brought the perspective of an experienced trial attorney to the complex process of evidence rulemaking, which proved especially critical during the restyling process. He also solicited helpful input from the American Bar Association's Section of Litigation and the American College of Trial Lawyers. Ms. Myers proved to be a superb advocate for the federal defenders, but she always sought the best result, not simply what would be most advantageous to her clients. Judge Fitzwater noted that Ms. Myers worked especially well with her counterpart from the Department of Justice. Members added their sincere thanks for the hard work performed by and friendships forged with Mr. Hangley and Ms. Myers. Their service to the committee and practical insights will be sorely missed.

Mr. Rose reported on the status of the Committee's vacancies and pending appointments. He noted that the Chief Justice is expected to select replacements for Mr. Hangley and Ms. Myers imminently.

Public Hearings

Judge Fitzwater noted that the Committee has scheduled two public hearings for members of the public who wish to present testimony on the proposed amendments to Rules 801 and 803. The first is scheduled in conjunction with the Standing Committee's semi-annual meeting, on January 4, 2013, in Boston, Massachusetts. A second public hearing is scheduled for January 22, 2013, in Washington D.C. Judge Fitzwater stated that there was strong support for publication at the Standing Committee. Mr. Robinson reported that no comments had yet been received by the Administrative Office.

Approval of Minutes

The minutes of the Spring 2012 Committee meeting were approved.

Rule 502 Symposium

Judge Fitzwater commented on the Rule 502 Symposium that took place on the morning before the meeting. He remarked that the symposium far exceeded his expectations and raised a number of important suggestions for promoting the use of Rule 502 to reduce discovery costs. He noted that a transcript of the proceedings — as well as a number of articles from Symposium participants — will be published in the Fordham Law Review.

Judge Fitzwater invited those present to share their observations about the symposium. The members all agreed that the presentation was excellent. A judge member strongly suggested that Rule 502 be referenced in the Federal Rules of Civil Procedure so that parties at the outset of the proceedings are aware of its importance in reducing the costs of preproduction privilege review. Another member added that the work ahead is largely in the hands of the Advisory Committee on Civil Rules, and that the Committee should monitor the progress of that committee. A third member expressed concerns about the perceived approach of a "tipping point" if the costs of reviewing and producing electronically stored information continue to eclipse the amounts in controversy.

The members discussed whether to undertake work to develop a model Rule 502 order. A judge member recommended pursuing a model order that could be broadly publicized, prior to the proliferation of local rules or standing orders that may fail to incorporate important concepts examined during the symposium. The reporter stated that several symposium participants had agreed to work together further to develop a model order, which will be published in the symposium edition of the Fordham Law Review. The reporter noted several potential obstacles the Committee could encounter if it sought to take the lead in drafting and "issuing" a model order. The Reporter suggested, and the members generally agreed, that the better way for the Committee to draw attention to the benefits of Rule 502 may be to send a letter from the Committee to each chief judge highlighting the rule, the symposium, and the model order. Judge Fitzwater recommended that such a letter be discussed at the Standing Committee meeting.

A judge member suggested, and the full committee agreed, that in addition to any letter writing initiative, the Federal Judicial Center should be strongly encouraged to develop judicial education and training materials addressing Rule 502. One member observed that newly-appointed judges with primarily criminal practice backgrounds might have little or no knowledge of Rule 502, and all members agreed that it would be worthwhile to develop specific materials for the orientation seminar for newly-appointed federal judges. Another member remarked that a program of orientation on Rule 502 will be just as useful to sitting judges.

The Committee briefly discussed the application of Rule 502 in the criminal law setting. A member noted that there are important Sixth Amendment issues yet to be resolved before the courts

of appeals. Another member stated that subdivision (d) of Rule 502 will have limited use in criminal proceedings, but the Committee should be aware of the possibility of "intentional inadvertent disclosures" by defense counsel in criminal cases, notwithstanding the obvious ethical implications. The member noted that if unscrupulous defense counsel believed the fruits of her intentional inadvertent disclosure could be placed out of reach of prosecutors, there may be a strong temptation to intentionally produce privileged material and then demand use fruits protection from the court (through a *Kastigar* hearing or otherwise). The members agreed that little if anything could be done in the text of the rule to eliminate the possibility of such strategic behavior.

Mr. Rose observed that the reporter handled with ease the difficult task of moderating a panel of such high-caliber judges, practitioners, and academics, and suggested that the continued use of such symposia as introductory events to committee meetings would continue to enhance the public perception of the rulemaking process and increase participation from the bench, bar, and public. The members joined Judge Fitzwater's sincere thanks to the Reporter and the symposium participants for a well-executed program.

June Meeting of the Standing Committee

Judge Fitzwater reported on the June meeting of the Standing Committee. He summarized the Committee's report and his presentation to the Standing Committee including the Committee's proposals: 1) to refer an amendment to Rule 803(10) to the Judicial Conference; and 2) to release proposed amendments to Rules 801(d)(1)(B) and Rules 803(6)-(8) for public comment. The Standing Committee unanimously approved all of the Committee's proposals.

II. Proposed Amendment to Rule 803(10)

The Committee briefly discussed the proposed amendment to Rule 803(10). That amendment adds a notice-and-demand procedure to the Rule in cases where the government is offering a certificate against a defendant in a criminal case. Such certificates are in almost all cases "testimonial" and so introducing them against an accused will violate the Confrontation Clause under the Supreme Court's opinion in *Melendez-Diaz v. Massachusetts*. Under the notice-and-demand procedure, the person who prepared the certificate need not be produced to testify if the government provides timely notice of intent to proffer the certificate and the defendant fails to timely demand production of the witness. In *Melendez-Diaz*, the Court declared that the use of a notice-and-demand procedure (and the defendant's failure to demand production under that procedure) would cure an otherwise unconstitutional use of testimonial certificates.

The Advisory Committee's proposed amendment was approved by the Judicial Conference on the consent calendar at its September 2012 session. The Supreme Court will have until May 1, 2013, to review the proposed amendment. Unless Congress takes action to modify, defer, or reject the proposed amendment, it would become effective on December 1, 2013.

III. Proposed Amendment to Rule 801(d)(1)(B)

At the Spring 2012 meeting the Committee voted to recommend that a proposed amendment to Evidence Rule 801(d)(1)(B) — the hearsay exemption for certain prior consistent statements — be released for public comment. Under the proposal, Rule 801(d)(1)(B) would be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The justification for the amendment is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements.

Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility — specifically those that rebut a charge of recent fabrication or improper influence or motive — are also admissible substantively. In contrast, other rehabilitative statements — such as those that explain a prior inconsistency or rebut a charge of faulty recollection — are not admissible under the hearsay exemption but only for rehabilitation. There are two basic practical problems in the distinction between substantive and credibility use as applied to prior consistent statements. First, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement ordinarily adds no real substantive effect to the proponent's case.

As of the date of the fall meeting, no formal public comment had been received on the proposed amendment. But the Reporter noted that a professor had raised a concern that the proposed amendment might "overrule" the Supreme Court's decision in *Tome v. United States*, because it might be read to allow the admission of prior consistent statements for substantive effect even though those statements were made *after* a witness's motive to falsify arose. The Reporter reiterated that the point of the amendment was *not* to admit more prior consistent statements. The only point was to provide the same (substantive effect) treatment for all the statements currently admitted as prior consistent statements. The Reporter recognized that *if* a court found that a prior consistent statement made after the motive to falsify arose would actually be properly admitted to rehabilitate the witness's credibility, then under the amendment that statement would also be admitted as substantive evidence. But the Reporter noted that 1) such an event was extremely unlikely; and 2) in the narrow band of cases in which it could even possibly occur, it would in any case, under the logic of the amendment, be appropriate to treat such a statement as substantively admissible. That is because under the proposed amendment, all prior consistent statements that are admissible for rehabilitation are also admissible substantively.

The Committee concluded that prior consistent statements made after a motive to falsify might be admitted as substantive evidence, but that such an admission would not reflect any alteration to the present scope of admissibility (instead clarifying how admissible evidence may be used). The Committee's consultant on privileges noted that *Tome v. United States* was not a

constitutional case, and that any variance between the proposed amendment to Rule 801(d)(1)(b) and the Court's holding would not run afoul of transubstantive rulemaking concerns.

The Reporter suggested that the draft committee note accompanying the proposed rule be revised to eliminate the citation to a relevant law review article. He noted the Standing Committee's preference to avoid legal citations in committee notes. The members acknowledged the helpful input of Frank W. Bullock, Jr., the author of the article and former member of the Standing Committee, who first suggested that the Committee pursue the amendment. The members agreed to discuss further refinements to the proposed amendment at the Committee's Spring 2013 meeting, after the close of the public comment period.

IV. Possible Amendment to Rules 803(6)-(8)

The Committee briefly discussed the proposed amendments to Rules 803(6)-(8), the hearsay exceptions for business records, absence of business records, and public records. Those exceptions in original form set forth admissibility requirements and then provided that a record meeting those requirements was admissible despite the fact it is hearsay "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The rules do not specifically state which party has the burden of showing trustworthiness or untrustworthiness. The amendments clarify that the opponent has the burden of showing that the proffered record is untrustworthy. The reasons for the amendment are: 1) to resolve a conflict in the case law by providing a uniform rule; 2) to clarify a possible ambiguity in the rule as it was originally adopted and as restyled; and 3) to provide a result that makes the most sense, as imposing a burden of proving trustworthiness on the proponent is unjustified given that the proponent must establish that all the other admissibility requirements of these rules are met — requirements that tend to guarantee trustworthiness in the first place.

The Committee discussed the slight differences among the committee notes for Rules 803(6)-(8). A member suggested that the Committee consider deleting the second paragraph (i.e. "The opponent, in meeting its burden . . .") of the note accompanying Rule 803(8) as redundant of the note set out for Rule 803(6). The Reporter opposed deleting the second paragraph from the note for Rule 803(8). He described the practical differences between the three rules and detailed why a tailored note for each was preferable. He noted that when enacted, the Rules and Committee notes will be read and applied separately, not together, and so there was no risk of redundancy. He also noted that it was important to state that an opponent, in meeting its burden of showing untrustworthiness, need not produce evidence — that sometimes argument is sufficient. And deleting such an important provision from the note to Rule 803(8) but retaining it in Rule 803(6) could mislead lawyers and courts to think that the opponent *does* have to provide evidence to show that a record offered under Rule 803(8) is untrustworthy. The Committee's consultant on privileges echoed the need for a more thorough note for each rule. Judge Fitzwater asked the Committee to revisit the issue, if necessary, at its Spring 2013 meeting, following the close of the public comment period.

V. *Crawford* Developments — Presentation on *Williams v. Illinois*

The Reporter provided the Committee with a case digest of all federal circuit cases discussing *Crawford v. Washington* and its progeny. The digest was grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The *Crawford* digest this time around provided a special focus on the Supreme Court's Confrontation Clause case from last term — *Williams v. Illinois* — and its impact on the Federal Rules of Evidence. Paul Shechtman, Ken Broun and the Reporter engaged in a roundtable discussion on the meaning of *Williams* — a case that was decided 4-1-4 with the deciding vote by Justice Thomas based on an analysis with which all other members of the Court disagreed. The speakers all concluded — as did the Committee — that the result of *Williams* is so murky that it will take the courts some time to figure out its impact on the relationship between the Confrontation Clause and the Federal Rules of Evidence. Accordingly, the Committee determined that it would be inappropriate at this time to propose any amendments designed to prevent one or more of the Federal Rules from being applied in violation of the Confrontation Clause.

The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

VII. Symposium on Technology and the Federal Rules of Evidence

The Evidence Rules Committee is sponsoring a symposium on whether the Evidence Rules should be amended to accommodate technological advances in the presentation of evidence. This Symposium is intended to follow the same process as the previous symposia on the Restyling and Rule 502. The Committee will invite outstanding members of the bench, bar and legal academia to make presentations, and the proceedings will be published in a law review. This symposium will take place on the morning before the Fall 2013 meeting of the Committee.

The Reporter invited suggestions from the members for symposium panelists. Members identified a handful of judges and law professors, but resolved to continue the search for potential panelists leading up to the symposium.

VIII. Privileges Report

Professor Broun, the Committee's consultant on privileges, presented his analysis of the journalist's privilege. This presentation is part of Professor Broun's continuing work to develop an article on the federal common law of privileges. Professor Broun's work, when it is published, will

neither represent the work of the Committee nor suggest explicit nor implicit approval by the Standing Committee or the Advisory Committee.

Professor Broun asked for Committee input on whether attempting to write the text of a journalist privilege under federal law was a worthwhile effort, in light of the conflict in the cases and lack of consensus as to whether such a privilege even exists. The DOJ representative expressed a preference not to develop a survey rule because the Justice Department does not believe there is a journalist's privilege rooted in the First Amendment. A member observed that defining who is a journalist will prove to be a significant drafting obstacle given the use of blogs, just as attempts to define who is a media defendant for purposes of libel law has created a morass of conflicting case law.

Committee members expressed gratitude to Professor Broun for keeping the Committee apprised of developments in the area of privileges, but did not request that he perform further research or drafting regarding the journalist's privilege.

IX. Next Meeting

The Spring 2013 meeting of the Committee is scheduled for Friday, May 3, in Miami, Florida.

Respectfully submitted,

Benjamin Robinson
Daniel J. Capra

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TAB 4A

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

DATE: December 5, 2012

TO: Judge Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Steven M. Colloton, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on September 27, 2012, in Philadelphia, Pennsylvania. The Committee saluted your work as chair, and wished you well in your new role as chair of the Standing Committee. You kindly invited me to attend the meeting, and I assumed the chair of the advisory committee on October 1, 2012.

At the September meeting, the Committee removed from its agenda three items (concerning sealed appellate filings, criminal appeal deadlines, and pinpoint citations in briefs), and discussed various other items. The Advisory Committee is not presenting any action items for the Standing Committee's January 2013 meeting.

The Committee has scheduled its next meeting for April 22 and 23, 2013, in Washington, DC. Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the September meeting and in the Committee's study agenda, both of which are attached to this report.

II. Information Items

The Committee decided not to proceed with a proposed rule amendment concerning the sealing or redaction of appellate briefs. The circuits take varying approaches to sealing and redaction on appeal. In the D.C. and Federal Circuits, litigants are directed to review the record and determine whether any sealed portions should be unsealed at the time of the appeal. In some other circuits, matters sealed below are presumptively maintained under seal in the record on appeal. In the Seventh Circuit, by contrast, the opposite presumption applies: Unless sealing is directed by statute or rule, sealed items in the record on appeal are unsealed after a brief grace period unless a party seeks the excision of those items from the record or unless a party moves to seal those items on appeal.

The Seventh Circuit's approach arises from a strong presumption that judicial proceedings should be open and transparent. During the Committee's discussions, a number of participants expressed support for the Seventh Circuit's approach. But participants also noted that each circuit currently seems happy with its own approach to sealed filings. Ultimately, the Committee decided not to propose a rule amendment on the topic of sealing on appeal. Committee members, however, felt that each circuit might find it helpful to know how other circuits handle such questions. Shortly after the meeting, you wrote to the Chief Judge and Clerk of each circuit to summarize the concerns that have been raised about sealed filings, the various approaches to those filings in different circuits, and the rationale behind the Seventh Circuit's approach.

The Committee removed from its agenda a proposal that Appellate Rule 4(b) be amended to lengthen from 14 days to 30 days the time for a criminal defendant to file an appeal. The Rule allows 30 days for the government to file an appeal. The Committee considered a similar proposal in 2002-04 and decided that no change was warranted. Participants in the September 2012 discussion observed that there are institutional reasons why the government requires more time, and noted that the period between conviction and sentencing provides time for defense counsel to assess possible grounds for appealing the conviction. They also noted that the district court has discretion under Appellate Rule 4(b)(4) to extend the appeal time for good cause – a standard that could be met, for example, if defense counsel needs additional time to assess possible grounds for appealing the sentence. In light of these considerations, members did not perceive a need to amend the Rule.

The Committee also removed from its agenda a proposal that Appellate Rule 28(e) be amended "to require a pinpoint citation to the appendix or record to support each statement of fact and procedural history anywhere in every brief," rather than "only in the statement of facts." Members noted that Rule 28 already does require specific citations in the argument section of a brief: Rule 28(a)(9)(A) requires that the argument contain "citations to the . . . parts of the record on which the appellant relies." After discussion, the Committee decided not to proceed with a proposed rule amendment on this topic.

Three existing items were retained on the agenda to await future developments. First, the Committee briefly considered whether the Appellate Rules should be amended in light of the shift to electronic filing and service. In particular, some participants viewed as anachronistic Appellate Rule 26(c)'s "three-day rule," which adds three days to a given period if that period is measured after service and service is accomplished electronically or by a non-electronic means that does not result in delivery on the date of service. But the discussion did not disclose any aspects of the Appellate Rules that urgently require revision. Committee members noted that it may make sense to wait until the Advisory Committees feel the time is ripe to address these questions jointly.

Second, the Committee revisited the topic of "manufactured finality," which concerns attempts to "manufacture" a final judgment – in order to appeal the disposition of one or more claims – by dismissing the remaining claims in a case without prejudice or conditionally. The Committee noted that the Supreme Court recently granted certiorari in *SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011). In *Gabelli*, the Second Circuit's jurisdiction rested on that circuit's precedent holding that an appealable judgment results if a litigant who wishes to appeal the dismissal of its primary claim dismisses all remaining claims and commits not to reassert those claims if the judgment is affirmed, but reserves the right to reinstate the dismissed claims if the court of appeals reverses. The Committee decided to await the Court's decision in *Gabelli* before deciding what, if anything, to do with respect to the topic of manufactured finality.

Third, the Committee retained on its agenda a proposal to further amend the language of Form 4 (concerning applications to proceed *in forma pauperis*). Proposed amendments to Form 4 are currently before the Supreme Court; if the Court approves them and Congress takes no contrary action, those amendments will take effect December 1, 2013. There was no consensus that another amendment to Form 4 is warranted, but the Committee decided for now to retain the item on the agenda.

The Committee discussed two topics that call for consultation with the Civil Rules Committee. One concerns the treatment of appeal bonds in Civil Rule 62. A Committee member has suggested that it would be useful to clarify a number of aspects of practice under Civil Rule 62. In particular, he notes that Civil Rule 62(b) and Civil Rule 62(d) treat separately the period of time during which postjudgment motions are pending and the period of the appeal itself, and he suggests that it would be preferable to treat both those time periods under one unified framework. As any action on this topic probably would involve an amendment to Civil Rule 62, rather than to an Appellate Rule, it seems unlikely that the matter will proceed unless the Civil Rules Committee deems it worthy of attention.

The other topic concerns appeals by class action objectors. The Committee has received a proposal that Appellate Rule 42 be amended to add a provision that would bar the dismissal of an appeal from a judgment approving a class action settlement or fee award if there is any payment in exchange for the dismissal of the appeal. This proposal implicates themes that previously arose in the Civil Rules Committee's discussions leading up to the 2003 amendments to Civil Rule 23. The proposal to amend Appellate Rule 42, however, would go beyond the provisions of Civil Rule 23(e)(5). Here, too, close consultation with the Civil Rules Committee

will be necessary.

The Committee is considering whether to overhaul the treatment of length limits in the Appellate Rules. Appellate Rules 28.1(e) and 32(a)(7) set the length limits for briefs by means of a type-volume formula, with a (shorter) page limit as a safe harbor. But Rules 5, 21, 27, 35, and 40 still set length limits for other types of appellate filings in pages. Members have reported that the page limits invite manipulation of fonts and margins, and that such manipulation wastes time, disadvantages opponents, and makes filings harder to read. The Committee intends to consider whether the time has come to extend the type-volume approach to these other types of appellate filings.

TAB 4B

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Advisory Committee on Appellate Rules
Table of Agenda Items — December 2012

FRAP Item	Proposal	Source	Current Status
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004.	Advisory Committee	Discussed and retained on agenda 04/05; awaiting proposal from Department of Justice Discussed and retained on agenda 04/06; Department of Justice will monitor practice under the Act
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11
07-AP-H	Consider issues raised by Warren v. American Bankers Insurance of Florida, 2007 WL 3151884 (10th Cir. 2007), concerning the operation of the separate document rule.	Appellate Rules Committee	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09
08-AP-G	Consider substantive and style changes to FRAP Form 4	Appellate Rules Committee	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Draft approved 04/11 for submission to Standing Committee Approved for publication by Standing Committee 06/11 Published for comment 08/11 Draft approved 04/12 for submission to Standing Committee Approved by Standing Committee 06/12 Approved by Judicial Conference 09/12

FRAP Item	Proposal	Source	Current Status
08-AP-H	Consider issues of "manufactured finality" and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 09/12
08-AP-J	Consider FRAP implications of conflict screening	Committee on Codes of Conduct	Discussed and retained on agenda 11/08
08-AP-L	Amend FRAP 6(b)(2)(A)(ii) to remove ambiguity	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11 Draft approved 04/12 for submission to Standing Committee Approved for publication by Standing Committee 06/12 Published for comment 08/12
08-AP-M	Consider FRAP implications of interlocutory appeals in tax cases	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Draft approved 10/10 for submission to Standing Committee Approved for publication by Standing Committee 01/11 Published for comment 08/11 Draft approved 04/12 for submission to Standing Committee Approved by Standing Committee 06/12 Approved by Judicial Conference 09/12
08-AP-N	Amend FRAP 5 to allow parties to submit an appendix of key documents from the record along with petitions and answers	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09
08-AP-P	Amend FRAP 32 to change from double line-spacing to 1.5 line-spacing for briefs	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09
08-AP-Q	Consider amending FRAP 10(b) to permit the use of digital audio recordings in place of written transcripts	Hon. Michael M. Baylson	Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10

FRAP Item	Proposal	Source	Current Status
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09
09-AP-A	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	ABA Council of Appellate Lawyers	Discussed and retained on agenda 04/09
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12
09-AP-C	Consider possible FRAP amendments in the light of project to revise Part VIII of the Bankruptcy Rules	Bankruptcy Rules Committee	Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11 Draft approved 04/12 for submission to Standing Committee Approved for publication by Standing Committee 06/12 Published for comment 08/12
09-AP-D	Consider implications of Mohawk Industries, Inc. v. Carpenter	John Kester, Esq.	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10
10-AP-B	Consider FRAP 28's treatment of statements of the case and of the facts	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Draft approved 04/11 for submission to Standing Committee Approved for publication by Standing Committee 06/11 Published for comment 08/11 Draft approved 04/12 for submission to Standing Committee Approved by Standing Committee 06/12 Approved by Judicial Conference 09/12
10-AP-D	Consider factors to be taken into account when taxing costs under FRAP 39	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 10/11

FRAP Item	Proposal	Source	Current Status
10-AP-H	Consider issues relating to appellate review of remand orders	Committee on Federal-State Jurisdiction	Discussed and retained on agenda 10/10
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Awaiting initial discussion
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12
11-AP-F	Consider amendment authorizing discretionary interlocutory appeals from attorney-client privilege rulings	Amy M. Smith, Esq.	Awaiting initial discussion
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12
12-AP-E	Consider treatment of length limits for petitions for rehearing en banc under Rule 35	Professor Neal K. Katyal	Discussed and retained on agenda 09/12
12-AP-F	Consider amending FRAP 42 to address class action appeals	Professors Brian T. Fitzpatrick and Brian Wolfman and Dean Alan B. Morrison	Discussed and retained on agenda 09/12

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DRAFT

Minutes of Fall 2012 Meeting of
Advisory Committee on Appellate Rules
September 27, 2012
Philadelphia, Pennsylvania

I. Introductions

Judge Jeffrey S. Sutton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, September 27, 2012, at 10:10 a.m. at the University of Pennsylvania Law School in Philadelphia, Pennsylvania. The following Advisory Committee members were present: Judge Michael A. Chagares, Judge Robert Michael Dow, Jr., Justice Allison H. Eid, Judge Peter T. Fay, Professor Amy Coney Barrett, Professor Neal K. Katyal, Mr. Kevin C. Newsom, and Mr. Richard G. Taranto. Mr. H. Thomas Byron III, Civil Division, U.S. Department of Justice ("DOJ"), was present representing the Solicitor General. Also present were Judge Steven M. Colloton, the incoming Chair of the Committee; Judge Adalberto Jordan, liaison from the Bankruptcy Rules Committee; Professor Daniel R. Coquillette, Reporter for the Standing Committee; Mr. Jonathan C. Rose, Rules Committee Officer in the Administrative Office ("AO"); Mr. Benjamin Robinson, Deputy Rules Committee Officer and Counsel to the Rules Committees; Mr. Leonard Green, liaison from the appellate clerks; Ms. Marie Leary from the Federal Judicial Center ("FJC"). Dean Michael A. Fitts attended briefly to welcome the committee; Professor Stephen B. Burbank and Professor Tobias Barrington Wolff attended the first portion of the meeting to give a presentation. A number of students from the Law School attended portions of the meeting. Professor Catherine T. Struve, the Reporter, took the minutes.

Dean Fitts welcomed the Committee and noted that how pleased and honored the Law School was to have the Committee meet at the Law School. He observed that Penn Law School is very proud of its civil procedure faculty, including Professors Burbank and Wolff (who would be addressing the Committee). And he thanked the Committee members for their important work in improving the Rules. Judge Sutton thanked Dean Fitts for hosting the Committee's meeting. Judge Sutton noted that Judge Jordan is joining the Committee as a liaison member from the Bankruptcy Rules Committee in order to facilitate communications between the two Committees on matters that pertain to both the Appellate Rules and the Bankruptcy Rules. Judge Jordan served as an Assistant United States Attorney and then as a federal district judge in Miami, and in early 2012 he was confirmed to a seat on the U.S. Court of Appeals for the Eleventh Circuit. Judge Sutton also welcomed Judge Colloton, whose term as the Chair of the Appellate Rules Committee would commence on October 1, 2012.

Professor Coquillette brought greetings from Judge Mark R. Kravitz, the Chair of the Standing Committee. Professor Coquillette also reported that Judge Kravitz had just received a major honor: The Connecticut Bar Foundation has instituted a symposium in Judge Kravitz's name.

During the meeting, Judge Sutton thanked Mr. Rose, Mr. Robinson, and the AO staff for their preparations for and participation in the meeting. Judge Sutton also thanked Mr. Green for his excellent and important contributions during his service on the Committee. He congratulated Mr. Green on his retirement, and observed that Mr. Green was the longest-serving Clerk of the Sixth Circuit.

II. Presentations by Professor Burbank and Professor Wolff

The Reporter introduced Professors Burbank and Wolff. She noted how fortunate she is to serve on a faculty with colleagues who are stronger scholars of procedure than she is. Professor Burbank, she noted, is the nation's leading authority on the history of the Rules Enabling Act and has long been a close observer of the rulemaking process. The Reporter noted her personal debt of gratitude to Professor Burbank for his generous and thoughtful guidance during the twelve years that they had been colleagues. More recently, Penn was fortunate to induce Professor Wolff to join the faculty. Even before getting to know Professor Wolff, the Reporter recalled, she had already realized that he is the most creative, thoughtful, innovative scholar of her generation on topics such as such as the preclusive effect of judgments in class actions. At Judge Sutton's invitation, Professor Burbank had agreed to address the Committee on the topic of the rulemaking process, and Professor Wolff had agreed to comment on this presentation.

Professor Burbank observed that the Federal Rules of Civil Procedure are nearing their seventy-fifth anniversary, and thus he took as his topic "Rulemaking at 75" (with a focus on the Civil Rules). He noted that Professor Barrett is an expert on the topic of courts' inherent rulemaking power. Congress, he observed, has almost plenary power with respect to federal court procedure – limited only in those areas where true inherent court power operates. The U.S. Supreme Court has been very modest in its claims of inherent power that can trump a contrary directive from Congress.

Nonetheless, Congress has given the federal courts rulemaking power, both local and supervisory, since almost the beginning. In the eighteenth and nineteenth century, the Supreme Court refrained from exercising its supervisory rulemaking power for actions at law. By means of the 1872 Conformity Act, Congress effectively withdrew that power. Meanwhile, experience in states such as New York – which went from the relative simplicity of the Field Code to complexity of the Throop Code – and the concerns of lawyers with multistate practices contributed to a movement supporting adoption of a uniform system of federal procedure. The American Bar Association took up that idea and advocated in favor of it for two decades. The concept was opposed by Senator Thomas Walsh, but after Walsh's death the concept of uniform federal procedure came to fruition in the 1934 passage of the Rules Enabling Act.

When the first Advisory Committee began meeting in the 1930s, questions arose with respect to the scope and limits of the rulemaking power. The major question at the time concerned the meaning of "general rules." Ultimately, the Advisory Committee almost backed into the idea that their task was to create trans-substantive rules.

As for the scope limitation set by the Enabling Act – that the Rules "shall neither abridge, enlarge, nor modify the substantive rights of any litigant" – the original Advisory Committee had no coherent and consistent understanding of that limitation. In a 1937 letter, William D. Mitchell (the Chair of the original Advisory Committee) stated that "the twilight zone around the dividing line between substance and procedure is a very broad one. If it were not for the fact that the court which makes these rules will decide whether they were within the authority, we would have very serious difficulties in dealing with this problem. The general policy I have acted on is that where a difficult question arose as to whether a matter was substance or procedure and I thought the proposed provision was a good one, I have voted to put it in, on the theory that if the Court adopted it, the Court would be likely to hold, if the question ever arises in litigation, that the matter is a procedural one." And Mitchell's prediction proved accurate; the Supreme Court has never invalidated a Civil Rule.

Sibbach v. Wilson & Co., 312 U.S. 1 (1941), cast the Enabling Act's scope limitation in terms of federalism concerns, but the notion that the Enabling Act's scope limitation arose from federalism concerns is a myth; the real motivation for that limit was a concern over separation of powers. *Hanna v. Plumer*, 380 U.S. 460 (1965), clarified that it makes a difference, for purposes of the *Erie* analysis, what *type* of federal law is operating, but *Hanna* did not improve the law respecting the nature of the Enabling Act's scope limitation. The concerns expressed by Justice Harlan in his separate opinion in *Hanna* have been vindicated; it seems almost impossible to invalidate a duly adopted Rule. Citing as examples *Semtek International, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), and *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1 (1987), Professor Burbank stated that the Supreme Court's jurisprudence on the Enabling Act's scope limitation is incoherent.

During the early 1980s, Professor Burbank recalled, the Civil Rules Committee took a broad view of its powers, as evidenced by the 1983 amendments to Civil Rule 11. As a contrast, Professor Burbank cited the conference that the Civil Rules Committee convened in 2001 to discuss the topic of federal courts' power to enjoin overlapping class actions. Academics who participated in that conference expressed the view that the rulemakers would exceed their powers under the Enabling Act if they were to propose the adoption of a rule empowering federal courts to enjoin the certification of a state-court class action where certification of a substantially similar class had been denied in federal court; and the Committee decided not to proceed with such a proposal. Similar concerns about the scope of rulemaking authority led some to support the enactment by Congress of the Class Action Fairness Act.

Professor Burbank next highlighted the politics of rulemaking during different time periods. Initially, there was a long honeymoon (punctuated occasionally by dissents – by Justices Black and Douglas – from the Court's orders promulgating a proposed rule). In the 1980s, Representative

Kastenmeier began engaging in oversight of issues relating to the Civil Rules – such as offers of judgment under Civil Rule 68. Congress itself has acknowledged the power of procedure; for instance, in the Private Securities Litigation Reform Act it ratcheted up the pleading standard. As the power of procedure to affect the operation of the substantive law became more widely recognized, the topic attracted interest, and also interest groups. Meanwhile, during the 1980s the rulemaking process became more transparent. Chief Justice Burger oversaw the creation of a legislative affairs office within the AO.

The composition of the Advisory Committee changed over time. The original Advisory Committee was made up of lawyers and academics; it included no sitting judges. That changed during the 1970s, perhaps because people no longer perceived (as they formerly had) a unity of interests between the bench and bar. Calls arose for judicial management of litigation. Now, Professor Burbank observed, judges have come to dominate the rulemaking process. This raises the question, he suggested, how judges should function as part of a political process – for that, he stated, is what the rulemaking process is.

The rulemaking process has made progress with respect to the use of empirical data. Charles Clark and Edson Sunderland were legal realists who valued empirical research. One barrier to such research on matters touching the rulemaking process, Professor Burbank argued, has been the appeal of the image of trans-substantive rules. But when one compares the rulemakers' attitude toward empirical research in the 1980s and today, the change is admirable. Professor Burbank adduced, as an example of this shift, the Civil Rules Committee's decision not to incorporate into the recent Civil Rule 56 amendments the point-counterpoint mechanism that some districts mandate by local rule. But, Professor Burbank suggested, it would be even better if the AO would systematically collect, and make available to researchers outside the FJC, data concerning the litigation system.

Professor Wolff opened his remarks by noting that much of his scholarship focuses on the relationship between procedural rules and the underlying substantive law. He suggested that the rulemakers should take a modest view of the role that rules should play in relation to the substantive law. Judges and lawyers have become accustomed, Professor Wolff observed, to thinking about procedure trans-substantively. Similarly, he noted, in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 130 S. Ct. 1431 (2010), the plurality asserted that Civil Rule 23 is merely another joinder rule. That assertion, Professor Wolff suggested, avoids the tough question that would otherwise arise: If you acknowledge the transformative nature of Rule 23, how could Rule 23 be a valid exercise of rulemaking power? Professor Wolff posited that one can answer that question by viewing the permissibility of class certification as tied to, and dependent on, the policies that underlie the relevant substantive law. In this view, the rules provide courts with an *occasion* for asking difficult liability questions. But, he suggested, it is not for the rulemakers to decide how liability policy will respond to the Rules; that task lies with legislators or with common-law courts. The Court recognized this principle, Professor Wolff commented, in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). In *Wal-Mart*, one of the Court's holdings was that the proposed employment discrimination class could not be certified under Civil Rule 23(b)(2) because that would conflict with certain requirements that the Court viewed as non-defeasible features of Title VII's statutory scheme.

Judge Sutton thanked Professor Burbank and Professor Wolff for their remarks. It is very helpful, he noted, for the Committee to obtain big-picture perspectives on the rulemaking process. He recalled that, in fall 2011, the Committee had heard from Professor Richard D. Freer on the issue of the frequency of rule amendments. (Later in the meeting, Judge Sutton noted that Professor Freer had recently drafted an article setting out his critiques of the rulemaking process.) Judge Sutton asked Professors Burbank and Wolff if they had advice to share with the Committee about the rulemaking process.

Professor Wolff noted that rule changes impose costs on the legal profession. Bold changes in the Rules, he suggested, should be undertaken only when supported by empirical data. Professor Burbank mentioned his 1993 article, "Ignorance and Procedural Law Reform: Time for a Moratorium," in which he criticized the 1993 amendments to Civil Rule 26 concerning initial disclosures. Professor Burbank agreed about the importance of empirical data. He also noted that trans-substantive procedure has costs. When rules are made with complex cases in mind, the rules become more elaborate and this raises the expense of litigation. As an example, Professor Burbank cited the point-counterpoint procedure for summary judgment, which, he observed, allows a litigant to impose huge costs on an opponent. Professor Wolff questioned whether the recent amendments to Civil Rule 56 were helpful to litigants in low-stakes cases. It is important, he suggested, to think about the broad array of litigants who may use the federal courts, and to ensure access to justice.

Professor Coquillette recalled that, in the 1990s, the Standing Committee considered the possibility of drafting a set of uniform Federal Rules of Attorney Conduct. In the end, the Standing Committee decided not to proceed with that project, which some regarded as being at or outside the limits of the rulemaking power. Senator Leahy, however, regarded the project as a good one and drafted a bill that would have empowered the rulemakers to undertake it. Professor Coquillette asked whether it is valuable when Congress looks to the Rules Committees for ideas on law reform. Professor Burbank responded that good law reform can require thinking beyond the boundaries of the Rules Enabling Act. (He pointed out that when sending forward the 1993 amendments to Civil Rule 4, the rulemakers included a special note flagging the question whether new Rule 4(k)(2) complied with the Rules Enabling Act's limits.) Professor Burbank suggested that multi-tiered lawmaking – in which the rulemakers provide input to Congress – can be useful.

Professor Wolff suggested that it can also be useful for the rulemakers to flag for the judicial branch issues that may arise from a change in the Rules. As an example, he cited the 1966 Committee Note to Civil Rule 23, which directed judges' attention to the connection between the procedures articulated in amended Rule 23 and the binding effect of a resulting judgment.

Mr. Rose stated that a classmate of his who is a district judge has commented on the difference between managerial judges who seek to avert trial through case management and summary judgment, and others who are more traditionalist about the idea that scheduling trials itself constitutes effective case management. He asked the presenters if they had suggestions for changing the way that the AO collects statistics. Professor Burbank noted that he had been involved in the ABA's project on the "vanishing trial" and, in connection with that, he wrote two articles about summary judgment. He found that the AO's data did not distinguish summary judgment motions

from other pretrial motions. The AO, Professor Burbank said, keeps statistics for the judiciary's purposes, and not for researchers' purposes. The Rules Committees have turned to the FJC for targeted research, but the FJC's resources are limited. He noted that he and Professor Judith Resnik participate in the activities of the American Bar Association's Standing Committee on Federal Judicial Improvements, and they have proposed a project on the collection of court data. Mr. Rose asked whether Professor Burbank has a view on the question of managerial judging. Professor Burbank responded that it is sad that people have come to regard trial as a failure. Modern procedure, he said, has made trial impossible, even for those who want it and deserve it. Summary judgments now account for from four to six times as many terminations as trials do. It would be better, he suggested, if federal judges spent more time in court trying cases and less time in their chambers managing cases.

Returning to the topic of the amendments to Civil Rule 56, an appellate judge recalled that the proposal to include a point-counterpoint mechanism in Rule 56 first arose because many federal districts have instituted such a mechanism in their local rules. Those districts felt that the mechanism worked very well. There was a concern that the rules for summary judgment procedure should be uniform nationwide. Opposition to the point-counterpoint proposal did come from judges in some districts who had employed the point-counterpoint mechanism and found that it did not work well. But there were also those who did not want a new mechanism imposed on their districts. So the failure of the point-counterpoint proposal was not solely due to conclusions drawn from empirical data. There were concerns about whether the proposal could ultimately receive approval. And there was a balancing of the value of uniformity against the value of local control. Professor Burbank responded that if the Committee had reached a contrary conclusion, that would have been surprising in light of the FJC study's findings concerning the length of time to motion disposition: When the point-counterpoint procedure was used, summary judgment motions took longer to decide. Also, the FJC study found a statistically significant difference in dismissal rates in employment discrimination cases: When the point-counterpoint mechanism was used, those cases were dismissed at a higher rate. The appellate judge participant responded that in evaluating the higher dismissal rate, one must consider why cases are being dismissed at a higher rate. The purpose of the point-counterpoint rule, he noted, is to clarify the issues.

Professor Wolff recalled that, at the 2010 Duke Civil Litigation Conference, he had argued during one of the sessions that *Twombly* and *Iqbal* confer a type of discretion on district judges – to employ their "judicial experience and common sense" – that the judges themselves should not wish to have. In a one-on-one conversation after that discussion, a judge had said to him that the *Twombly* / *Iqbal* pleading standard is a useful tool for disposing of *pro se* prisoner complaints. Professor Wolff suggested that good empirical data can help make visible to judges aspects of the practice in their own courthouses that the judges, acting in all good faith, may not otherwise perceive.

Judge Sutton asked Professors Burbank and Wolff for their views on whether it is better for procedural reforms to come about through judicial decisions or by means of a Rule amendment. Professor Burbank noted that the idea of "uniform rules" is appealing, but that a facially uniform rule can be interpreted differently in different places around the country. Many Rules, he observed,

confer discretion; such discretion-conferring Rules should not be viewed the same way as Rules that explicitly make policy choices. Professor Wolff suggested that so long as judges think carefully about the interplay between procedural rules and the substantive law, open-textured Rules can be a virtue. As an example, he cited litigation in which many "Doe" defendants are joined in a single copyright-infringement suit concerning file-sharing; in such suits, Civil Rules 20 and 26 give the district judge considerable discretion whether to allow early discovery prior to resolving the propriety of joinder.

Judge Sutton thanked Professors Burbank and Wolff for their presentations.

III. Approval of Minutes of April 2012 Meeting

During the meeting, a motion was made and seconded to approve the minutes of the Committee's April 2012 meeting. The motion passed by voice vote without dissent.

IV. Report on June 2012 Meeting of Standing Committee and Other Information Items

Judge Sutton described relevant aspects of the Standing Committee's June 2012 meeting. He noted that the Standing Committee gave final approval to proposed amendments to Appellate Rules 13, 14, 24, 28, and 28.1 and to Form 4, and that those amendments were recently approved by the Judicial Conference for submission to the Supreme Court. The Standing Committee approved for publication proposed amendments to Appellate Rule 6, concerning appeals in bankruptcy cases; so far, he reported, no comments had been submitted.

Judge Sutton noted that, after the Appellate Rules Committee's spring 2012 meeting, he had written to the Chief Judge of each circuit to thank them for their input on the question of amicus filings by Indian tribes and to let them know that the Committee plans to revisit the question in five years. At the Judicial Conference, Judge Sutton reported, he spoke with Chief Judge Kozinski, who stated that the Ninth Circuit will consider the possibility of adopting a local rule concerning such filings. He encouraged those present to suggest to the Chief Judge of their home circuit that the circuit consider adopting a local rule on that issue.

Judge Sutton noted that, at the Standing Committee's January 2012 meeting, Judge Kravitz had appointed Judge Gorsuch as the chair of a subcommittee to discuss terms, in the sets of national Rules, that may be affected by the shift from paper to electronic filing, storage, and transmission. Research performed for the subcommittee by Andrea Kuperman disclosed that the Rules currently use many different terms that could be affected by the shift to electronic filing. The subcommittee held discussions during spring 2012 and determined that, going forward, each Advisory Committee should attend carefully to the choice of words, in proposed Rule amendments, to denote the filing, storage, and transmission of documents.

V. Discussion Items

A. Item No. 10-AP-I (redactions in briefs)

Judge Sutton invited Judge Dow to introduce this item, concerning sealing and redaction of appellate briefs. Judge Dow noted that the item arose from an observation by Paul Alan Levy of Public Citizen Litigation Group, who stated that redactions in appellate briefs make it difficult for a potential amicus to gain the information necessary for effective amicus participation. That observation led the Committee to a more general discussion of sealing on appeal.

The Committee's inquiries identified three primary approaches to sealing and redaction on appeal. The D.C. Circuit and Federal Circuit require the litigants to review the record and to try to determine jointly whether any sealed portions can be unsealed; the litigants are to present that agreement to the court below. Some other circuits apply a presumption that materials sealed below should remain sealed on appeal. By contrast, the Seventh Circuit applies a contrary presumption; after a brief grace period, any sealed portions of the record on appeal are unsealed unless a motion is made to maintain the seal or unless the parties ask the court to excise the materials in question from the record on appeal.

Judge Dow reported that he, Mr. Letter, and Mr. Green had spoken informally with people in selected Circuit Clerks' offices to gain a better understanding of local circuit practices. In Mr. Letter's absence, the Reporter summarized the results of his research; she reported that the officials with whom Mr. Letter had conferred did not identify any practical problems with their circuits' approaches to sealing. The clerks' responses did provide some reason to think, the Reporter suggested, that a shift to an approach like the Seventh Circuit's approach might raise concerns in some circuits about possible resource constraints and delays. Mr. Green noted that, in the Sixth Circuit, items in the record that were sealed below remain sealed on appeal. The Sixth Circuit's approach, he said, seems to work well; motions seeking either to seal or to unseal matters in the record are rare, and counsel tend to have no complaints.

Judge Dow explained that the premise underlying the Seventh Circuit's approach is that the judiciary's activities are open to the public. There is a concern that district courts may seal items in the record without adequate justification if both parties agree to sealing. Judge Dow noted that the Seventh Circuit's approach requires more work both from the district court and from the parties. On appeal in the Seventh Circuit, the following procedure applies: If the record on appeal includes sealed items and the sealing is not required by statute or rule, the Clerk's Office notifies the parties that after two weeks the sealed documents will be unsealed unless a party moves to maintain the documents under seal or unless a party asks the Court to return the sealed documents to the district court (on the ground that those documents were not germane to the lower court's decision). Participants in this process characterize it as a well-oiled machine.

In sum, Judge Dow concluded, each circuit that was canvassed seems happy with its own procedures for dealing with sealed appellate filings. To achieve nationwide adoption of an approach similar to the Seventh Circuit's might take a Supreme Court decision or legislation. Failing that, the best course may be to try to generate dialogue among the circuits concerning best practices. The CM/ECF system, Judge Dow noted, has the capacity to handle sealed filings.

An appellate judge agreed that it may be difficult to induce other circuits to change their approaches, and that this fact makes him somewhat skeptical about the prospects for a national rule on the subject. On the other hand, he suggested, the Seventh Circuit's approach makes sense. He agreed that it could be productive to circulate to each circuit information concerning the other circuits' practices.

An attorney member asked how sealed filings affect the resulting court opinions. The Reporter responded that her research had not focused on the treatment, in judicial opinions, of information from sealed filings. Participants in the discussion noted the importance of explaining the reasons for a judicial decision and also the possibility of asking the parties to address in letter briefs whether previously sealed information should be disclosed in the opinion. An appellate judge asked how sealed materials in criminal cases are handled on appeal in the Seventh Circuit. The Reporter mentioned that the Seventh Circuit's procedures take into account statutory sealing requirements; if materials are sealed pursuant to statute or rule, then the Seventh Circuit's presumption in favor of unsealing on appeal does not apply. Judge Dow reported that there sometimes are motions by third parties to unseal materials that the court has placed under seal; such motions might be made, for example, by a media entity. An appellate judge noted that judicial opinions might disclose some information from a sealed document; for example, an opinion addressing a sentencing issue might discuss information from a pre-sentence investigation report.

An appellate judge member suggested that, if each circuit is satisfied with its own approach, there is no need for rulemaking on this topic. Judge Dow, noting the earlier proposal to circulate information to each circuit's Chief Judge, asked what sort of information might be included. Judge Sutton responded that the letter could describe the genesis of this item and also describe the varied approaches that the circuits take to sealed materials. The Committee has found that information useful, he noted, so it could be helpful to share it with each circuit.

A member expressed support for the idea but asked whether it is likely that the circuits would give attention to this question. The Reporter observed that after the Committee had circulated to the Chief Judges of each circuit Ms. Leary's 2011 report on the taxation of appellate costs under Rule 39, at least one circuit had changed its practices concerning costs. A participant suggested that any letter on sealing practices should be sent to the Circuit Clerks as well as the Chief Judges. A member asked how frequently the Committee decides to send letters to the Chief Judges. The Reporter noted that in fall 2006 Judge Stewart, as the Chair of the Committee, had written to the Chief Judge of each circuit to urge the circuits to consider whether their local briefing requirements were truly necessary and to stress the need to make those requirements accessible to lawyers.

Professor Coquillette observed that it is important not to encourage the proliferation of local circuit rules. In some instances, though, committees have identified specific areas where local variation may be justified, and have merely circulated information about such local variations.

An appellate judge member asked whether the letter should take a policy position on which approach is best. Another participant asked whether such a letter might cause readers to wonder why the Committee is not moving forward with a rulemaking proposal. An appellate judge observed

that, even if a provision were to be adopted that imposed a nationally uniform presumption in favor of unsealing on appeal (i.e., an approach similar to the Seventh Circuit's), this would not ensure that the resulting *decisions* on motions to seal achieved uniform results. The Reporter observed that if the Committee were to decide to take a strong policy position, consultation with other interested Judicial Conference committees (such as the Judicial Conference Committee on Court Administration and Case Management ("CACM")) might be advisable. Mr. Rose said that advance coordination would not be necessary if the Committee's letter were informational.

An appellate judge member expressed support for the idea of a letter. Judge Sutton asked whether the Committee preferred that the letter take an agnostic position on the relative merits of the circuits' approaches. Professor Coquillette stated that it would be necessary to consult CACM before taking the step of endorsing the Seventh Circuit's approach. An appellate judge member suggested that the letter could usefully identify the concerns that arise from sealed and redacted appellate filings. A district judge member added that the letter could also note the Seventh Circuit's rationale for its approach.

A motion was made that the Committee not proceed with a proposed rule amendment on the subject of sealed or redacted appellate filings. The motion was seconded and passed by voice vote without dissent.

Judge Sutton undertook to write to the Chief Judge of each circuit to advise them of Mr. Levy's suggestion, the reasons for it, the Committee's findings concerning the circuits' approaches, and the rationale for the Seventh Circuit's approach. Copies of the letter would be sent to the Circuit Clerks. A motion was made to approve this approach. The motion was seconded and passed by voice vote without dissent.

B. Item No. 11-AP-E (FRAP 4(b) / criminal appeal deadlines)

Judge Sutton invited Judge Fay to present this item, which arises from a suggestion by Dr. Roger Roots that Appellate Rule 4(b) be amended to lengthen the deadline for a criminal defendant to take an appeal. Judge Fay reviewed the suggestion and observed that the Committee had discussed a similar proposal roughly a decade earlier. At that time, after a very broad discussion, the Committee had voted to remove the proposal from its agenda. More recently, the Committee at its Spring 2012 meeting discussed Dr. Roots' proposal. Much of the discussion focused on whether the current 14-day deadline poses a hardship for defendants. Participants in that discussion observed that it is typically easier for a criminal defendant to decide whether to appeal than it is for the government to decide whether to appeal. And there is ordinarily a time lapse between conviction and sentencing, so that (except as to sentencing issues) defendants tend to have more than 14 days within which to consider possible bases for appeal.

Judge Fay noted that the agenda materials for the current meeting included some figures concerning the rate at which federal criminal defendants appeal; he stated that he was surprised by the low proportion of such defendants who appeal. The agenda materials also indicated that the choice of deadlines for criminal defendants' appeals is not likely to have major implications for

speedy trial requirements. It appears, Judge Fay noted, that relatively few appeals are dismissed on untimeliness grounds. District courts are likely to grant extensions where warranted. After *Bowles v. Russell*, 551 U.S. 205 (2007), courts are unlikely to regard a criminal defendant's appeal deadline as jurisdictional. The DOJ has opposed altering criminal defendants' appeal time limit, and has pointed out that there are big differences between the government and criminal defendants in terms of the time needed to decide whether to appeal. In sum, Judge Fay suggested, the current Rule works well and there is no reason to change it.

The Reporter thanked Ms. Leary for her very helpful research on criminal defendants' appeals. Ms. Leary noted that she had done a preliminary search, looking only at criminal appeals terminated in the Third Circuit since January 1, 2011. Among those appeals, nine were dismissed because the pro se defendant failed to meet Appellate Rule 4(b)'s 14-day deadline. But, she noted, in all but one of those cases, the defendant's delay was lengthy and would have rendered the appeal untimely even if the relevant deadline had been 30 days rather than 14 days. A member asked whether Ms. Leary had looked at all relevant appeals in the Third Circuit during the stated time period; she responded that the search was comprehensive.

A district judge member observed that very few cases go to trial. There is typically a long delay between conviction and sentencing. And where a criminal defendant needs more time to file a notice of appeal, caselaw in the Seventh Circuit supports the view that the district court should grant an extension under Rule 4(b)(4). Mr. Byron reiterated the DOJ's view that no amendment is needed.

A motion was made and seconded to remove this item from the Committee's agenda. The motion passed by voice vote without dissent.

C. Item Nos. 08-AP-A, 11-AP-C, and 11-AP-D (possible changes in light of electronic filing and service)

Judge Sutton invited the Reporter to introduce these items, which concern the possibility of amending the Appellate Rules to account for the shift to electronic filing, service, and transmission. The Committee last discussed this set of issues at its fall 2011 meeting. At this point, the Advisory Committees may not be ready to take joint action to further adjust the Rules in light of electronic filing. Given that fact, the Committee may wish to consider whether it wishes to proceed with such updates to the Appellate Rules outside the context of a joint project. There have been some relevant developments since the fall 2011 meeting. In the interim, the Eleventh and Federal Circuits have instituted electronic filing. The Bankruptcy Rules Committee has published for comment proposed amendments to Part VIII of the Bankruptcy Rules, which deal with appellate practice and which reflect the early adoption, in bankruptcy practice, of electronic filing and service. There are a variety of adjustments that might eventually be made to the Appellate Rules in light of the shift to electronic filing; one of the questions before the Committee is how to time those adjustments. One approach would be to propose such revisions only when the Committee is proposing to amend a particular Rule for other reasons. But, the Reporter suggested, it makes sense for the Committee to

consider whether there are any such revisions that are worth proposing earlier than that, as stand-alone amendments.

Mr. Green reported that the Circuit Clerks do not see an urgent need for revisions to the Appellate Rules at this time. Admittedly, he noted, Rule 26(c)'s "three-day rule" is odd and anachronistic. It would be difficult to achieve nationally uniform procedures for the treatment of the record and appendix; practices currently vary widely among the circuits. Judge Sutton asked whether the "three-day rule" is causing problems. Mr. Green responded that he did not think it causes logistical problems; rather, it is an oddity and it is hard to explain why it exists.

Mr. Byron asked about the effects, if any, of the adoption of the next generation of software for the CM/ECF system. The Reporter noted that the new software is slated to be rolled out gradually over a period of years. Mr. Green stated that the next generation software will make refinements, rather than big changes, in the electronic filing system.

Judge Sutton suggested that it might make sense for the Advisory Committees to address jointly the question of whether to revise the Rules to account for changes related to electronic filing. By consensus, the Committee retained Items 08-AP-A, 11-AP-C, and 11-AP-D on its study agenda.

D. Item No. 08-AP-H (manufactured finality)

Judge Sutton invited the Reporter to introduce this item, which concerns the possibility of amending the Rules to address situations in which parties attempt to "manufacture" a final appealable judgment (so as to obtain review of a ruling on one claim in a suit (the "central claim")) by dismissing all other pending claims (the "peripheral claims"). The Reporter noted that the Civil / Appellate Subcommittee, chaired by Judge Colloton, had considered this item in depth but had not reached consensus on it.

The Reporter noted that there are a variety of ways in which one might try to secure review of the central claim. First, a straightforward way is to dismiss the peripheral claims with prejudice; there is consensus that such action produces a final, appealable judgment. Second, at the other end of the spectrum, if the peripheral claims are dismissed without prejudice, roughly half the circuits have made clear that this does not produce an appealable judgment; but there are some decisions in a few circuits taking a different view. The Ninth Circuit has a test that examines whether the would-be appellant tried to manipulate appellate jurisdiction. Third, when the dismissal of the peripheral claims was nominally without prejudice but those claims can no longer be asserted due to some practical impediment, there is a growing consensus that such a dismissal does create an appealable judgment. Fourth, in the Eighth and Ninth Circuits an appealable judgment results when the dismissal of the peripheral claims without prejudice completely removes a defendant from the suit. Fifth, the Second Circuit takes the view that an appealable judgment results if the appellant conditionally dismisses the peripheral claims with prejudice – i.e., commits not to re-assert the peripheral claims unless the appeal results in the reinstatement of the central claim. However, some four circuits disagree with this view. Most recently, in *SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011),

the Second Circuit applied the conditional-prejudice doctrine to permit an appeal, but refused to extend the doctrine to the attempted cross-appeal in the same case.

An attorney member noted that, two days earlier, the Supreme Court had granted certiorari in *Gabelli*.

Judge Colloton summarized the Civil Rules Committee's discussions of the topic of manufactured finality; some members of that Committee had reacted negatively to the idea of the conditional-prejudice doctrine. The Civil / Appellate Subcommittee considered the idea of proposing a rule that would eliminate avenues for manufacturing jurisdiction (such as dismissal without prejudice or with conditional prejudice), and alternatively considered the idea of not proposing a rule amendment. Ultimately, through lack of strong support for the first option, the Subcommittee defaulted to the second option. Some participants in the discussion were of the opinion that any problems that arise can be handled under Civil Rule 54(b).

A member asked whether the topic of appellate jurisdiction is appropriate for rulemaking. Judge Colloton responded that Congress has authorized rulemaking to define when a district-court ruling is final for purposes of appeal. An attorney member stated that this area of law meets his criterion for rulemaking action: It is an area in which litigants ought to be able to find a clear answer.

A participant asked for examples of scenarios that could not be adequately dealt with under Civil Rule 54(b). It was noted that the use of Civil Rule 54(b) is within the district court's discretion, and that Civil Rule 54(b) certification can apply only when there is a particular claim that is ripe for the certification. Judge Colloton noted that Professor Cooper had pointed out that Civil Rule 54(b) does not address instances where a ruling severely affects a claim but does not completely dispose of it – as when a court has excluded a party's most persuasive evidence in support of its claim, but has ruled admissible just enough evidence "to survive summary judgment and limp through trial."

It was suggested that it would be wise to await the Supreme Court's decision in *Gabelli*. By consensus, the Committee retained this item on its study agenda.

VI. Additional Old Business and New Business

A. Item No. 12-AP-B (Form 4's directive regarding institutional-account statements)

Judge Sutton invited the Reporter to introduce this item, which arises from a comment that the National Association of Criminal Defense Lawyers ("NACDL") submitted on the pending amendment to Form 4 (concerning applications to proceed *in forma pauperis* ("IFP")). The pending amendments – which are on track to take effect on December 1, 2013 if the Supreme Court approves them and Congress takes no contrary action – make certain technical changes to the Form and revise

the current Form's detailed questions about the applicant's payments for legal and other services.

The pending technical changes include a revision to the Form's directive that prisoners must attach an institutional account statement. The pending revision would limit that directive to prisoners "seeking to appeal a judgment in a civil action or proceeding." That revised language more closely tracks the language in 28 U.S.C. § 1915(a)(2) (a statutory provision added by the Prison Litigation Reform Act ("PLRA")). Commenting on this proposed change, NACDL suggested that this provision be further revised by adding the following parenthetical: "(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255)."

The Reporter stated that NACDL's legal analysis accords with the overall state of the law. All circuits have cases stating that the PLRA's IFP provisions do not apply to habeas petitions under Section 2254. A majority of circuits have cases stating the same view with respect to Section 2255 motions. However, the Reporter noted that courts might well apply the PLRA's IFP requirements if a prisoner (erroneously or not) styled a challenge to prison conditions as a habeas petition, or if a prisoner included a prison-conditions challenge in a habeas petition.

The Reporter suggested that, in evaluating NACDL's proposal, it may be useful to consider the effect of Form 4's wording on the risk of error by an IFP applicant. Form 4, as revised by the pending amendment, might risk inconveniencing some IFP applicants in habeas cases who erroneously think that they must include an institutional-account statement with their IFP application. This risk may be relatively widespread, but would likely pose no more than an inconvenience in any given case. If NACDL's proposed change is made, there would be a risk that some (relatively small) number of IFP applicants would erroneously believe they need not include an institutional-account statement. That risk would not likely be widespread, but it might have more significant implications for the appeal. Those implications would depend on how courts would treat the absence of an institutional-account statement when one is required. The caselaw gives reason to hope that such an error would not render the filing untimely, and that the appeal would be permitted to proceed so long as the applicant supplied the required statement promptly once alerted to the error. That would be the likely outcome, but there remains the possibility that a court might disagree.

An appellate judge member suggested that the worst-case scenario under the Form (as revised by the pending amendment) does not seem a matter for grave concern: The prison will simply supply an institutional-account statement unnecessarily. An attorney member asked what would happen if an inmate is moved from one institution to another – would he or she need to supply more than one institutional-account statement? Mr. Green stated that if a litigant omitted an institutional-account statement when one was required, his office would simply direct the litigant to remedy the omission. A district judge member reported that this requirement does not cause problems at the district court level; within his district, each prison has a designated person whose job it is to process the institutional-account statements.

Judge Colloton noted the broader issue of the role of rulemaking concerning forms; the Civil Rules Committee, he observed, is considering whether to cease promulgating forms. Professor Coquillette noted that the Advisory Committees vary in their approaches to forms.

An attorney member suggested that any change in response to NACDL's comment should be held for disposition along with other small changes that might be addressed once every five years or so. Judge Sutton agreed that it is worth thinking about the frequency of rule amendments. More generally, though, bundling amendments might not always work for all of the Advisory Committees. Mr. Byron recalled that in the late 1990s and early 2000s the Appellate Rules Committee did follow the practice of bundling rule amendments.

Concerning the present proposal about Form 4, Mr. Byron stated that the DOJ defers to the views of the judges and clerks. An appellate judge member suggested that it would make sense to wait and see how the pending amendments to Form 4 function in practice before considering further changes.

By consensus, the Committee retained this item on its agenda.

B. Item No. 12-AP-C (FRAP 28 – pinpoint citations)

Judge Sutton invited Judge Chagares to present this item, which arises from a suggestion submitted by the Council of Appellate Lawyers of the Appellate Judges Conference of the American Bar Association's Judicial Division (the "Council") as part of that group's comments on the pending amendments to Rules 28 and 28.1 (concerning the statement of the case). The Council proposes "amending Rule 28(e) to require a pinpoint citation to the appendix or record to support each statement of fact and procedural history anywhere in every brief," rather than "only in the statement of facts."

Judge Chagares noted that it is very frustrating to read briefs that lack citations to the record. The amendment proposed by the Council, he suggested, might raise awareness (among less experienced lawyers) about the requirement of citations to the record. However, an attorney member asked what the Council's proposed amendment would change. Another attorney member observed that Appellate Rule 28(a)(9)(A) already requires "citations to the authorities and parts of the record on which the appellant relies." Professor Coquillette argued that one should not propose a rule amendment for the purpose of educating lawyers. A member suggested that lawyers should not need further instruction concerning the requirement of citations to the record. Judge Jordan observed that the Bankruptcy Rules Committee has had a similar discussion about whether to amend the Rules in order to address lawyers' failure to comply with existing requirements; some rules, he noted, are disobeyed frequently. Good lawyers will comply with the rules and bad lawyers will not.

A motion was made and seconded to remove this item from the Committee's study agenda. The motion passed by voice vote without dissent.

C. Item No. 12-AP-D (Civil Rule 62 and FRAP 8 – appeal bonds)

Judge Sutton invited Mr. Newsom to introduce this item, which arises from Mr. Newsom's suggestion that the Committee consider the topic of appeal bonds. Mr. Newsom explained that he finds the bonding process mystifying every time that it arises in a complex civil case. Though he does not advocate amending the Rules to educate lawyers about the bonding process, he suggested that amendments might usefully address gaps in the Rules' treatment of the topic. This topic centrally concerns Civil Rule 62, but most lawyers who deal with these issues are appellate lawyers.

Mr. Newsom pointed out that Civil Rule 62 currently addresses separately two time periods for which a bond will typically be needed: Civil Rule 62(b) addresses stays of a judgment pending disposition of a postjudgment motion, while Civil Rule 62(d) addresses stays of the judgment pending appeal. Issues that might be addressed by a Rule amendment include the timing, form, and amount of a bond. Current Rule 62 may produce something of a gap, because under Rule 62(d) the stay takes effect only when the court approves the bond, and the bond can be given "upon or after filing the notice of appeal." So technically the Rule 62(b) stay would have expired upon the disposition of the postjudgment motion, and the Rule 62(d) stay would not take effect until the appellant has filed the notice of appeal and the bond, and the court has approved the bond.

The question of procedure, Mr. Newsom suggested, is more interesting than the question of the amount of the bond. Questions include the following: (1) Should Civil Rule 62(b) be amended to *require* the issuance of a stay upon the posting of sufficient security? (2) Should the Rule be amended to reflect the reality that most complex cases involve both postjudgment motions and an appeal, and to treat those two periods under the same framework? (3) Should the Rule be amended to address the timing gap between disposition of the postjudgment motion and the approval of the supersedeas bond? In practice, Mr. Newsom said, lawyers take a "belt and suspenders" approach by obtaining – for purposes of the postjudgment motion period – a bond that will also meet the requirements for a supersedeas bond under Civil Rule 62(d); one pays a single annual premium and can get a refund for the unused period.

An attorney member observed that this topic seems to fall largely within the jurisdiction of the Civil Rules Committee. Judge Sutton asked for Judge Dow's views. Judge Dow responded that the appeal-bond requirement can be a big problem when things go wrong. He suggested that the Reporter discuss the matter with Professor Cooper.

By consensus, the Committee retained this item on its study agenda.

D. Item No. 12-AP-E (FRAP 35 – length limits for petitions for rehearing en banc)

Judge Sutton invited Professor Katyal to introduce this item, which arises from Professor Katyal's observation that Appellate Rule 35(b)(2) sets a 15-page limit for rehearing petitions.

Professor Katyal observed that he has seen a lot of manipulation of length limits that are set in pages. People waste time altering fonts and line spacing. The 1998 amendments to the Appellate Rules set type-volume length limits for merits briefs, but limits denoted in pages remain in Rules

5, 21, 27, and 35. The time may have come to reconsider that choice. Technological developments have made it much easier to count words. The type-volume limit is harder to manipulate. On the other hand, the type-volume limit does entail an added item – a certificate of compliance. And some pro se litigants continue to file handwritten briefs. But on balance, Professor Katyal suggested, it would be worthwhile to denote length limits in a consistent fashion. An attorney member agreed with this view.

A district judge member pointed out that Rule 28(j) sets a 350-word limit for letters concerning supplemental authorities, and he expressed support for that approach. Mr. Byron noted that one might view the type-volume approach as the exception and the page-limit approach as the general rule. He asked whether the page limits create problems for judges and clerks. Mr. Green said that they do not. Professor Katyal observed that when one's opponent manipulates a page limit, it can be awkward to call the opponent on it. The district judge member observed that when length limits are set in pages, the resulting briefs can be harder to read.

The Reporter noted that the type-volume limits include a safe harbor denoted in pages, and she asked how those safe-harbor page limits compare to the type-volume limits. Mr. Byron responded that the safe-harbor page limits are significantly shorter than the type-volume limits. An attorney member observed that the Supreme Court switched from page limits to word limits in 2007. A participant asked how length limits are applied to pro se briefs. An appellate judge participant responded that the court would likely just deal with the pro se brief on its merits rather than worrying about its compliance with length limits.

An attorney member expressed support for pursuing this topic further. By consensus, the Committee retained this item on its study agenda.

E. Item No. 12-AP-F (FRAP 42 and class action appeals)

Judge Sutton invited the Reporter to introduce this item, which arises from a suggestion by Professors Brian T. Fitzpatrick, Brian Wolfman, and Alan B. Morrison that Appellate Rule 42 be amended to require approval from the court of appeals for any dismissal of an appeal from a judgment approving a class action settlement or fee award, and to bar such dismissals absent a certification that no person will give or receive anything of value in exchange for dismissing the appeal.

The Reporter observed that the backdrop for this proposal is the debate over the role of objectors in class actions. That debate played a part in the Civil Rules Committee's discussions, during the early 2000s, of the proposals that ultimately gave rise to the 2003 amendments to Civil Rule 23. The 2003 amendments, among other things, revised Rule 23(e) in order to intensify judicial scrutiny of proposed class settlements. In considering ways to better inform the district judge about the merits of such a proposed settlement, the Civil Rules Committee had discussed possible ways to facilitate a role for objectors in generating information about a proposed settlement. Participants discussed – but the Committee ultimately rejected – the possibility of amending Rule 23 to, for example, provide for discovery conducted by objectors, or provide ways to remunerate

objectors and their counsel. Participants noted that objectors may have varying motives and that it could be problematic to give all such objectors undue sway. Ultimately the Committee moved in a different direction; the 2003 amendments to Rule 23 use other means to try to improve the settlement approval process – such as providing the possibility of a second round of opting out.

The question, in dealing with objectors, has always been how best to promote useful objections while minimizing the problems caused by objectors (and their counsel) whose objections do not improve the result for the class and who are motivated by the prospect of personal gain. When determining how to treat the withdrawal of an objection, one might also seek to distinguish between objections with grounds that apply to the class as a whole and objections founded upon circumstances unique to the objector in question.

Civil Rule 23(e)(5) addresses the question of dropping an objection. It provides that "[a]ny class member may object" to a proposed class settlement, and that "the objection may be withdrawn only with the court's approval." To that extent, Civil Rule 23(e)'s treatment of objectors departs from the usual principle that the court will not force a litigant to keep litigating when the litigant no longer wishes to do so. (Of course, the requirement of court approval for class settlements is itself a departure from that principle.)

The proponents of the current proposal point out that Civil Rule 23(e)(5) will not prevent objectors from making objections in order to extract monetary compensation. Those objectors might simply wait until they have a pending appeal and then offer to drop the appeal if they are paid off at that point. Currently there is no provision in the Rules that explicitly addresses that possibility. Professor Cooper has pointed out that during the discussions that led to the 2003 amendments, there was a proposal to draft the provision in Civil Rule 23(e) broadly enough to encompass the withdrawal of objector appeals. That proposal did not make it into the 2003 amendments to Civil Rule 23. Some participants had questioned whether a district court would have authority to address the propriety of an objector's dismissal of a pending appeal.

Compared with current Civil Rule 23(e)(5), the proposed amendment to Appellate Rule 42 is broader in scope and more stringent in its criteria. Unlike Civil Rule 23(e)(5), the proposed amendment would encompass objections to fee awards. Civil Rule 23(h)(2) does contemplate objections to fee awards, but does not constrain the dropping of such objections in the way that the proposed Appellate Rule 42 amendment would. In addition, Civil Rule 23(e)(5) gives the district court discretion whether to approve the withdrawal of an objection, whereas the proposed amendment to Appellate Rule 42 would remove the court of appeals' discretion to approve the withdrawal of the appeal if there is a payment in exchange for that withdrawal.

The Reporter suggested that the proposal is an elegant one in the sense that its goal is to craft a Rule that would cause undesirable objectors to self-select out of the appellate process. If they anticipate that they can get no personal benefit from the appeal, then they will not appeal. But the Reporter noted a few questions about the proposal. One concerns the possibility that the Rule's existence might not deter all such objectors from appealing. If an objector did in fact take an appeal, and then receive something of value in exchange for dropping the appeal, the court would be in the

unusual position of forcing a now-unwilling appellant to maintain an appeal. There are not very many cases that interpret and apply Appellate Rule 42, but among those scattered cases are at least some that remark upon the awkwardness of denying an appellant permission to drop an appeal. Perhaps it would be less awkward in the case of a class action objector's appeal, to the extent that one could view the objector as having a duty to act in the interests of the class when objecting. One question is whether the proposal could be modified to provide the court of appeals with discretion whether to permit the dropping of an appeal – along the lines of the discretion that Civil Rule 23(e)(5) accords to the district court. The decision whether to permit the withdrawal of the appeal would fall to the court of appeals, unless that court decided to remand to the district court for a resolution of that question. Court of appeals judges may not be as well situated as the district court to assess the validity of the objector's reasons for seeking to withdraw the appeal.

Judge Sutton suggested that this proposal might best be considered within the larger context of the Civil Rules Committee's consideration of possible changes to Civil Rule 23. If so, perhaps it would be useful for a member of the Appellate Rules Committee to participate in the discussions of the relevant subcommittee of the Civil Rules Committee. Professor Coquillette agreed that it will be important to work closely with the Civil Rules Committee.

An attorney member stated that the current proposal concerning Appellate Rule 42 would go beyond the provisions of Civil Rule 23(e)(5). It is not intuitively obvious, this member suggested, that all payments to class action objectors are nefarious. District judges are in a better position than court of appeals judges to assess an objector's reasons for withdrawing an objection. If the Committee moves forward with a proposal on this topic, the proposal should assign the decision to the district court rather than the court of appeals.

An appellate judge member described her experience with parties' motions seeking permission to withdraw from an appeal. Resolving such motions, she reported, can be very time-intensive for the appellate court.

By consensus, the Committee retained this item on its study agenda.

VII. Adjournment

The Committee adjourned at 3:45 p.m. on September 27, 2012.

Respectfully submitted,

Catherine T. Struve
Reporter

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MEMORANDUM

TO: **Honorable Jeffrey S. Sutton, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Honorable Eugene R. Wedoff, Chair**
Advisory Committee on Bankruptcy Rules

DATE: **December 5, 2012**

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

I. Introduction

The Advisory Committee on Bankruptcy Rules met on September 20 and 21, 2012, in Portland, Oregon. The draft minutes of that meeting accompany this report.

At this meeting the Advisory Committee discussed a number of suggestions for rule amendments and new forms that had been submitted by bankruptcy judges, members of the bar, and court personnel. It also continued its discussion of several ongoing projects.

The Advisory Committee has no action items to report at this time. Rather, this report is intended to provide the Standing Committee with information about four matters that may result in rule or form amendments that the Advisory Committee will bring to the June meeting for approval for publication.

Part II of the report presents for the Standing Committee's preliminary consideration revised bankruptcy forms for individual debtor cases. These proposed forms are the products of the Forms Modernization Project. The first group of modernized individual forms was published in August, and the Committee will be reviewing any comments addressing them. The forms included in this report are the remaining revised individual forms. They have not yet been

approved by the Advisory Committee because it wants to take into account any comments received on the published individual forms before acting on the remaining ones. The Advisory Committee anticipates, however, that it will bring these forms to the Standing Committee at the June meeting with a recommendation that they be published for comment in August 2013.

Part III discusses a mini-conference that the Advisory Committee held in Portland on September 19, the day before its regular meeting. The focus of the mini-conference was on the home mortgage forms and related rules that went into effect on December 1, 2011. The invited participants provided feedback to the Committee about how the new reporting requirements are being implemented and whether there is a need for any revision of the forms or rules.

Part IV reports on the progress of the Committee's development of an official form for chapter 13 plans and its consideration of related rule amendments. The Committee hopes to be in a position to seek the Standing Committee's approval in June of the publication of the proposed form and rule amendments.

Finally, Part V of this report discusses the Committee's consideration of whether to propose a bankruptcy rule that would allow bankruptcy filings with the electronic signature of an individual who is not a registered user of the CM/ECF system without requiring the individual's attorney or the court to retain an original document bearing the individual's handwritten signature.

II. Restyled Forms

The Bankruptcy Forms Modernization Project ("FMP") began its work in 2008. The project is being carried out by an ad hoc group composed of members of the Advisory Committee's Subcommittee on Forms, working with representatives of other relevant Judicial Conference committees, the Federal Judicial Center, and the Administrative Office of the U.S. Courts.

The dual goals of the FMP are to improve the official bankruptcy forms and to improve the interface between the forms and available technology. The judiciary is in the process of developing "the next generation" of CM/ECF ("Next Gen"), and the modernized forms are being designed to use the enhanced technology that will become available through Next Gen. From a forms perspective, a major change in Next Gen will be the ability to store as data all information reported on forms so that authorized users can produce customized reports from the forms containing the information they want, displayed in whatever format they choose.

The Advisory Committee approved the FMP's decision to create a separate set of forms for use in cases involving individual debtors. Separating those forms from the forms used by non-individual debtors, such as corporations and partnerships, allows for the elimination of irrelevant questions on both sets of forms and for the incorporation of a more user-friendly style in the individual forms.

In August 2012 the Standing Committee published for public comment the first group of restyled individual forms:

- application forms for the payment of fees in installments and for fee waivers (currently Official Forms 3A and 3B);
- income and expenses forms (currently Official Forms 6I and 6J); and
- means test forms (currently Official Forms 22A, 22B, and 22C).

To date, only one comment has been received on the published forms. It was submitted by a consumer bankruptcy attorney in Pennsylvania and was supportive of the proposed forms. The Advisory Committee, however, expects to receive more comments before the February deadline, and it will review those comments before deciding whether to seek approval for publication of the remaining individual forms. Because of the likelihood, however, that the Committee will bring the balance of the individual forms to the Standing Committee in June with a request that they be approved for publication, the Advisory Committee will present them for preliminary review at this meeting.

Drafts of the eighteen revised individual forms currently under consideration are attached to this report. The accompanying Committee Note for each form discusses the most significant differences between the proposed form and the one it would replace. In order to generate more complete and accurate responses, all of the proposed forms adopt a style and format that is easier to read and understand than the existing forms. This restyling is based on the recognition that there is a need for the forms submitted by individuals to be less technical, both because individuals are generally less sophisticated than other entities and because individuals may not have the assistance of counsel. Accordingly, the proposed forms for individual debtors use language more common in ordinary conversation, employ more intuitive layouts, and include clearer instructions and examples within the forms. Many open-ended and multiple-part questions have been replaced with specific questions.

The forms presented with this report are the following:

- Official Form 101—Voluntary Petition for Individuals Filing for Bankruptcy
- Official Form 101AB—Your Statement About an Eviction Judgment Against You – Parts A and B
- Official Form 104—List in Individual Chapter 11 Cases of Creditors Who Have the 20 Largest Unsecured Claims Against You Who are not Insiders
- Official Form 106 – Summary—A Summary of Your Assets and Liabilities and Certain Statistical Information
- Official Form 106A—Schedule A: Property
- Official Form 106B—Schedule B: Creditors Who Hold Claims Secured by Property
- Official Form 106C—Schedule C: Creditors Who Have Unsecured Claims
- Official Form 106D—Schedule D: The Property You Claim as Exempt

- Official Form 106E—Schedule E: Executory Contracts and Unexpired Leases
- Official Form 106F—Schedule F: Your Codebtors
- Official Form 106 – Declaration—Declaration About an Individual Debtor's Schedules
- Official Form 107—Your Statement of Financial Affairs for Individuals Filing for Bankruptcy
- Official Form 112—Statement of Intention for Individuals Filing Under Chapter 7
- Official Form 119—Bankruptcy Petition Preparer's Notice, Declaration and Signature
- Official Form 121—Your Statement About Your Social Security Numbers
- Official Form 318—Discharge of Debtor in a Chapter 7 Case
- Official Form 423—Certification About a Financial Management Course
- Official Form 427—Cover Sheet for Reaffirmation Agreement

As the above list of forms reflects, the FMP has developed a new numbering system that organizes the bankruptcy forms in a logical way and retains a relationship to current form numbering. The basic protocol of the new numbering system is as follows:

1xx – Forms for Individuals Filing for Bankruptcy (used early in the case)
2xx – Forms for Non-individual Filing for Bankruptcy (used early in the case)
3xx – Orders and Court Notices
4xx – Additional Official Forms (used later in the case)
xxxx – Director's Forms

To the extent possible, forms incorporate their current numbers. The following is an example of how the new numbering system relates to the current numbering:

Current Voluntary Petition	Official Form 1
Modernized Individual Voluntary Petition	Official Form 101
Modernized Non-individual Voluntary Petition	Official Form 201

The logic of this numbering system, which is intuitive and easy to explain, is intended to ease the transition to the modernized forms for those who are accustomed to the numbering and organization of the current Official Bankruptcy Forms. A working draft of the conversion table is included in the attachment to this report.

An instruction booklet that would accompany the revised individual forms is also included in the attachment. It contains information about the process of filing for bankruptcy, checklists of forms that must be filed with the petition or within fourteen days thereafter, and the pre-filing notice that § 342(b) of the Bankruptcy Code requires the bankruptcy clerk to give to individuals with primarily consumer debts. The booklet then provides detailed instructions for completing selected forms and a glossary of terms used in the forms.

Setting out detailed instructions in a separate document reduces the need for lengthy instructions in the forms themselves. The Advisory Committee does not anticipate requesting

that the instruction booklet be approved as an Official Form, but the instruction booklet is included with the proposed forms now to illustrate the manner in which the new forms will be presented to debtors.

III. Home Mortgage Forms and Rules

On December 1, 2011, amendments to Rule 3001(c), new Rule 3002.1, and new Official Forms 10A, 10S1, and 10S2 went into effect. These rules and forms were promulgated to ensure that debtors and trustees are fully informed of the basis for home mortgage claims and of the amounts that must be paid to cure any arrearages and to make payments in the proper amount on home mortgages during chapter 13 cases. They require a home mortgage creditor to provide more detailed information in support of its proof of claim and, during the course of a chapter 13 case, to give notice of any changes in the ongoing payment amount and of the assessment of any fees, expenses, and charges. Rule 3002.1 also provides a procedure for obtaining information about the status of a home mortgage at the conclusion of a chapter 13 case.

The Advisory Committee held a mini-conference on September 19, 2012, to explore the effectiveness of the new rules and forms and to consider whether any adjustments to the requirements might be advisable. The Committee invited fifteen participants, consisting of attorneys for consumer debtors and for mortgage servicers, chapter 13 trustees, bankruptcy judges, and a bankruptcy clerk. The participants were asked to discuss a set of issues that the Committee identified in advance of the conference, including the following:

- *Balancing amount and cost of disclosure.* Do the rules and forms strike the optimal balance between disclosure of useful information and the cost of producing the information?

- *Best procedures.* Can there be improvements in the procedures for disclosing the required information and for resolving any disputes about amounts claimed by creditors, arising both before and after the bankruptcy filing?

- *Technical and administrative issues.* Have any administrative or technical problems been encountered in completing or filing the forms?

- *Possible ambiguities.* Are there ambiguous provisions of the rules or forms that need to be amended by the Rules Committee rather than left to judicial interpretation?

The mini-conference revealed general acceptance of the disclosure requirements. Participants expressed a desire, however, to eliminate ambiguities in the rules and forms and to make some adjustments to facilitate compliance and to require the provision of additional information. Some participants agreed to continue discussions with each other after the mini-conference in order to arrive at consensus recommendations for the Committee. They were

invited to submit supplemental information, and the Committee has received several such submissions.

The Committee's Consumer Issues and Forms Subcommittees are considering the feedback that was provided at the mini-conference and are evaluating whether any amendments to the home mortgage rules or forms need to be pursued now. A number of the issues discussed at the conference are likely to be resolved over time as courts and affected parties become more familiar with the new requirements. Others, however, may merit the Committee's consideration. The subcommittees are actively considering the suggestion that a detailed loan payment history be attached to a home mortgage proof of claim in a format that can be automated. They are also considering whether there is a need to amend Rule 9009 (Forms) in response to the desire expressed at the mini-conference to eliminate local variations in the disclosure requirements. The Advisory Committee will take up at its spring meeting any recommendations from the subcommittees.

IV. Chapter 13 Form Plan and Related Rule Amendments

As previously reported, an ad hoc group of the Advisory Committee has been working on drafting an official form for chapter 13 plans. The creation of such a form was the subject of suggestions that a bankruptcy judge and an association of state attorneys general submitted to the Committee. A survey of chief bankruptcy judges revealed strong support for a national form plan.

One benefit of an official form plan would be to make more uniform the procedures for plan confirmation in chapter 13 cases, which now vary substantially among the districts. Many districts require the use of local model plans containing distinctive features. These differences impose substantial costs on creditors with regional or national businesses and on software vendors, whose products must accommodate all of the local variations. Also, a national form could require that any variances from its standard provisions be located in a specific, highlighted section of the plan, allowing for easier review by the court, trustees, and creditors. This would assist courts' compliance with the Supreme Court's direction in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010), that bankruptcy judges independently review chapter 13 plans for conformity with applicable law.

The working group presented a draft of the form plan for preliminary review at the Committee's fall meeting. The group also proposed amendments to Rules 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, designed to require use of the national form and provide authority needed to implement some of the plan's provisions. The Committee discussed the proposed form and rule amendments in Portland and accepted the working group's suggestion that the drafts be shared with a cross-section of interested parties to obtain their feedback on the proposals.

In order to obtain this feedback, the Committee will hold a mini-conference on the draft plan and proposed rule amendments on January 18 in Chicago. Invited participants include chapter 13 trustees, consumer debtors' attorneys, attorneys for a variety of creditor interests, a representative of the Executive Office for U.S. Trustees, bankruptcy judges, and a bankruptcy clerk. They have been divided into panels and asked to address specific topics relating to the plan or rule amendments.

Assuming that there is a generally favorable response to the proposals at the mini-conference, the working group will make revisions to the plan and rule amendments based on the feedback received and then present the model plan package to the Consumer Issues and Forms Subcommittees for their consideration. The subcommittees will report their recommendation to the Advisory Committee at its spring meeting. If the Committee approves a form chapter 13 plan and rule amendments at that meeting, it will seek the Standing Committee's approval for publication of the package in August 2013.

V. Consideration of Electronic Signature Issues

As the Committee reported at the June 2012 meeting, it has been considering the development of a rule that would allow courts to accept for filing in a bankruptcy case a document that bears the electronic signature of a person who is not registered with the CM/ECF system—without requiring the retention of the original document with the handwritten signature of the non-registrant. Currently, under Rule 5005(b)[1] these issues in bankruptcy courts are governed by local rules that vary significantly from one district to another. The Committee on Court Administration and Case Management ("CACM") was the originator of model rules regarding electronic case filing, and the Commentary to those rules asserted the need to retain the original hand-signed document.[2] As a result, many, but not all, bankruptcy courts require the

[1] Bankruptcy Rule 5005(b)(2) provides in part that a "court may by local rule permit or require documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes." This provision was added in 1996 to authorize courts to permit electronic filing, signing, and verification, and later amended in 2006 to allow courts to require those activities to be done electronically, so long as reasonable exceptions are allowed.

[2] Model Rule 7 (Retention Requirements) imposed a duty on a Filing User (i.e. the filing attorney) to maintain in paper form any electronically filed document that required the original signature of someone other than the Filing User. The Commentary to the rule stated without further elaboration that, "because electronically filed documents do not include original, handwritten signatures, it is necessary to provide for retention of certain signed documents in paper form in case they are needed as evidence in the future." The rule did not specify a retention period, but instead left that decision up to each district. The Commentary noted that the then-existing local rules "varied considerably on the required retention period." It advised that, "[a]ssuming that the purpose of document retention is to preserve relevant evidence for a subsequent proceeding, the appropriate retention period might relate to relevant statutes of limitations."

attorney for the non-registrant (usually a debtor) to retain the original document with a handwritten signature for a specified period of time.

The Advisory Committee began considering this issue at the request of the Forms Modernization Project. A number of debtors' attorneys who provided feedback on the restyled individual forms expressed concern about the increased length of the proposed forms. The FMP suggested that this concern would be lessened if attorneys were not required to retain paper copies of all of the documents requiring the debtor's signature. That change would also respond to two concerns expressed by representatives of the Department of Justice about the current practice: (1) The debtor's attorney is usually the custodian of documents that might be used to prosecute the debtor, and (2) the required retention periods vary among districts and are not necessarily related to any relevant statutes of limitations.

The Committee, through its Subcommittee on Technology and Cross Border Insolvency, has begun to investigate two approaches to the use of electronic signatures that would not require the retention of documents with handwritten signatures. The first approach, used in at least one bankruptcy court, requires that, for any electronically filed document signed by someone other than the filing attorney, the document be accompanied by a declaration of authenticity that is hand-signed by the non-attorney. That declaration is scanned and maintained in electronic form by the clerk's office. The second approach is used by the Internal Revenue Service pursuant to 26 U.S.C. § 6061(b)(2), which validates electronic signatures on tax returns. The IRS uses personal identification numbers as electronic signatures, with no requirement for any original hand-signed document.

At its June 2012 meeting, the Standing Committee authorized the Committee to continue to pursue this issue as it relates to the Bankruptcy Rules. The Committee thereafter requested the assistance of the Federal Judicial Center to examine existing practices regarding the use of electronic signatures by non-registrants and requirements for the retention of documents with handwritten signatures. Dr. Molly Johnson of the FJC has been gathering information on relevant local bankruptcy and district court rules. She has also surveyed Assistant U.S. Attorneys, U.S. Trustees, and chapter 7 trustees regarding several alternative approaches to the use of electronic signatures by bankruptcy debtors and the retention of documents with handwritten signatures.[3] She will report her findings to the Committee by the end of the year. That information will be conveyed to the Standing Committee by oral report at the January meeting.

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[3] After its fall meeting, the Advisory Committee received a copy of a memorandum from Judge Julie Robinson, CACM chair, to Judge Mark Kravitz that requested the Standing Committee to "explore creating a federal rule regarding electronic signatures and the retention of paper documents containing original signatures." CACM suggested three possible approaches to the issue, and Dr. Johnson included those approaches in her survey, along with the declaration procedure that the Committee has been considering.

APPENDIX A.1

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Fill in this information to identify your case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (*If known*): _____ Chapter you are filing under:

- ❑ Chapter 7
- ❑ Chapter 11
- ❑ Chapter 12
- ❑ Chapter 13

❑ Check if this is an amended filing

Official Form 101

Voluntary Petition for Individuals Filing for Bankruptcy 12/14

The bankruptcy forms use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. For example, if a form asks, "Do you own a car?" the answer would be *yes* if either debtor owns a car. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Identify Yourself

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
1. Your full name Write the name that is on your government-issued picture identification (for example, your driver's license or passport). Bring your picture identification to your meeting with the trustee.	_____ First name _____ Middle name _____ Last name _____ Suffix (Sr., Jr., II, III)	_____ First name _____ Middle name _____ Last name _____ Suffix (Sr., Jr., II, III)
2. All other names you have used in the last 8 years Include your married or maiden names.	_____ First name _____ Middle name _____ Last name _____ First name _____ Middle name _____ Last name	_____ First name _____ Middle name _____ Last name _____ First name _____ Middle name _____ Last name
3. Only the last 4 digits of your Social Security number or federal Individual Taxpayer Identification number (ITIN)	xxx – xx – ____ ____ ____ ____ OR **9** xx – xx – ____ ____ ____ ____	xxx – xx – ____ ____ ____ ____ OR **9** xx – xx – ____ ____ ____ ____

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
4. Any business names and Employer Identification Numbers (EIN) you have used in the last 8 years Include trade names and *doing business as* names	❑ I have not used any business names or EINs. _____ Business name _____ Business name __ __ – __ __ __ __ __ __ __ EIN __ __ – __ __ __ __ __ __ __ EIN	❑ I have not used any business names or EINs. _____ Business name _____ Business name __ __ – __ __ __ __ __ __ __ EIN __ __ – __ __ __ __ __ __ __ EIN
5. Where you live	_____ Number Street _____ _____ City State ZIP Code _____ County **If your mailing address is different from the one above, fill it in here.** Note that the court will send any notices to you at this mailing address. _____ Number Street _____ P.O. Box _____ City State ZIP Code	**If Debtor 2 lives at a different address:** _____ Number Street _____ _____ City State ZIP Code _____ County **If Debtor 2's mailing address is different from yours, fill it in here.** Note that the court will send any notices to this mailing address. _____ Number Street _____ P.O. Box _____ City State ZIP Code
6. Why you are choosing *this district* to file for bankruptcy	*Check one:* ❑ Over the last 180 days before filing this bankruptcy filing package, I have lived in this district longer than in any other district. ❑ I have another reason. Explain. (See 28 U.S.C. § 1408.) _____ _____	*Check one:* ❑ Over the last 180 days before filing this bankruptcy filing package, I have lived in this district longer than in any other district. ❑ I have another reason. Explain. (See 28 U.S.C. § 1408.) _____ _____

Part 2: Tell the Court About Your Bankruptcy Case

7. The Chapter of the Bankruptcy Code you are choosing to file under

Check one. (For a brief description of each, see *Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy* (Form B2010)). Also, go to the top of page 1 and check the appropriate box.

- ❑ Chapter 7
- ❑ Chapter 11
- ❑ Chapter 12
- ❑ Chapter 13

8. How you will pay the fee

If you file under Chapter …	Your total fee is…
7	$306
11	$1,213
12	$246
13	$281

- ❑ **I will pay the entire fee when I file my petition**. Please check with the clerk's office in your local court for more details about how you may pay. Typically, if you are paying the fee yourself, you may pay with cash, cashier's check, or money order. If your attorney is submitting your payment on your behalf, your attorney may pay with a credit card or check with a pre-printed address.
- ❑ **I need to pay the fee in installments**. If you choose this option, sign and attach the *Application for Individuals to Pay Your Filing Fee in Installments* (Official Form 103A).
- ❑ **I request that my fee be waived** (You may request this option only if you are filing for Chapter 7. By law, a judge may waive your fee only if your income is less than 150% of the official poverty line that applies to your family size and you are unable to pay the fee in installments). If you choose this option, you must fill out the *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 103B) and file it with your bankruptcy filing package.

9. Have you filed for bankruptcy within the last 8 years?

- ❑ No
- ❑ Yes. District _____ When _____ Case number _____
  MM / DD / YYYY

  District _____ When _____ Case number _____
  MM / DD / YYYY

  District _____ When _____ Case number _____
  MM / DD / YYYY

10. Are any bankruptcy cases pending or being filed by a spouse who is not filing this case with you, a business partner, or an affiliate?

- ❑ No
- ❑ Yes. Debtor _____ Relationship to you _____

  District _____ When _____ Case number, if known_____
  MM / DD / YYYY

  Debtor _____ Relationship to you _____

  District _____ When _____ Case number, if known_____
  MM / DD / YYYY

11. Do you rent your residence?

- ❑ No. Go to Part 3.
- ❑ Yes. Has your landlord obtained an eviction judgment against you?
  - ❑ No. Go to Part 3.
  - ❑ Yes. Fill out *Part A - Your Statement About an Eviction Judgment Against You* (Official Form 101A) and file it with this bankruptcy petition.

Part 3: Report About Any Businesses You Own as a Sole Proprietor

12. Are you a sole proprietor of any full- or part-time business?

A sole proprietorship is a business you own as an individual, rather than a separate legal entity such as a corporation, partnership, or LLC.

If you have more than one sole proprietorship, use a separate sheet and attach it to this package.

- ❑ No. Go to Part 4.
- ❑ Yes. Name and location of business

_____
Name of business, if any

_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Check the appropriate box to describe your business:

- ❑ Health Care Business (as defined in 11 U.S.C. § 101(27A))
- ❑ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- ❑ Stockbroker (as defined in 11 U.S.C. § 101(53A))
- ❑ Commodity Broker (as defined in 11 U.S.C. § 101(6))
- ❑ None of the above

13. Are you filing under Chapter 11 of the Bankruptcy Code and are you a *small business debtor*?

For a definition of *small business debtor*, see 11 U.S.C. § 101(51D).

If you are filing under Chapter 11, the court must know whether you are a small business debtor so that it can set appropriate deadlines.

- ❑ No. I am not filing under Chapter 11.
- ❑ No. I am filing under Chapter 11, but I am NOT a small business debtor according to the definition in the Bankruptcy Code.
- ❑ Yes. I am filing under Chapter 11 and I am a small business debtor according to the definition in the Bankruptcy Code.

Part 4: Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention

14. Do you own or have any property that poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety? Or do you own any property that needs immediate attention?

For example, do you own perishable goods or livestock that must be fed?

- ❑ No
- ❑ Yes. What is the hazard? _____

_____

If immediate attention is needed, why is it needed? _____

_____

Where is the property? _____
Number Street

_____

_____ _____ _____
City State ZIP Code

Part 5: Explain Your Efforts to Receive Credit Counseling

15. Tell the court whether you have received credit counseling.

The law requires that you receive credit counseling before you file for bankruptcy. You must truthfully check one of the following choices. If you cannot do so, you are not eligible to file.

If you file anyway, the court can dismiss your case, you will lose whatever filing fee you paid, and your creditors can begin collection activities again.

About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
You must check one:	*You must check one:*
❑ **I received counseling from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.** Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.	❑ **I received counseling from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.** Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.
❑ **I received counseling from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.** Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.	❑ **I received counseling from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.** Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.
❑ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and the following circumstances merit a 30-day temporary waiver of the requirement.** To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the credit counseling and why you were unable to obtain it before filed for bankruptcy. Your case may be dismissed if the court is dissatisfied with your reasons for not receiving credit counseling before you file this bankruptcy filing package. If the court is satisfied with your reasons, you must still receive credit counseling within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed. Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.	❑ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and the following circumstances merit a 30-day temporary waiver of the requirement.** To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the credit counseling and why you were unable to obtain it before filed for bankruptcy. Your case may be dismissed if the court is dissatisfied with your reasons for not receiving credit counseling before you file this bankruptcy filing package. If the court is satisfied with your reasons, you must still receive credit counseling within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed. Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.
❑ **I am not required to receive credit counseling because of:** ❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances. ❑ **Disability.** My physical disability causes me to be unable to participate in credit counseling in person, by phone, or through the internet, even after I reasonably tried to do so. ❑ **Active duty.** I am currently on active military duty in a military combat zone. If you believe you are not required to receive credit counseling, you must file a motion for waiver of credit counseling with the court.	❑ **I am not required to receive credit counseling because of:** ❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances. ❑ **Disability.** My physical disability causes me to be unable to participate in credit counseling in person, by phone, or through the internet, even after I reasonably tried to do so. ❑ **Active duty.** I am currently on active military duty in a military combat zone. If you believe you are not required to receive credit counseling, you must file a motion for waiver of credit counseling with the court.

Part 6: Answer These Questions for Reporting Purposes

16. What kind of debt do you have?

16a. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

- ❑ No. Go to line 16b.
- ❑ Yes. Go to line 17.

16b. **Are your debts primarily business debts?** *Business debts* are debts that you incurred to obtain money for a business or investment or through the operation of the business or investment.

- ❑ No. Go to line 16c.
- ❑ Yes. Go to line 17.

16c. State what debts you owe that are not consumer debts or business debts. _____

17. Are you filing under Chapter 7?

Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available for distribution to unsecured creditors?

- ❑ No. I am not filing under Chapter 7. Go to line 18.
- ❑ Yes. I am filing under Chapter 7. Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available to distribute to unsecured creditors?
  - ❑ No
  - ❑ Yes

18. How many creditors do you estimate that you owe?

- ❑ 1-49
- ❑ 50-99
- ❑ 100-199
- ❑ 200-999
- ❑ 1,000-5,000
- ❑ 5,001-10,000
- ❑ 10,001-25,000
- ❑ 25,001-50,000
- ❑ 50,001-100,000
- ❑ More than 100,000

19. How much do you estimate your assets to be worth?

- ❑ $0-$50,000
- ❑ $50,001-$100,000
- ❑ $100,001-$500,000
- ❑ $500,001-$1 million
- ❑ $1,000,001-$10 million
- ❑ $10,000,001-$50 million
- ❑ $50,000,001-$100 million
- ❑ $100,000,001-$500 million
- ❑ $500,000,001-$1 billion
- ❑ $1,000,000,001-$10 billion
- ❑ $10,000,000,001-$50 billion
- ❑ More than $50 billion

20. How much do you estimate your liabilities to be?

- ❑ $0-$50,000
- ❑ $50,001-$100,000
- ❑ $100,001-$500,000
- ❑ $500,001-$1 million
- ❑ $1,000,001-$10 million
- ❑ $10,000,001-$50 million
- ❑ $50,000,001-$100 million
- ❑ $100,000,001-$500 million
- ❑ $500,000,001-$1 billion
- ❑ $1,000,000,001-$10 billion
- ❑ $10,000,000,001-$50 billion
- ❑ More than $50 billion

Part 7: Sign Here

I declare under penalty of perjury that the information provided in this petition is true and correct to the best of my knowledge, information, and belief. I understand that if I make a false statement, I could be fined up to $250,000 or imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

If I have chosen to file under Chapter 7, I am aware that I may proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under Chapter 7.

If no attorney represents me and I did not pay or agree to pay someone who is not an attorney to help me fill out this document, I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

For your attorney, if you are represented by one

If you are not represented by an attorney, you do not need to file this page.

I, the attorney for the debtor(s) named in this petition, declare that I have informed the debtor(s) about eligibility to proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each chapter for which the person is eligible. I also certify that I have delivered to the debtor(s) the notice required by 11 U.S.C. § 342(b) and, in a case in which § 707(b)(4)(D) applies, certify that I have no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect.

✘ _____ Date _____

Signature of Attorney for Debtor MM / DD / YYYY

_____

Printed name

_____

Firm name

_____

Number Street

_____

_____ _____ _____

City State ZIP Code

Contact phone _____ Email address _____

_____ _____

Bar number State

For you if you are filing this bankruptcy filing package without an attorney

If you are represented by an attorney, you do not need to file this page.

As an individual, the law allows you to represent yourself in bankruptcy court, but **you should understand that many people find it extremely difficult to represent themselves successfully. Because bankruptcy has long-term financial and legal consequences, you are strongly urged to hire a qualified attorney.**

To be successful, you must correctly file and handle your bankruptcy case. The rules are very technical, and a misstep or inaction may affect your rights. For example, your case may be dismissed because you did not file a required document, pay a fee on time, attend a meeting or hearing, or cooperate with the court, case trustee, U.S. trustee, bankruptcy administrator, or audit firm if your case is selected for audit. If that happens, you could lose your right to file another case, or you may lose protections, including the benefit of the automatic stay.

You must list all your property and debts in the schedules that you are required to file with the court. Even if you plan to pay a particular debt outside of your bankruptcy, you must list that debt in your schedules. If you do not list a debt, the debt may not be discharged. If you do not list property or properly claim it as exempt, you may not be able to keep the property. The judge can also deny you a discharge of all your debts if you do something dishonest in your bankruptcy case, such as destroying or hiding property, falsifying records, or lying. Individual bankruptcy cases are randomly audited to determine if debtors have been accurate, truthful, and complete. **Bankruptcy fraud is a serious crime; you could be fined and imprisoned.**

If you decide to file without an attorney, the court expects you to follow the rules as if you had hired an attorney. The court will not treat you differently because you are filing for yourself. To be successful, you must be familiar with the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the local rules of the court in which your case is filed. You must also be familiar with any state exemption laws that apply.

Are you aware that filing for bankruptcy is a serious action with long-term financial and legal consequences?

- ❑ No
- ❑ Yes

Are you aware that bankruptcy fraud is a serious crime and that if your bankruptcy filing package is inaccurate or incomplete, you could be fined or imprisoned?

- ❑ No
- ❑ Yes

Did you pay or agree to pay someone who is not an attorney to help you fill out this bankruptcy filing package?

- ❑ No
- ❑ Yes. Name of Person_____.
  Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

By signing here, I acknowledge that I understand the risks involved in filing without an attorney. I have read and understood this notice, and I am aware that filing a bankruptcy case without an attorney may cause me to lose my rights or property if I do not properly handle the case.

✘ _____	✘ _____
Signature of Debtor 1	Signature of Debtor 2
Date _____ MM / DD / YYYY	Date _____ MM / DD / YYYY
Contact phone _____	Contact phone _____
Cell phone _____	Cell phone _____
Email address _____	Email address _____

COMMITTEE NOTE

Official Form 101, *Voluntary Petition for Individuals Filing for Bankruptcy*, applies only in cases of individual debtors. Form 101 replaces Official Form 1, Voluntary Petition. It is renumbered to distinguish it from the forms used by non-individual debtors such as corporations, and includes stylistic changes throughout the form. It is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. Because the goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats, many of the open-ended questions and multiple-part instructions have been replaced with more specific questions.

Official Form 101 has been substantially reorganized. References to Exhibits A, B, C, and D, and the exhibits themselves, have been eliminated because the requested information is now asked in the form or is not applicable to individual debtors.

Part 1, *Identify Yourself,* line 6, replaces the venue box from page 2 of Official Form 1 and deletes venue questions that pertain only to non-individuals.

Part 2, *Tell the Court About Your Bankruptcy Case,* line 7, removes choices for chapters 9 and 15 filings because they do not pertain to individuals. Additionally, Part 2 adds a table at line 8 which lists the applicable filing fees for chapters 7, 11, 12, and 13. The status of "being filed" is added to the question regarding bankruptcy cases pending or filed by a spouse, business partner, or affiliate (line 10). Lastly, the question "Do you rent your residence?" (line 11) and Official Form B101AB, *Your Statement About an Eviction Judgment Against You – Part A & B*, replaces "certification by a debtor who resides as a tenant of residential property," on page 2 of Official Form 1.

Part 3, *Report About Any Businesses You Own as a Sole Proprietor,* line 12, incorporates options from the "nature of business" box from page 1 of Official Form 1 that would apply to individual debtors, thus eliminating checkboxes for railroads and clearing banks. Part 3, line 13, also eliminates a checkbox to report whether a plan was filed with the petition, or if plan acceptances were solicited prepetition. Additionally, line 13 rephrases the question relating to whether a debtor filing under Chapter 11 is a small business debtor.

Part 4, *Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention,* line 14, replaces Exhibit C from Official Form 1 and adds the category of "property that needs immediate attention."

Part 5, *Explain Your Efforts to Receive Credit Counseling* (line 15), replaces Exhibit D from Official Form 1. Additionally, this part describes incapacity and disability using a simplified definition, tells the debtor of the ability to file a motion for a waiver, and eliminates statutory reference about districts where credit counseling does not apply because such districts are rare.

Part 6, *Answer These Questions for Reporting Purposes* (line 16c), provides a text field for the debtor to describe the type of debt, if the debtor believes it is neither primarily consumer nor business debt.

Part 7, *Sign Here*, combines the two attorney signature blocks into one certification and eliminates signature lines for corporations/partnerships and chapter 15 Foreign Representative. The declaration and signature section for a non-attorney bankruptcy petition preparer (BPP) has also been removed as unnecessary. The same declaration, required under 11 U.S.C. § 110, is contained in Official Form 119. That form must be completed and signed by the BPP, and filed with each document prepared by a BPP.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Draft August 23, 2012

Official Form 101A

Part A: Your Statement About an Eviction Judgment Against You 12/14

Fill out this form only if:

- **you rent your residence; and**
- **your landlord has obtained a judgment for possession in an eviction, unlawful detainer action, or similar proceeding (called an *eviction judgment*) against you to possess your residence; and**
- **you want to stay in your rented residence after you file your case for bankruptcy.**

***Your Statement About an Eviction Judgment Against You* has two parts that you must file at different times:**

- **File Part A with the court when you first file your bankruptcy filing package. Serve a copy on your landlord.**
- **File Part B within 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101). Also, serve a copy on your landlord.**

You must serve your landlord with a copy of this form. Check the Bankruptcy Rules (www.uscourts.gov/rules) and the court's local website (go to www.uscourts/gov.courtlinks to find your court's website) for any specific requirements that you might have to meet to serve this statement.

File this part when you file your bankruptcy filing package

Fill this out if your landlord has an eviction judgment against you AND you wish to stay in your residence for 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101) with the court.

11 U.S.C. §§ 362(b)(22) and 362(l)

If your landlord DOES NOT have an eviction judgment, you do not need to fill out this form.

Has your landlord obtained an eviction judgment against you to possess your residence?

No. You do not need to fill out this form.

Yes. Landlord's name _____

Landlord's address _____
Number Street

_____ _____ _____
City State ZIP Code

If you answered *Yes*, check all that apply:

I certify under penalty of perjury that:

Under the state or other nonbankruptcy law that applies to the judgment for possession (*eviction judgment*), I have the right to stay in my residence by paying my landlord the entire amount I owe.

I have given the bankruptcy court clerk a deposit for the rent that would be due during the 30 days after I file the *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).

_____ _____
Signature of Debtor 1 Signature of Debtor 2

Date _____ Date _____
MM / DD / YYYY MM / DD / YYYY

If you checked both boxes above, signed the form to certify that both apply, and served your landlord a copy of this statement, the automatic stay under 11 U.S.C. § 362(a)(3) will apply to the continuation of the eviction against you for 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).

If you wish to stay in your residence after that 30-day period and continue to receive the protection of the automatic stay under 11 U.S.C. § 362(a)(3), you must pay the entire amount you owe to your landlord as stated in the eviction judgment before the 30-day period ends. You must also fill out Part B of this form, file it with the bankruptcy court, and serve your landlord a copy of it before the 30-day period ends.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Draft August 16, 2012

Official Form 101B

Part B: Your Statement About an Eviction Judgment Against You 12/14

Fill out Part B of this form only if:

- **you filed Part A of this form; and**
- **you served a copy of Part A on your landlord; and**
- **you want to stay in your rented residence for more than 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).**

File Part B within 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101). Also, serve a copy on your landlord.

File Part B within 30 days after you file your bankruptcy filing package

If your landlord has an eviction judgment against you, do you wish to stay in your residence for MORE than 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101) with the court?

11 U.S.C. §§ 362(b)(22) and 362(l).

If your landlord DOES NOT have an eviction judgment, you do not need to fill out this form.

No. You do not need to fill out this form.

Yes. **I certify under penalty of perjury that** (*Check all that apply*):

- ❑ Under the state or other nonbankruptcy law that applies to the judgment for possession (*eviction judgment*), I have the right to stay in my residence by paying my landlord the entire amount I owe.
- ❑ Within 30 days after I filed my *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101), I have paid my landlord the entire amount I owe as stated in the judgment for possession (*eviction judgment*).

_____
Signature of Debtor 1

Date _____
MM / DD / YYYY

_____
Signature of Debtor 2

Date _____
MM / DD / YYYY

You must serve your landlord with a copy of this form.

Check the Bankruptcy Rules (www.uscourts.gov/rules) and the court's local website (go to www.uscourts/gov.courtlinks to find your court's website) for any specific requirements that you might have to meet to serve this statement.

COMMITTEE NOTE

Official Form 101AB, *Your Statement About an Eviction Judgment Against You*, is substantially revised as part of the Forms Modernization Project. It replaces the "*Certification by a Debtor Who Resides as a Tenant of Residential Property*" section on Official Form 1, *Voluntary Petition*. The form applies only in cases of individual debtors.

The form is divided into Parts A and B.

Part A explains that debtors need to complete and file the form only if their landlord has a judgment for possession or an eviction judgment against them and they wish to stay in their residence for 30 days after filing their bankruptcy petition. The form adds references to the provisions in the Bankruptcy Code that specify when debtor-tenants subject to eviction may remain in their residence after filing for bankruptcy.

The form eliminates the checkboxes that the debtor has served the landlord with the certification and paid the court the rent that would be due during the 30 days after the filing of the bankruptcy petition. Instead, debtors are required to certify under penalty of perjury that the rent has been paid to the court and the instructions direct debtors to serve a copy of the statement on the landlord.

The form eliminates the checkbox that the debtor claims there are circumstances under applicable nonbankruptcy law under which the debtor would be permitted to cure the monetary default that gave rise to the judgment for possession (or eviction judgment) and remain in residence. Instead, debtors are required to certify under penalty of perjury that they have the right to stay in their residence under state law or other nonbankruptcy law by paying their landlord the entire amount they owe.

Part B is new. If debtors wish to stay in their residence for more than 30 days after filing the petition, they must complete and file Part B of Form 101AB within the 30 days. Under Part B, debtors certify under penalty of perjury that they have paid their landlord the entire amount owed as stated in the judgment for possession or in the eviction judgment.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 104

For Individual Chapter 11 Cases: The List of Creditors Who Have the 20 Largest Unsecured Claims Against You Who Are Not Insiders

12/14

If you are an individual filing for bankruptcy under Chapter 11, you must fill out this form. If you are filing under Chapter 7, Chapter 12, or Chapter 13, do not fill out this form. Do not include claims by anyone who is an *insider*. Insiders include relatives; general partners of you or your relatives; corporations of which you are an officer, director, or person in control; and any managing agent. 11 U.S.C. § 101. Also, do not include claims by secured creditors, unless the unsecured claim resulting from inadequate collateral value places the creditor among the holders of the 20 largest unsecured claims.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information.

List the 20 Unsecured Claims in Order from Largest to Smallest. Do not include claims by insiders.

		Unsecured claim
1	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
	Creditor's Name Number Street City State ZIP Code Contact Contact phone	
2	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
	Creditor's Name Number Street City State ZIP Code Contact Contact phone	

			Unsecured claim
3	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
4	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
5	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
6	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
7	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____

			Unsecured claim
8	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
9	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
10	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
11	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
12	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____

			Unsecured claim
13	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
14	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
15	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
16	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
17	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____

			Unsecured claim
18	_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code _____ Contact _____ Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
19	_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code _____ Contact _____ Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
20	_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code _____ Contact _____ Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____

COMMITTEE NOTE

Official Form 104, *For Individual Chapter 11 Cases: The List of Creditors Who Have the 20 Largest Unsecured Claims Against You Who Are Not Insiders*, is revised as part of the Forms Modernization Project. It replaces Official Form 4, *List of Creditors Holding 20 Largest Unsecured Claims* in chapter 11 cases filed by individuals or joint debtors and is renumbered to distinguish it from the version to be used in chapter 11 cases filed by non-individuals, such as corporations and partnerships, and in chapter 9 cases.

Form 104 is reformatted to make it easier to complete and understand and to be more visually appealing. Blanks and checkboxes are provided for specific information about each claim rather than columns for types of information. A separate, numbered section is provided for each of the 20 claims, rather than providing a single section that is to be copied and completed for additional claims.

The instruction not to include fully secured claims is restated in less technical terms. Debtors are instructed to include a secured creditor only if the creditor has an unsecured claim resulting from inadequate collateral value. Blanks are provided to calculate the value of the unsecured portion of a partially secured claim.

Examples of "insiders" are provided in addition to the statutory reference. The form adds an explicit instruction not to file the form in a chapter 7, chapter 12, or chapter 13 case. An instruction to be as complete and accurate as possible is added, along with a warning that, if two married people are filing jointly, both are equally responsible for supplying correct information.

The form eliminates the declaration under penalty of perjury. Also, with respect to children who may be creditors, the direction to state only the initials of a minor child and the name and address of the child's parent or guardian, rather than the child's full name, is moved to the general instruction booklet for the forms, because it applies to all of the forms.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106-Summary

A Summary of Your Assets and Liabilities and Certain Statistical Information 12/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. Fill out all of your schedules first; then complete the information on this form. If you are filing amended schedules after you file your original forms, you must fill out a new *Summary* and check the box at the top of this page.

Part 1: Summarize Your Assets

	Your assets Value of what you own
1. ***Schedule A: Property*** (Official Form 106A).	
1a. Copy line 55, Total real estate, from *Schedule A*	$ _____
1b. Copy line 62, Total personal property, from *Schedule A*	$ _____
1c. Copy line 63, Total of all property on *Schedule A*	$ _____

Part 2: Summarize Your Liabilities

	Your liabilities Amount you owe
2. *Schedule B: Creditors Who Have Claims Secured by Your Property* (Official Form 106B)	
2a. Copy the total you listed in the *Amount of claim* column at the bottom of the last page of Part 1 of *Schedule B*	$ _____
3. *Schedule C: Creditors Who Have Unsecured Claims* (Official Form 106C)	
3a. Copy the total claims from Part 2 (priority unsecured claims) from line 6e of *Schedule C*	$ _____
3b. Copy the total claims from Part 3 (nonpriority unsecured claims) from line 6j of *Schedule C*	+ $ _____
Your total liabilities	$ _____

Part 3: Summarize Your Income and Expenses

4. *Schedule G: Your Income* (Official Form 106G) Copy your combined monthly income from line 12 of *Schedule G*	$ _____
5. *Schedule H: Your Expenses* (Official Form 106H) Copy your monthly expenses from line 22, Column A, of *Schedule H*	$ _____

Part 4: Answer These Questions for Administrative and Statistical Records

6. **Are you filing for bankruptcy under Chapters 7, 11, or 13?**

- ❑ No. You have nothing to report on this part of the form. Check this box and submit this form to the court with your other schedules.
- ❑ Yes

7. **What kind of debt do you have?**

- ❑ **Your debts are primarily consumer debts.** *Consumer debts* are those "incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8). Fill out lines 8-10 for statistical purposes. 28 U.S.C. § 159.
- ❑ **Your debts are not primarily consumer debts**. You have nothing to report on this part of the form. Check this box and submit this form to the court with your other schedules.

8. **From the *Statement of Your Current Monthly Income*** (Official Forms 108-1, 109, or 110-1):
Copy your total current monthly income from line 14 of 108-1, line 11 of 109, or line 11 of 110-1. $ _____

9. **Copy the following special categories of claims from Part 4, line 6 of *Schedule C: Creditors Who Have Unsecured Claims*** (Official Form 106C):

	Total claim
From Part 4 on *Schedule C*, copy the following:	
9a. Domestic support obligations (Copy line 6a.)	$_____
9b. Taxes and certain other debts you owe the government. (Copy line 6b.)	$_____
9c. Claims for death or personal injury while you were intoxicated. (Copy line 6c.)	$_____
From Part 4 on *Schedule C*, copy the following:	
9d. Student loans. (Copy line 6f.)	$_____
9e. Obligations arising out of a separation agreement or divorce that you did not report as priority claims. (Copy line 6g.)	$_____
9f. Debts to pension or profit-sharing plans, and other similar debts. (Copy line 6h.)	+ $_____
9g. **Total.** Add lines 9a through 9f.	$_____

Fill in this information to identify your case and this filing:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number _____

❑ Check if this is an amended filing

Official Form 106A

Schedule A: Property

12/14

In each category, separately list and describe items worth more than $500. Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Describe Each Residence, Building, Land, or Other Real Estate You Own or Have an Interest in

1. **Do you own or have any legal or equitable interest in any residence, building, land, or similar property?**

❑ No
❑ Yes. Where is the property?

1a.

_____
Street address, if available, or other description

_____

_____
City State ZIP Code

_____
County

What is the property? Check all that apply.

Single-family home
Duplex or multi-unit building
Condominium or cooperative
Manufactured or mobile home
Land
Investment property
Time share
Other _____

Who is an owner of the property? Check one.

❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule B: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property	**Current value of the portion you own**
$_____	$_____

❑ **Check if this is community property** (see instructions)

Other information you wish to add about this item, such as local property identification number:

If you own or have more than one, list here:

1b.

_____
Street address, if available, or other description

_____

_____
City State ZIP Code

_____
County

What is the property? Check all that apply.

❑ Single-family home
❑ Duplex or multi-unit building
❑ Condominium or cooperative
❑ Manufactured or mobile home
❑ Land
❑ Investment property
❑ Time share
❑ Other _____

Who is an owner of the property? Check one.

❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule B: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property	**Current value of the portion you own**
$_____	$_____

❑ **Check if this is community property** (see instructions)

Other information you wish to add about this item, such as local property identification number:

1c.

Street address, if available, or other description

City State ZIP Code

County

What is the property? Check all that apply.

- ❑ Single-family home
- ❑ Duplex or multi-unit building
- ❑ Condominium or cooperative
- ❑ Manufactured or mobile home
- ❑ Land
- ❑ Investment property
- ❑ Time share
- ❑ Other _____

Who is an owner of the property? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule B: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property	**Current value of the portion you own**
$_____	$_____

❑ **Check if this is community property** (see instructions)

Other information you wish to add about this item, such as local property identification number:

2. **Add the dollar value of all of your entries from Part 1, including any entries for pages you have attached for Part 1. Write that number here.** ..... ➔ $_____

Part 2: Describe Your Vehicles

Do you own or have legal or equitable interest in any vehicles, whether they are registered or not? Include any vehicles you own that someone else drives. Do not report leased vehicles here. If you lease a vehicle, fill out *Schedule E: Executory Contracts and Unexpired Leases.*

3. **Cars, vans, trucks, tractors, sport utility vehicles, motorcycles**

- ❑ No
- ❑ Yes

3a.

Make: _____

Model: _____

Year: _____

Mileage: ❑ 0-24,999
❑ 25,000-49,999
❑ 50,000-74,999
❑ 75,000 or more

Other information:

Who is an owner of the property? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule B: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property	**Current value of the portion you own**
$_____	$_____

If you own or have more than one, describe here:

3b.

Make: _____

Model: _____

Year: _____

Mileage: ❑ 0-24,999
❑ 25,000-49,999
❑ 50,000-74,999
❑ 75,000 or more

Other information:

Who is an owner of the property? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule B: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property	**Current value of the portion you own**
$_____	$_____

3c. Make: _____

Model: _____

Year: _____

Mileage: ❑ 0-24,999
❑ 25,000-49,999
❑ 50,000-74,999
❑ 75,000 or more

Other information:

Who is an owner of the property? Check one.

❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule B: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property	**Current value of the portion you own**
$_____	$_____

3d. Make: _____

Model: _____

Year: _____

Mileage: ❑ 0-24,999
❑ 25,000-49,999
❑ 50,000-74,999
❑ 75,000 or more

Other information:

Who is an owner of the property? Check one.

❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule B: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property	**Current value of the portion you own**
$_____	$_____

4. **Watercraft, aircraft, motor homes, ATVs and other recreational vehicles, other vehicles, and accessories**

Examples: Boats, trailers, motors, personal watercraft, fishing vessels, snow mobiles, accessories

❑ No
❑ Yes

4a. Make: _____

Model: _____

Year: _____

Other information:

Who is an owner of the property? Check one.

❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule B: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property	**Current value of the portion you own**
$_____	$_____

If you own or have more than one, list here:

4b. Make: _____

Model: _____

Year: _____

Other information:

Who is an owner of the property? Check one.

❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule B: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property	**Current value of the portion you own**
$_____	$_____

5. **Add the dollar value of all of your entries from Part 2, including any entries for pages you have attached for Part 2. Write that number here** ..... ➔ $_____

Part 3: Describe Your Personal and Household Items

Do you own or have any legal or equitable interest in any of the following items?	**Current value of the portion you own** Do not deduct secured claims or exemptions.
6. **Household goods and furnishings** *Examples*: Major appliances, furniture, linens, china, kitchenware ❑ No ❑ Yes. Describe.....	$_____
7. **Electronics** *Examples:* Televisions and radios; audio, video, stereo, and digital equipment; computers, printers, scanners; music collections; electronic devices including cell phones, cameras, media players, games ❑ No ❑ Yes. Describe.....	$_____
8. **Collectibles of value** *Examples:* Antiques and figurines; paintings, prints, or other artwork; books, pictures, or other art objects; stamp, coin, or baseball card collections; china and crystal; other collections, memorabilia, collectibles ❑ No ❑ Yes. Describe.....	$_____
9. **Equipment for sports and hobbies** *Examples:* Sports, photographic, exercise, and other hobby equipment; bicycles, pool tables, golf clubs, skis; canoes and kayaks; carpentry tools; musical instruments ❑ No ❑ Yes. Describe.....	$_____
10. **Firearms** *Examples:* Pistols, rifles, shot guns, ammunition, and related equipment ❑ No ❑ Yes. Describe.....	$_____
11. **Clothes** *Examples:* Everyday clothes, furs, leather coats, designer wear, shoes, accessories ❑ No ❑ Yes. Describe.....	$_____
12. **Jewelry** Examples: Everyday jewelry, costume jewelry, engagement rings, wedding rings, heirloom jewelry, watches, gems, gold, silver ❑ No ❑ Yes. Describe.....	$_____
13. **Non-farm animals** *Examples:* Dogs, cats, birds, horses ❑ No ❑ Yes. Describe.....	$_____
14. **Any other personal and household items you did not already list, including any health aids you did not list** ❑ No ❑ Yes. Give specific information.	$_____
15. **Add the dollar value of all of your entries from Part 3, including any entries for pages you have attached for Part 3. Write that number here** ..... ➔	$_____

Part 4: Describe Your Financial Assets

Do you own or have any legal or equitable interest in any of the following?

Current value of the portion you own
Do not deduct secured claims or exemptions.

16. **Cash**

Examples: Money you have in your wallet, in your home, in a safe deposit box, and on hand when you file your petition

- ❑ No
- ❑ Yes

Cash: $_____

17. **Deposits of money**

Examples: Checking, savings, money market, or other financial accounts; certificates of deposit; shares in credit unions, brokerage houses, and other similar institutions. If you have multiple accounts with the same institution, list each.

- ❑ No
- ❑ Yes

	Institution name:	
17a. Checking account:	_____	$_____
17b. Checking account:	_____	$_____
17c. Savings account:	_____	$_____
17d. Savings account:	_____	$_____
17e. Certificates of deposit:	_____	$_____
17f. Other financial account:	_____	$_____
17g. Other financial account:	_____	$_____
17h. Other financial account:	_____	$_____
17i. Other financial account:	_____	$_____

18. **Bonds, mutual funds, or publicly traded stocks**

Examples: Bond funds, investment accounts with brokerage firms, money market accounts

- ❑ No
- ❑ Yes

Institution name:	
_____	$_____
_____	$_____
_____	$_____

19. **Non-publicly traded stock and interests in incorporated and unincorporated businesses, including an interest in an LLC, partnership, and joint venture**

- ❑ No
- ❑ Yes. Give specific information about them.

Name of entity:	% of ownership:	
_____	_____%	$_____
_____	_____%	$_____
_____	_____%	$_____

20. **Government and corporate bonds and other negotiable and non-negotiable instruments**

Negotiable instruments include personal checks, cashiers' checks, promissory notes, and money orders. *Non-negotiable instruments* are those you cannot transfer to someone by signing or delivering them.

❑ No

❑ Yes. Give specific information about them. .....

Issuer name:

_____ $_____

_____ $_____

_____ $_____

21. **Retirement or pension accounts**

Examples: Interests in IRA, ERISA, Keogh, 401(k), 403(b), thrift savings accounts, or other pension or profit-sharing plans

❑ No

❑ Yes. List each account separately. .

Type of account:	Institution name:	
401(k) or similar plan:	_____	$_____
Pension plan:	_____	$_____
IRA:	_____	$_____
Retirement account:	_____	$_____
Keogh:	_____	$_____
Additional account:	_____	$_____
Additional account:	_____	$_____

22. **Security deposits and pre-payments**

Your share of all unused deposits you have made so that you may continue service or use from a company

Examples: Agreements with landlords, prepaid rent, public utilities (electric, gas, water), telecommunications companies, or others

❑ No

❑ Yes.....

	Institution name or individual:	
Electric:	_____	$_____
Gas:	_____	$_____
Heating oil:	_____	$_____
Security deposit on rental unit:	_____	$_____
Prepaid rent:	_____	$_____
Telephone:	_____	$_____
Water:	_____	$_____
Rented furniture:	_____	$_____
Other:	_____	$_____

23. **Annuities** (A contract for a periodic payment of money to you, either for life or for a number of years)

❑ No

❑ Yes.....

Issuer name and description:

_____ $_____

_____ $_____

_____ $_____

24. **Interests in an education IRA** as defined in 26 U.S.C. § 530(b)(1) or under a qualified state tuition plan as defined in 26 U.S.C. § 529(b)(1).

- ❑ No
- ❑ Yes .....

Institution name and description. Separately file the records of any interests.11 U.S.C. § 521(c):

_____ $_____

_____ $_____

_____ $_____

25. **Trusts, equitable or future interests in property (other than anything listed in Part 1), and rights or powers exercisable for your benefit**

- ❑ No
- ❑ Yes. Give specific information about them....

$_____

26. **Patents, copyrights, trademarks, trade secrets, and other intellectual property**

Examples: Internet domain names, websites, proceeds from royalties and licensing agreements

- ❑ No
- ❑ Yes. Give specific information about them....

$_____

27. **Licenses, franchises, and other general intangibles**

Examples: Building permits, exclusive licenses, cooperative association holdings, liquor licenses, professional licenses

- ❑ No
- ❑ Yes. Give specific information about them....

$_____

Money or property owed to you

Current value of the portion you own
Do not deduct secured claims or exemptions.

28. **Tax refunds owed to you**

- ❑ No
- ❑ Yes. Give specific information about them, including whether you already filed the returns and the tax years. .....

Federal: $_____

State: $_____

Local: $_____

29. **Family support**

Examples: Past due or lump sum alimony, spousal support, child support, maintenance, divorce settlement, property settlement

- ❑ No
- ❑ Yes. Give specific information.....

Alimony: $_____

Maintenance: $_____

Support: $_____

Divorce settlement: $_____

Property settlement: $_____

30. **Other amounts someone owes you**

Examples: Amounts earned and unpaid from wages, disability insurance payments, disability benefits, sick pay, vacation pay, workers' compensation, Social Security benefits

- ❑ No
- ❑ Yes. Give specific information.....

$_____

31. **Interests in insurance policies**

Examples: Health, disability, or life insurance; health savings account (HSA); credit, homeowner's, or renter's insurance

- ❑ No
- ❑ Yes. Name the insurance company of each policy and list its value.....

Company name:	Beneficiary:	Surrender or refund value:
_____	_____	$_____
_____	_____	$_____
_____	_____	$_____

32. **Any interest in property that is due you from someone who has died**

If you are the beneficiary of a living trust, expect proceeds from a life insurance policy, have inherited something from an existing estate

- ❑ No
- ❑ Yes. Give specific information..... $_____

33. **Claims against third parties, whether or not you have filed a lawsuit or made a demand for payment**

Examples: Accidents, employment disputes, insurance claims, or rights to sue

- ❑ No
- ❑ Yes. Describe each claim. ..... $_____

34. **Other contingent and unliquidated claims of every nature, including counterclaims of the debtor and rights to set off claims**

- ❑ No
- ❑ Yes. Describe each claim. ..... $_____

35. **Any financial assets you did not already list**

- ❑ No
- ❑ Yes. Give specific information. ..... **$**_____

36. **Add the dollar value of all of your entries from Part 4, including any entries for pages you have attached for Part 4. Write that number here** ..... ➔ **$**_____

Part 5: Describe Any Business-Related Property You Own or Have an Interest in. List any real estate in Part 1.

37. **Do you own or have any legal or equitable interest in any business-related property?**

- ❑ No. Go to Part 6.
- ❑ Yes. Go to line 38.

	Current value of the portion you own Do not deduct secured claims or exemptions.
38. **Accounts receivable or commissions you already earned**	
❑ No	
❑ Yes. Describe	$_____
39. **Office equipment, furnishings, and supplies** *Examples:* Business-related computers, software, modems, printers, copiers, fax machines, rugs, telephones, desks, chairs, electronic devices	
❑ No	
❑ Yes. Describe	$_____

40. **Machinery, fixtures, equipment, supplies you use in business, and tools of your trade**

- ❑ No
- ❑ Yes. Describe .....

$_____

41. **Inventory**

- ❑ No
- ❑ Yes. Describe .....

$_____

42. **Interests in partnerships or joint ventures**

- ❑ No
- ❑ Yes. Describe .....

Name of entity:	% of ownership:	
_____	_____%	$_____
_____	_____%	$_____
_____	_____%	$_____

43. **Customer lists, mailing lists, or other compilations**

- ❑ No
- ❑ Yes. **Do your lists include personally identifiable information** (as defined in 11 U.S.C. § 101(41A))**?**
  - ❑ No
  - ❑ Yes. Describe. .....

$_____

44. **Any business-related property you did not already list**

- ❑ No
- ❑ Yes. Give specific information .....

$_____
$_____
$_____
$_____
$_____
$_____

45. **Add the dollar value of all of your entries from Part 5, including any entries for pages you have attached for Part 5. Write that number here** ..... ➔

$_____

Part 6: Describe Any Farm- and Commercial Fishing-Related Property You Own or Have an Interest in

If you own or have an interest in farmland, fill out Part 1.

46. **Do you own or have any legal or equitable interest in any farm- or commercial fishing-related property?**

- ❑ No. Go to Part 7.
- ❑ Yes. Go to line 47.

Current value of the portion you own
Do not deduct secured claims or exemptions.

47. **Farm animals**

Examples: Livestock, poultry, farm-raised fish

- ❑ No
- ❑ Yes .....

$_____

48. **Crops—either growing or harvested**

- ❑ No
- ❑ Yes. Give specific information. .....

$_____

49. **Farm and fishing equipment and implements**

- ❑ No
- ❑ Yes.....

$_____

50. **Farm and fishing supplies, chemicals, and feed**

- ❑ No
- ❑ Yes.....

$_____

51. **Any farm- and commercial fishing-related property you did not already list**

- ❑ No
- ❑ Yes. Give specific information. .....

$_____

52. **Add the dollar value of all of your entries from Part 6, including any entries for pages you have attached for Part 6. Write that number here** ..... ➔ $_____

Part 7: Describe All Property You Own or Have an Interest in That You Did Not List Above

53. **Do you have other property of any kind you did not already list?**
Examples: Season tickets, country club membership

- ❑ No
- ❑ Yes. Give specific information. .....

$_____
$_____
$_____

54. **Add the dollar value of all of your entries from Part 7. Write that number here** ..... ➔ $_____

Part 8: List the Totals of Each Part of this Form

55. **Part 1: Total real estate, line 2**..... ➔ **$**_____

56. **Part 2: Total vehicles, line 5** $_____

57. **Part 3: Total personal and household items, line 15** $_____

58. **Part 4: Total financial assets, line 36** $_____

59. **Part 5: Total business-related property, line 45** $_____

60. **Part 6: Total farm- and fishing-related property, line 52** $_____

61. **Part 7: Total other property not listed, line 54** + $_____

62. **Total personal property.** Add lines 56 through 61..... $_____ Copy personal property total ➔ + $_____

63. **Total of all property on Schedule A.** Add line 55 + line 62..... $_____

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106B

Schedule B: Creditors Who Hold Claims Secured by Property 12/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, copy the Additional Page, fill it out, number the entries, and attach it to this form. On the top of any additional pages, write your name and case number (if known).

1. **Do any creditors hold claims secured by your property?**
   - ❑ No. Check this box and submit this form to the court with your other schedules. You have nothing else to report on this form.
   - ❑ Yes. Fill in all of the information below.

Part 1: List Your Creditors Who Hold Secured Claims

2. **List all of your creditors who hold secured claims in alphabetical order.** If a creditor has more than one secured claim, list the creditor separately for each claim.

		Amount of claim Do not deduct the value of collateral.	Value of collateral that supports this claim	Unsecured portion If any
1	**Describe the property that is collateral:**	$_____	$_____	$_____

Creditor's Name _____
Number Street _____
City State ZIP Code _____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Who owes the debt? Check one.
- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another
- ❑ **Check if this is a community claim**

Nature of lien. Check all that apply.
- ❑ An agreement you made (such as mortgage or secured car loan)
- ❑ Statutory lien (such as tax lien, mechanic's lien)
- ❑ Judgment lien from a lawsuit
- ❑ Other _____

Date debt was incurred _____ **Last 4 digits of account number** ___ ___ ___ ___

2	**Describe the property that is collateral:**	$_____	$_____	$_____

Creditor's Name _____
Number Street _____
City State ZIP Code _____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Who owes the debt? Check one.
- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another
- ❑ **Check if this is a community claim**

Nature of lien. Check all that apply.
- ❑ An agreement you made (such as mortgage or secured car loan)
- ❑ Statutory lien (such as tax lien, mechanic's lien)
- ❑ Judgment lien from a lawsuit
- ❑ Other _____

Date debt was incurred _____ **Last 4 digits of account number** ___ ___ ___ ___

Add the dollar value of your entries on this page. Write that number here:	$_____		$_____

Part 1: Additional Page	Amount of claim Do not deduct the value of collateral.	Value of collateral that supports this claim	Unsecured portion If any

☐ ________________________________
Creditor's Name
____
Number Street
____
____
City State ZIP Code

Describe the property that is collateral: $________ $________ $________

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Who owes the debt? Check one.
- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community claim**

Nature of lien. Check all that apply.
- ❑ An agreement you made (such as mortgage or secured car loan)
- ❑ Statutory lien (such as tax lien, mechanic's lien)
- ❑ Judgment lien from a lawsuit
- ❑ Other ________________________________

Date debt was incurred ____________

Last 4 digits of account number ___ ___ ___ ___

☐ ________________________________
Creditor's Name
____
Number Street
____
____
City State ZIP Code

Describe the property that is collateral: $________ $________ $________

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Who owes the debt? Check one.
- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community claim**

Nature of lien. Check all that apply.
- ❑ An agreement you made (such as mortgage or secured car loan)
- ❑ Statutory lien (such as tax lien, mechanic's lien)
- ❑ Judgment lien from a lawsuit
- ❑ Other ________________________________

Date debt was incurred ____________

Last 4 digits of account number ___ ___ ___ ___

☐ ________________________________
Creditor's Name
____
Number Street
____
____
City State ZIP Code

Describe the property that is collateral: $________ $________ $________

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Who owes the debt? Check one.
- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community claim**

Nature of lien. Check all that apply.
- ❑ An agreement you made (such as mortgage or secured car loan)
- ❑ Statutory lien (such as tax lien, mechanic's lien)
- ❑ Judgment lien from a lawsuit
- ❑ Other ________________________________

Date debt was incurred ____________

Last 4 digits of account number ___ ___ ___ ___

Add the dollar value of your entries on this page. Write that number here: $________ $________

If this is the last page of your form, add the dollar value from all pages. Write that number here: $________ $________

Part 2: List Others to Be Notified for a Debt That You Already Listed

Use this page only if you have others to be notified for a debt that you already listed in Part 1. For example, if a collection agency is trying to collect from you for a debt you owe to someone else, list the creditor in Part 1, then list the collection agency here.

If you do not have more than one creditor for the same debt, do not fill out or submit this page.

____
Name

____
Number Street

____

____
City State ZIP Code

On which line in Part 1 did you enter the creditor? _____

Last 4 digits of account number ___ ___ ___ ___

____
Name

____
Number Street

____

____
City State ZIP Code

On which line in Part 1 did you enter the creditor? _____

Last 4 digits of account number ___ ___ ___ ___

____
Name

____
Number Street

____

____
City State ZIP Code

On which line in Part 1 did you enter the creditor? _____

Last 4 digits of account number ___ ___ ___ ___

____
Name

____
Number Street

____

____
City State ZIP Code

On which line in Part 1 did you enter the creditor? _____

Last 4 digits of account number ___ ___ ___ ___

____
Name

____
Number Street

____

____
City State ZIP Code

On which line in Part 1 did you enter the creditor? _____

Last 4 digits of account number ___ ___ ___ ___

____
Name

____
Number Street

____

____
City State ZIP Code

On which line in Part 1 did you enter the creditor? _____

Last 4 digits of account number ___ ___ ___ ___

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Draft August 20, 2012

❑ Check if this is an amended filing

Official Form 106C

Schedule C: Creditors Who Have Unsecured Claims

12/14

Be as complete and accurate as possible. Use Part 1 for creditors with PRIORITY claims and Part 2 for creditors with NONPRIORITY claims. If you need more space, copy the Part you need, fill it out, and number the entries in the boxes on the left. Attach the Continuation Page to this page. If you have no information to report in a Part, do not file that Part. On the top of any additional pages, write your name and case number (if known).

Part 1: List All of Your Creditors with PRIORITY Unsecured Claims

1. Do any creditors have priority unsecured claims against you?

❑ No. Go to Part 2.
❑ Yes.

2. List in alphabetical order all of your creditors with priority unsecured claims and identify what kind of priority claim it is. If you have more than two creditors with priority unsecured claims, fill out the Continuation Page of Part 2. (For an explanation of each type of claim, see *How to Fill Out Schedule C* in the instructions for this form.)

	Total claim	Priority amount	Nonpriority amount
2a	$_____	$_____	$_____
2b	$_____	$_____	$_____

2a

_____
Priority Creditor's Name

_____
Number Street

_____

_____
City State ZIP Code

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

❑ Contingent
❑ Unliquidated
❑ Disputed
❑ None of the above apply

Who incurred the debt? Check one.

❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Type of PRIORITY unsecured claim:

❑ Domestic support obligations
❑ Taxes and certain other debts you owe the government
❑ Claims for death or personal injury while you were intoxicated
❑ Other. Specify _____

2b

_____
Priority Creditor's Name

_____
Number Street

_____

_____
City State ZIP Code

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

❑ Contingent
❑ Unliquidated
❑ Disputed
❑ None of the above apply

Who incurred the debt? Check one.

❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Type of PRIORITY unsecured claim:

❑ Domestic support obligations
❑ Taxes and certain other debts you owe the government
❑ Claims for death or personal injury while you were intoxicated
❑ Other. Specify _____

Part 1: Your Creditors with PRIORITY Unsecured Claims — Continuation Page

After listing any entries on this page, number them beginning with 2c, followed by 2d, and so forth.

	Total claim	Priority amount	Nonpriority amount
Entry 1	$__________	$__________	$__________
Entry 2	$__________	$__________	$__________
Entry 3	$__________	$__________	$__________
Entry 4	$__________	$__________	$__________

____
Priority Creditor's Name

____
Number Street

____

____
City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? ____________

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of PRIORITY unsecured claim:

- ❑ Domestic support obligations
- ❑ Taxes and certain other debts you owe the government
- ❑ Claims for death or personal injury while you were intoxicated
- ❑ Other. Specify ________________________________

____
Priority Creditor's Name

____
Number Street

____

____
City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? ____________

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of PRIORITY unsecured claim:

- ❑ Domestic support obligations
- ❑ Taxes and certain other debts you owe the government
- ❑ Claims for death or personal injury while you were intoxicated
- ❑ Other. Specify ________________________________

____
Priority Creditor's Name

____
Number Street

____

____
City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? ____________

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of PRIORITY unsecured claim:

- ❑ Domestic support obligations
- ❑ Taxes and certain other debts you owe the government
- ❑ Claims for death or personal injury while you were intoxicated
- ❑ Other. Specify ________________________________

____
Priority Creditor's Name

____
Number Street

____

____
City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? ____________

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of PRIORITY unsecured claim:

- ❑ Domestic support obligations
- ❑ Taxes and certain other debts you owe the government
- ❑ Claims for death or personal injury while you were intoxicated
- ❑ Other. Specify ________________________________

Part 2: List All of Your Creditors with NONPRIORITY Unsecured Claims

3. **Do any creditors have nonpriority unsecured claims against you?**

❑ No. Go to Part 3.
❑ Yes

4. **List in alphabetical order all of your creditors with nonpriority unsecured claims and identify what kind of nonpriority claim it is. After you list your creditors, number the boxes on the left for the creditors you entered in Part 2. Begin numbering with 4a, followed by 4b.** If you have more than 4 creditors with nonpriority unsecured claims, attach additional copies of Part 2.

Total claim

☐ ______________________________
Nonpriority Creditor's Name
____
Number Street
____
City State ZIP Code

Who incurred the debt? Check one.
❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another
❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___
When was the debt incurred? ________
As of the date you file, the claim is: Check all that apply.
❑ Contingent
❑ Unliquidated
❑ Disputed
❑ None of the above apply

Type of NONPRIORITY unsecured claim:
❑ Student loans
❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
❑ Debts to pension or profit-sharing plans, and other similar debts
❑ Other. Specify ______________________

$______________

☐ ______________________________
Nonpriority Creditor's Name
____
Number Street
____
City State ZIP Code

Who incurred the debt? Check one.
❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another
❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___
When was the debt incurred? ________
As of the date you file, the claim is: Check all that apply.
❑ Contingent
❑ Unliquidated
❑ Disputed
❑ None of the above apply

Type of NONPRIORITY unsecured claim:
❑ Student loans
❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
❑ Debts to pension or profit-sharing plans, and other similar debts
❑ Other. Specify ______________________

$______________

☐ ______________________________
Nonpriority Creditor's Name
____
Number Street
____
City State ZIP Code

Who incurred the debt? Check one.
❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another
❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___
When was the debt incurred? ________
As of the date you file, the claim is: Check all that apply.
❑ Contingent
❑ Unliquidated
❑ Disputed
❑ None of the above apply

Type of NONPRIORITY unsecured claim:
❑ Student loans
❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
❑ Debts to pension or profit-sharing plans, and other similar debts
❑ Other. Specify ______________________

$______________

☐ ______________________________
Nonpriority Creditor's Name
____
Number Street
____
City State ZIP Code

Who incurred the debt? Check one.
❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another
❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___
When was the debt incurred? ________
As of the date you file, the claim is: Check all that apply.
❑ Contingent
❑ Unliquidated
❑ Disputed
❑ None of the above apply

Type of NONPRIORITY unsecured claim:
❑ Student loans
❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
❑ Debts to pension or profit-sharing plans, and other similar debts
❑ Other. Specify ______________________

$______________

Part 3: List Others to Be Notified for a Debt That You Already Listed

5. Use this page only if you have other creditors for a debt that you already listed in Parts 1 or 2. For example, if a collection agency is trying to collect from you for a debt you owe to someone else, list the original creditor in Part 2, then list the collection agency here. If you do not have more than one creditor for the same debt, do not fill out or submit this page.

____
Name
____
Number Street
____
____
City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

____
Name
____
Number Street
____
____
City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

____
Name
____
Number Street
____
____
City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

____
Name
____
Number Street
____
____
City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

____
Name
____
Number Street
____
____
City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

____
Name
____
Number Street
____
____
City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

____
Name
____
Number Street
____
____
City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Part 4: Add the Amounts for Each Type of Unsecured Claim

6. Total the amounts of certain types of unsecured claims for statistical reporting purposes. For reporting purposes, add the amounts for each type of unsecured claim.

			Total claim
Total claims from Part 2	6a. **Domestic support obligations**	6a.	$_____
	6b. **Taxes and certain other debts you owe the government**	6b.	$_____
	6c. **Claims for death or personal injury while you were intoxicated**	6c.	$_____
	6d. **Other.** Add all other priority unsecured claims. Write that amount here.	6d.	+ $_____
	6e. **Total.** Add lines 6a through 6d.	6e.	$_____

			Total claim
Total claims from Part 3	6f. **Student loans**	6f.	$_____
	6g. **Obligations arising out of a separation agreement or divorce that you did not report as priority claims**	6g.	$_____
	6h. **Debts to pension or profit-sharing plans, and other similar debts**	6h.	$_____
	6i. **Other.** Add all other nonpriority unsecured claims. Write that amount here.	6i.	+ $_____
	6j. **Total.** Add lines 6f through 6i.	6j.	$_____

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

☐ Check if this is an amended filing

Official Form 106D

Schedule D: The Property You Claim as Exempt

1/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. Using the property you listed on *Schedule A: Property* (Official Form 106A) as your source, list the property that you claim as exempt. If more space is needed, fill out and attach to this page as many copies of *Part 2: Additional Page* as necessary. On the top of any additional pages, write your name and case number (if known). For each item of property you claim as exempt, you must specify the amount of the exemption you claim. Usually, a specific dollar amount is claimed as exempt, but in some circumstances the amount of the exemption claimed might be indicated as 100% of fair market value. For example, a debtor might claim 100% of fair market value for an exemption that is unlimited in dollar amount, such as some exemptions for health aids.

Part 1: Identify the Property You Claim as Exempt

1. **Which set of exemptions are you claiming?** *Check one only, even if your spouse is filing with you.*
   - ☐ You are claiming state and federal non-bankruptcy exemptions. 11 U.S.C. § 522(b)(3)
   - ☐ You are claiming federal exemptions. 11 U.S.C. § 522(b)(2)

2. **For any property you list on *Schedule A* that you claim as exempt, fill in the information below.**

Brief description of the property and line on *Schedule A* that lists this property	**Current value of the portion you own** Copy the value from *Schedule A*	**Amount of the exemption you claim**	**Specific laws that allow exemption**
Brief description: _____ Line from *Schedule A:* _____	$_____	_____	_____
Brief description: _____ Line from *Schedule A:* _____	$_____	_____	_____
Brief description: _____ Line from *Schedule A:* _____	$_____	_____	_____
Brief description: _____ Line from *Schedule A:* _____	$_____	_____	_____

3. **Are you claiming a homestead exemption of more than $146,450?** (Subject to adjustment on 4/01/13 and every 3 years after that for cases filed on or after the date of adjustment.)
   - ☐ No
   - ☐ Yes. Did you acquire the property covered by the exemption within 1,215 days before you filed this case?
     - ☐ No
     - ☐ Yes

Part 2: Additional Page

Brief description of the property and line on *Schedule A* that lists this property	Current value of the portion you own Copy the value from *Schedule A*	Amount of the exemption you claim	Specific laws that allow exemption
Brief description: ______ Line from *Schedule A:* ______	$________	________	________
Brief description: ______ Line from *Schedule A:* ______	$________	________	________
Brief description: ______ Line from *Schedule A:* ______	$________	________	________
Brief description: ______ Line from *Schedule A:* ______	$________	________	________
Brief description: ______ Line from *Schedule A:* ______	$________	________	________
Brief description: ______ Line from *Schedule A:* ______	$________	________	________
Brief description: ______ Line from *Schedule A:* ______	$________	________	________
Brief description: ______ Line from *Schedule A:* ______	$________	________	________
Brief description: ______ Line from *Schedule A:* ______	$________	________	________
Brief description: ______ Line from *Schedule A:* ______	$________	________	________
Brief description: ______ Line from *Schedule A:* ______	$________	________	________

Fill in this information to identify your case:

Debtor _____
First Name Middle Name Last Name

Debtor 2
(Spouse If filing) _____
First Name Middle Name Last Name

United States Bankruptcy Court for the:_____ District of _____
(State)

Case number
(If known) _____

❑ Check if this is an amended filing

Official Form 106E

Schedule E: Executory Contracts and Unexpired Leases

12/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, copy the additional page, fill it out, number the entries, and attach it to this page. On the top of any additional pages, write your name and case number (if known).

1. **Do you have any executory contracts or unexpired leases?**
   - ❑ No. Check this box and file this form with the court with your other schedules. You have nothing else to report on this form.
   - ❑ Yes. Fill in all of the information below.

2. **List separately each person or company with whom you have the contract or lease. Then state what each contract or lease is for (for example, rent, vehicle lease, cell phone).** See the instructions for more examples of executory contracts and unexpired leases.

	Person or company with whom you have the contract or lease	State what the contract or lease is for
1	Name Number Street City State ZIP Code	
2	Name Number Street City State ZIP Code	
3	Name Number Street City State ZIP Code	
4	Name Number Street City State ZIP Code	
5	Name Number Street City State ZIP Code	

Additional Page if You Have More Contracts or Leases

Person or company with whom you have the contract or lease	What the contract or lease is for
☐ Name Number Street City State ZIP Code	
☐ Name Number Street City State ZIP Code	
☐ Name Number Street City State ZIP Code	
☐ Name Number Street City State ZIP Code	
☐ Name Number Street City State ZIP Code	
☐ Name Number Street City State ZIP Code	
☐ Name Number Street City State ZIP Code	
☐ Name Number Street City State ZIP Code	

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the:_____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106F

Schedule F: Your Codebtors

12/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, copy the Additional Page, fill it out, and number the entries in the boxes on the left. Attach the Additional Page to this page. On the top of any Additional Pages, write your name and case number (if known). Answer every question.

1. **Do you have any codebtors?** (If you are filing a joint case, do not list either spouse as a codebtor.)
   - ❑ No
   - ❑ Yes

2. **Within the last 8 years, have you lived in a community property state or territory?** (*Community property states and territories* include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, and Wisconsin.)
   - ❑ No. Go to line 3.
   - ❑ Yes. Did your spouse, former spouse, or legal equivalent live with you at the time?
     - ❑ No
     - ❑ Yes. In which community state or territory did you live? _____

     Fill in the name and current address of that person.

     _____
     Name of your spouse

     _____
     Number Street

     _____
     City State ZIP Code

3. **In Column 1, list as codebtors all of the people or entities who are also liable for any debts you may have. Include all guarantors and co-signers; do not include your spouse as a codebtor if your spouse is filing with you. List the person shown in line 2 above as a codebtor only if that person is a guarantor or co-signer. Make sure you have listed the creditor on Schedule B or Schedule C. Use Schedule B or Schedule C to fill out Column 2.**

	Column 1: **Your codebtor**	*Column 2:* **The creditor to whom you owe the debt**
1	_____ Name _____ Number Street _____ City State ZIP Code	Line from *Schedule B:* _____ OR Line from *Schedule C:* _____
2	_____ Name _____ Number Street _____ City State ZIP Code	Line from *Schedule B:* _____ OR Line from *Schedule C:* _____
3	_____ Name _____ Number Street _____ City State ZIP Code	Line from *Schedule B:* _____ OR Line from *Schedule C:* _____

Additional Page to List More Codebtors

Column 1: **Your codebtor**	*Column 2:* **The creditor to whom you owe the debt**
Name Number Street City State ZIP Code	Line from *Schedule B:* ______ OR Line from *Schedule C:* ______
Name Number Street City State ZIP Code	Line from *Schedule B:* ______ OR Line from *Schedule C:* ______
Name Number Street City State ZIP Code	Line from *Schedule B:* ______ OR Line from *Schedule C:* ______
Name Number Street City State ZIP Code	Line from *Schedule B:* ______ OR Line from *Schedule C:* ______
Name Number Street City State ZIP Code	Line from *Schedule B:* ______ OR Line from *Schedule C:* ______
Name Number Street City State ZIP Code	Line from *Schedule B:* ______ OR Line from *Schedule C:* ______
Name Number Street City State ZIP Code	Line from *Schedule B:* ______ OR Line from *Schedule C:* ______
Name Number Street City State ZIP Code	Line from *Schedule B:* ______ OR Line from *Schedule C:* ______

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106-Declaration

Declaration About an Individual Debtor's Schedules

12/14

If two married people are filing together, both are equally responsible for supplying correct information.

You must file this form whenever you file bankruptcy schedules or amended schedules. If you make a false statement, you could be fined up to $500,000 or imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

Sign Here

Did you pay or agree to pay someone who is NOT an attorney to help you fill out this bankruptcy filing package?

❑ No

❑ Yes. Name of person_____.
Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

Under penalty of perjury, I declare that I have read the forms filed with this declaration, and that they are true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

COMMITTEE NOTE

The schedules to be used in cases of individual debtors are revised as part of the Forms Modernization Project, making them easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats. Therefore, many of the open-ended questions and multiple-part instructions have been replaced with more specific questions. The individual debtor schedules are also renumbered starting with the number 106 and followed by the letter or name of the schedule to distinguish them from the versions to be used in non-individual cases.

Official Form 106A, *Schedule A: Your Property*, consolidates information about an individual debtor's real and personal property into a single form. It replaces Official Form 6A, *Real Property Schedule* and Official Form 6B, *Personal Property,* in cases of individual debtors. In addition to specific questions about the assets the form also includes open text fields to allow debtors who want to provide additional information regarding particular assets to do so.

The layout and categories of property on Official Form 106A have changed. Instead of dividing property interests into two categories (real or personal property), the new form uses seven categories likely to be more familiar to non-lawyers: real estate, vehicles, personal household items, financial assets, business-related property, farm- and commercial fishing-related property, and a catch-all category for property that was not listed elsewhere in the form. Although the new form categories and the examples provided in many of the categories are designed to prompt debtors to be thorough and list all of their interests in property, the prompts are not intended to require a detailed description of items of little value that are unlikely to be administered by the case trustee. For example, the debtor is directed to separately describe and list individual items of property only if they are worth more than $500, and is allowed to describe generally items of minimal value (such

as children's clothes) by adding the value of the items and reporting the total.

Because a particular item of property may fit into more than category, the instructions for the form explain that it should be listed only once.

In addition, because property may fit within a particular category, but not be elicited by the particular line items within the category, the debtor is asked in Parts 3 – 6 (lines 14, 35, 44, and 51) to specifically identify and value any other property in the specific category.

Part 1, *Describe Each Residence, Building, Land, or Other Real Estate You Own or Have an Interest in*, avoids legal terms such as "life estate" or "joint tenancy," because many individual debtors do not fully understand the nature of their ownership interest in real property. Instead, the debtor is asked to state the "current value of the portion you own," and to also state whether ownership is shared with someone else. Furthermore, instead of asking an open-ended description of the property, the form guides the debtor in answering the description question by providing eight options from which to choose: single-family home, duplex or multi-unit building, condominium or cooperative, manufactured or mobile home, land, investment property, time share, and other.

Part 2, *Describe Your Vehicles*, also guides the debtor in answering the question, asking for the make, model, year, and mileage of the car or other vehicle. Because mileage is just a general indication of vehicle value, the debtor is not required to list the exact mileage, but instead is prompted to provide the approximate mileage by selecting from four checkboxes.

Part 3, *Describe Your Personal and Household Items*, simplifies wording, updates categories, and uses more common terms. For example, "Wearing apparel" is changed to "clothes" and examples include furs, which were previously grouped with jewelry. Firearms, on the other hand, which were previously grouped with sports and other hobbies, are now set out as a separate category. Additionally, because a new Part 6 has been

added to separately describe-farm related property, Part 3 includes a category for "non-farm animals."

Part 4, *Describe Your Financial Assets*, prompts a listing of the debtor's financial assets though several questions providing separate space for the institution name after the type of applicable account, and for the value of the debtor's interest in the asset. Two new categories are added: "bonds, mutual funds, or publicly traded stocks" and "claims against third parties, whether or not you have filed a lawsuit or made a demand for payment."

Part 5, *Describe Any Business-Related Property You Own or Have an Interest in,* provides prompts for listing business-related property such as accounts receivable, inventory, and machinery, and includes a direction to list business-related real estate in Part 1, to avoid listing real estate twice.

Part 6, *Describe Any Farm- and Commercial Fishing-Related Property You Own or Have an Interest in*, provides prompts for listing farm- or commercial fishing-related property such as farm animals, crops, and feed. It also includes a direction to list any farm- or commercial fishing-related real estate in Part 1.

Part 7, *Describe All Property You Own or Have an Interest In That You Did Not List Above* is a catch-all provision that allows the debtor to report property that is difficult to categorize.

Part 8, *List the Totals of Each Part of This Form*, tabulates the total value of the debtor's interest in the listed property. The tabulation includes two subtotals, one for real estate, which corresponds to the real property total that is reported on previous Official Form 6A. The second subtotal is of Parts 2-7, which corresponds to the personal property total that is reported on previous Official Form 6B.

Official Form 106B, *Schedule B: Creditors Who Hold Claims Secured by Property*, replaces Official Form 6D, *Creditors Holding Secured Claims,* in cases of individual debtors.

Part 1, *List Your Creditors Who Hold Secured Claims*, now directs the debtor to list only the last four digits of the account

number. Part 1 also adds four checkboxes with which to describe the nature of the lien: an agreement the debtor made (such as mortgage or secured car loan); statutory lien (such as tax lien, mechanic's lien); judgment lien from a lawsuit; and other.

The form adds Part 2, *List Others to Be Notified for a Debt That You Already Listed*. The debtor is instructed to use Part 2 if there is a need to notify someone other than the creditor for a debt listed in Part 1. For example, if a collection agency is trying to collect for a creditor listed in Part 1, the collection agency would be listed in Part 2.

Official Form 106C, *Schedule C: Creditors Who Have Unsecured Claims*, consolidates information about priority and nonpriority unsecured claims into a single form. It replaces Official Form 6E – *Creditors Holding Unsecured Priority Claims*, and Official Form 6F – *Creditors Holding Unsecured Nonpriority Claims*, in cases of individual debtors.

Although both priority and non-priority unsecured claims are reported in Official Form 106C, the two types of claims are separately grouped so that the total for each type can be reported for case administration and statistical purposes. The form eliminates the question "consideration for claim" and instructs debtors to list creditors in alphabetical order.

Part 1, *List All of Your Creditors with PRIORITY Unsecured Claims*, includes four checkboxes identifying the type of priority that applies to the claim: domestic support obligations; taxes and certain other debts owed to the government; claims for death or personal injury while intoxicated; and "other." The first three categories are required to be separately reported for statistical purposes. If the debtor selects "other," the debtor must specify the basis of the priority, *e.g.* wages, or employee benefit plan contribution.

Part 2, *List All of Your Creditors with NONPRIORITY Unsecured Claims*, no longer asks whether the claim is subject to setoff. The form creates four checkboxes for types of claims that must be separately reported for statistical purposes: student loans; obligations arising out of a separation agreement or divorce not

listed as priority claims; debts to pension or profit-sharing plans and other similar debts; and "other." If the debtor selects "other," the debtor must specify the basis of the claim.

Part 3, *List Others to Be Notified for a Debt That You Already Listed*, is a new addition to the form. The debtor is instructed to use Part 3 only if there is a need to notify someone other than the creditor for a debt listed in Parts 1 and 2. For example, if a collection agency is trying to collect for a creditor listed in Part 1, the collection agency would be listed in Part 3.

Finally, Part 4, *Add the Amounts for Each Type of Unsecured Claim*, subtotals particular types of unsecured claims for statistical reporting purposes.

Official Form 106D, *Schedule D: The Property You Claim as Exempt*, replaces Official Form 6C – *Property Claimed as Exempt*, in cases of individual debtors.

Part 1, *Identify the Property You Claim as Exempt*, includes a table to list the property the debtor seeks to exempt, the value of the property owned by the debtor, the amount of the claimed exemption, and the law that allows the exemption. The first column asks for a brief description of the exempt property, and also asks for the line number where the property is listed on Schedule A. The second column asks for the value of the portion if the asset owned by the debtor, rather than the entire asset. The third column asks for the amount, rather than the value, of the exemption claim. The change in the wording of the third column is stylistic.

The form has also been changed in light of the Supreme Court's ruling in *Schwab v. Reilly,* 130 S.Ct. 2652 (2010). The dollar sign is removed from the entries in the "amount of the exemption you claim" column, and an instruction is added to the form explaining that for each item of property the debtor claims as exempt, the debtor must specify the amount of the exemption claimed. Usually, a specific dollar amount is claimed as exempt because that is what the applicable law allows, but in some circumstances the law may permit the entire item to be claimed as exempt. In such a circumstance, an exemption claim might be

indicated as 100% of fair market value. For example, a debtor might claim 100% of fair market value for an exemption that is unlimited in dollar amount, such as some exemptions for health aids.

Official Form 106E*, Schedule E: Executory Contracts and Unexpired Leases*, replaces Official Form 6G, *Executory Contracts and Unexpired Leases*, in cases of individual debtors.

The form is simplified. Instead of requiring the debtor to make multiple assertions about each potential executory contract or unexpired lease, the form simply requires the debtor to identify the name and address of the entity that the contract or lease is with, and to state what the contract or lease is for. Definitions and examples of executory contracts and unexpired leases are included in the separate instructions for the form.

An additional page is provided in case the debtor has so many executory contracts and unexpired leases that the available page is not adequate. If the debtor needs to use the additional page, the debtor is required to fill-in the entry number.

Official Form 106F, *Schedule F: Your Codebtors*, replaces Official Form 6H, *Codebtors*, in cases of individual debtors.

The form breaks out the questions about whether there are any codebters, and whether the debtor has lived with a spouse or legal equivalent in a community property state in the prior eight years. It also removes Alaska from the listed community property states. Finally, it asks the debtor to indicate where the debt is listed on Schedule B or Schedule C, thereby eliminating the need to list the name and address of the creditor.

Official Form 106G, *Schedule G: Your Income,* replaces Official Form 6I, *Your Income*, in cases of individual debtors.

The form is one of an initial set of forms that were published as part of the Forms Modernization Project in 2012. It is renumbered and internal cross references are updated to conform to the new numbering system now being introduced by the Forms Modernization Project.

Official Form 106H, *Schedule H: Your Expenses,* replaces Official Form 6J, *Your Expenses*, in cases of individual debtors.

The form is one of an initial set of forms that were published as part of the Forms Modernization Project in 2012. It is renumbered and internal cross references are updated to conform to the new numbering system now being introduced by the Forms Modernization Project.

Official Form 106 – Summary, *A Summary of Your Assets and Liabilities and Certain Statistical Information*, replaces, Official Form 6, *Summary of Schedules and Statistical Summary of Certain Liability and Related Data (28 U.S.C. § 159)*, in cases of individual debtors.

The form is reformatted and updated with cross references indicating from which forms and line numbers the summary information is gathered. In addition, because most filings are now done electronically, the form no longer requires the debtor to list the other schedules being filed with the Summary or to tabulate the total number of sheets used to compile the Schedules.

Official Form 106 – Declaration, *Declaration About an Individual Debtor's Schedules*, replaces Official Form 6, *Declaration Concerning Debtor's* Schedules, in cases of individual debtors.

The form, which is to be signed by the debtor and filed with the debtor's schedules, deletes the Declaration and Signature of Bankruptcy Petition Preparer (BBP). Instead, the debtor is directed to complete and file Official Form 119, *Bankruptcy Petition Preparer's Notice, Declaration, and Signature*, if a BBP helped fill out the bankruptcy forms. The form also deletes the Declaration Under Penalty of Perjury on Behalf of a Corporation or Partnership as unnecessary in a bankruptcy case filed by an individual debtor.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 107

Your Statement of Financial Affairs for Individuals Filing for Bankruptcy 12/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Give Details About Where You Lived Before

1. **During the last 3 years, have you lived anywhere other than where you live now?**

❑ No
❑ Yes. List all of the places you lived in the last 3 years. Do not include where you live now.

Debtor 1:	Dates Debtor 1 lived there	Debtor 2:	Dates Debtor 2 lived there
_____ Number Street _____ _____ City State ZIP Code	From _____ To _____	Same as Debtor 1 _____ Number Street _____ _____ City State ZIP Code	Same as Debtor 1 From _____ To _____
_____ Number Street _____ _____ City State ZIP Code	From _____ To _____	Same as Debtor 1 _____ Number Street _____ _____ City State ZIP Code	Same as Debtor 1 From _____ To _____

2. **Within the last 8 years, did you ever live with a spouse or legal equivalent in a community property state or territory?** (*Community property states and territories* include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, and Wisconsin.)

❑ No
❑ Yes. Make sure you fill out Schedule F: *Your Codebtors* (Official Form 106F).

Part 2: Explain the Sources of Your Income

3. **Did you have any income from being employed or operating a business during this year or the two previous calendar years?**
Fill in a total amount for the income you receive from all jobs and all businesses, including part-time activities. If you are filing a joint case and you have income that you receive together, list it only once under Debtor 1.

❑ No
❑ Yes. Fill in the details.

	Debtor 1		Debtor 2	
	Sources of income Check all that apply.	**Gross income** (before deductions and exclusions)	**Sources of income** Check all that apply.	**Gross income** (before deductions and exclusions)
From January 1 of current year until the date you filed for bankruptcy:	Wages, commissions, bonuses, tips Operating a business	$_____	Wages, commissions, bonuses, tips Operating a business	$_____
For last calendar year: (January 1 to December 31, _____) YYYY	Wages, commissions, bonuses, tips Operating a business	$_____	Wages, commissions, bonuses, tips Operating a business	$_____
For the calendar year before that: (January 1 to December 31, _____) YYYY	Wages, commissions, bonuses, tips Operating a business	$_____	Wages, commissions, bonuses, tips Operating a business	$_____

4. **Did you receive any other income during this year or the two previous calendar years?**
Include income regardless of whether that income is taxable. Examples of *other income* are alimony, child support, Social Security, unemployment, and other public benefit payments, pensions, rental income, interest, dividends, money collected from lawsuits, royalties, and gambling and lottery winnings. If you are filing a joint case and you have income that you receive together, list it only once under Debtor 1.

List each source and the gross income for each separately. Do not include income that you listed in line 3.

❑ No
❑ Yes. Fill in the details.

	Debtor 1		Debtor 2	
	Sources of income Describe below.	**Gross income from each source** (before deductions and exclusions)	**Sources of income** Describe below.	**Gross income from each source** (before deductions and exclusions)
From January 1 of current year until the date you filed for bankruptcy:	_____ _____ _____	$_____ $_____ $_____	_____ _____ _____	$_____ $_____ $_____
For last calendar year: (January 1 to December 31, _____) YYYY	_____ _____ _____	$_____ $_____ $_____	_____ _____ _____	$_____ $_____ $_____
For the calendar year before that: (January 1 to December 31, _____) YYYY	_____ _____ _____	$_____ $_____ $_____	_____ _____ _____	$_____ $_____ $_____

Part 3: List Certain Payments You Made Before You Filed for Bankruptcy

5. Are either Debtor 1's or Debtor 2's debts primarily consumer debts?

❑ No. **My debts are not primarily consumer debts.** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

During the 90 days before you filed for bankruptcy, did you pay any creditor a total of $5,850 or more?

❑ No. Go to line 6.

❑ Yes. List below each creditor to whom you paid a total of $5,850 or more in one or more payments and the total amount you paid that creditor. Do not include payments for domestic support obligations, such as child support and alimony. Also, do not include payments to an attorney for this bankruptcy case.

❑ Yes. **My debts are primarily consumer debts.**

During the 90 days before you filed for bankruptcy, did you pay any creditor a total of $600 or more?

❑ No. Go to line 6.

❑ Yes. List below each creditor to whom you paid a total of $600 or more and the total amount you paid that creditor. Do not include payments for domestic support obligations, such as child support and alimony. Also, do not include payments to an attorney for this bankruptcy case.

	Dates of payment	Total amount paid	Amount you still owe	Was this payment for…
______ Creditor's Name ______ Number Street ______ ______ City State ZIP Code	______ ______ ______	$______	$______	Mortgage Car Credit card Loan repayment Suppliers or vendors Other ______
______ Creditor's Name ______ Number Street ______ ______ City State ZIP Code	______ ______ ______	$______	$______	Mortgage Car Credit card Loan repayment Suppliers or vendors Other ______
______ Creditor's Name ______ Number Street ______ ______ City State ZIP Code	______ ______ ______	$______	$______	Mortgage Car Credit card Loan repayment Suppliers or vendors Other ______

6. **Within 1 year before you filed for bankruptcy, did you make a payment on a debt you owed anyone who was an insider?**
Insiders include relatives; general partners of you or your relatives; corporations of which you are an officer, director, or person in control; and any managing agent. 11 U.S.C. § 101. Include payments for domestic support obligations, such as child support and alimony.

- ❑ No
- ❑ Yes. List all payments to an insider.

	Dates of payment	Total amount paid	Amount you still owe	Reason for this payment
_____ Insider's Name _____ Number Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	$_____	
_____ Insider's Name _____ Number Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	$_____	

7. **Within 1 year before you filed for bankruptcy, did you make any payments or transfer any property on account of a debt that benefitted an insider?**
Include payments on debts guaranteed or co-signed by an insider.

- ❑ No
- ❑ Yes. List all payments that benefit an insider.

	Dates of payment	Total amount paid	Amount you still owe	Reason for this payment Include creditor's name
_____ Insider's Name _____ Number Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	$_____	
_____ Insider's Name _____ Number Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	$_____	

Part 4: Identify Legal Actions, Repossessions, Foreclosures, and Returns

8. **Within 1 year before you filed for bankruptcy, were you a party in any lawsuit, court action, or administrative proceeding?**
List all such matters, including personal injury cases, small claims actions, divorces, collection suits, paternity actions, support or custody modifications, and contract disputes.

- ❑ No
- ❑ Yes. Fill in the details.

	Nature of the case	Court or agency	Status of the case
Case title_____ _____ Case number _____		_____ Court Name _____ Number Street _____ City State ZIP Code	Pending On appeal Concluded
Case title_____ _____ Case number _____		_____ Court Name _____ Number Street _____ City State ZIP Code	Pending On appeal Concluded

9. **Within 1 year before you filed for bankruptcy, was any of your property repossessed, foreclosed, garnished, attached, seized, or levied?**
Check all that apply and fill in the details below.

- ❑ No. Go to line 10.
- ❑ Yes. Fill in the information below.

	Describe the property	Date	Value of the property
_____ Creditor's Name _____ Number Street _____ City State ZIP Code	**Explain what happened** ❑ Property was repossessed. ❑ Property was foreclosed. ❑ Property was garnished. ❑ Property was attached. ❑ Property was seized or levied.	_____	$_____
_____ Creditor's Name _____ Number Street _____ City State ZIP Code	**Explain what happened** ❑ Property was repossessed. ❑ Property was foreclosed. ❑ Property was garnished. ❑ Property was attached. ❑ Property was seized or levied.	_____	$_____

10. **Within 90 days before you filed for bankruptcy, did any creditor, including a bank or financial institution, set off or otherwise take anything from your accounts without your permission or refuse to make a payment because you owed a debt?**

- ❑ No
- ❑ Yes. Fill in the details.

	Describe the action the creditor took	Date action was taken	Amount
_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code	Last 4 digits of account number: XXXX–___ ___ ___ ___	_____	$_____

11. **Within 1 year before you filed for bankruptcy, was any of your property in the possession of an assignee for the benefit of creditors, a court-appointed receiver, custodian, or other official?**

- ❑ No
- ❑ Yes. Fill in the details.

	Describe the property	Value
_____ Custodian's Name _____ Number Street _____ _____ City State ZIP Code	Case title _____ Case number _____ Date of order or assignment _____ MM / DD / YYYY	$_____ _____ Court Name _____ Number Street _____ City State ZIP Code

Part 5: List Certain Gifts and Contributions

12. **Within 2 years before you filed for bankruptcy, did you give any gifts with a total value of more than $600 per person?**

- ❑ No
- ❑ Yes. Fill in the details for each gift.

Gifts with a total value of more than $600 per person	Describe the gifts	Dates you gave the gifts	Value
_____ Person to Whom You Gave the Gift _____ Number Street _____ _____ City State ZIP Code Person's relationship to you _____		_____ _____	$_____ $_____

Gifts with a total value of more than $600 per person	Describe the gifts	Dates you gave the gifts	Value
_____ Person to Whom You Gave the Gift _____ _____ Number Street _____ City State ZIP Code Person's relationship to you _____		_____ _____	$_____ $_____

13. Within 2 years before you filed for bankruptcy, did you give any gifts or contributions with a total value of more than $600 to any charity?

- ❑ No
- ❑ Yes. Fill in the details for each gift or contribution.

Gifts or contributions to charities that total more than $600	Describe what you contributed	Date you contributed	Value
_____ Charity's Name _____ _____ Number Street _____ City State ZIP Code		_____ _____	$_____ $_____

Part 6: List Certain Losses

14. **Within 1 year before you filed for bankruptcy or since you filed for bankruptcy, did you lose anything because of theft, fire, other disaster, or gambling?**

- ❑ No
- ❑ Yes. Fill in the details.

Describe the property you lost and how the loss occurred	Describe any insurance coverage for the loss Include the amount that insurance has paid. List pending insurance claims on line 33 of *Schedule A: Property.*	Date of your loss	Value of property lost
		_____	$_____

Part 7: List Certain Payments or Transfers

15. **Within 1 year before you filed for bankruptcy, did you or anyone else acting on your behalf pay or transfer any property to anyone you consulted about seeking bankruptcy or preparing a bankruptcy petition?**
Include any attorneys, bankruptcy petition preparers, or credit counseling agencies for services required in your bankruptcy.

- ❑ No
- ❑ Yes. Fill in the details.

	Description and value of any property transferred	Date payment or transfer was made	Amount of payment
_____ Person Who Was Paid _____ Number Street _____ _____ City State ZIP Code _____ Email or website address _____ Person Who Made the Payment, if Not You		_____ _____	$_____ $_____

	Description and value of any property transferred	Date payment or transfer was made	Amount of payment
_____ Person Who Was Paid _____ Number Street _____ _____ City State ZIP Code _____ Email or website address _____ Person Who Made the Payment, if Not You		_____ _____	$_____ $_____

16. **Within 1 year before you filed for bankruptcy, did you or anyone else acting on your behalf pay anything to anyone who promised to help you deal with your creditors or to make payments to your creditors?**
Do not include any payment or transfer that you listed on line 15.

- ❑ No
- ❑ Yes. Fill in the details.

	Description and value of any property transferred	Date payment or transfer was made	Amount of payment
_____ Person Who Was Paid _____ Number Street _____ _____ City State ZIP Code		_____ _____	$_____ $_____

17. **Within 2 years before you filed for bankruptcy, did you sell, trade, or otherwise transfer any property to anyone, other than property transferred in the ordinary course of your business or financial affairs?**
Include both outright transfers and transfers made as security. Do not include gifts and transfers that you have already listed on this statement.

- ❑ No
- ❑ Yes. Fill in the details.

	Description and value of property transferred	Describe any property or payments received or debts paid in exchange	Date transfer was made
_____ Person Who Received Transfer _____ Number Street _____ _____ City State ZIP Code Person's relationship to you _____			_____
_____ Person Who Received Transfer _____ Number Street _____ _____ City State ZIP Code Person's relationship to you _____			_____

18. **Within 10 years before you filed for bankruptcy, did you transfer any property to a self-settled trust or similar device of which you are a beneficiary?** (These are often called *asset-protection devices*.)

- ❑ No
- ❑ Yes. Fill in the details.

	Description and value of the property transferred	Date transfer was made
Name of trust _____ _____		_____

Part 8: List Certain Financial Accounts, Safety Deposit Boxes, and Storage Units

19. **Within 1 year before you filed for bankruptcy, were any financial accounts or instruments held in your name, or for your benefit, closed, sold, moved, or transferred?**
Include checking, savings, money market, or other financial accounts; certificates of deposit; shares in banks, credit unions, brokerage houses, pension funds, cooperatives, associations, and other financial institutions.

- ❑ No
- ❑ Yes. Fill in the details.

	Last 4 digits of account number	Type of account	Date account was closed , sold, moved, or transferred	Last balance before closing or transfer
_____ Name of Financial Institution _____ Number Street _____ _____ City State ZIP Code	XXXX–___ ___ ___ ___	Checking Savings Money market Brokerage Other_____	_____	$_____
_____ Name of Financial Institution _____ Number Street _____ _____ City State ZIP Code	XXXX–___ ___ ___ ___	Checking Savings Money market Brokerage Other_____	_____	$_____

20. **Do you now have, or did you have within 1 year before you filed for bankruptcy, any safe deposit box or other depository for securities, cash, or other valuables?**

- ❑ No
- ❑ Yes. Fill in the details.

	Who else had access to it?	Describe the contents	Do you still have it?
_____ Name of Financial Institution _____ Number Street _____ _____ City State ZIP Code	_____ Name _____ Number Street _____ City State ZIP Code		No Yes

21. **Do you store property in a storage unit, or have you stored property in a storage unit within 1 year before you filed for bankruptcy?** Do not include storage units that are part of the building in which you live.

- ❑ No
- ❑ Yes. Fill in the details.

	Who else has or had access to it?	Describe the contents	Do you still have it?
_____ Name of Storage Facility _____ Number Street _____ _____ City State ZIP Code	_____ Name _____ Number Street _____ City State ZIP Code		No Yes

Part 9: Identify Property You Hold or Control for Someone Else

22. **Do you hold or control any property that someone else owns?** Include any property you borrowed from, are storing for, or hold in trust for someone.

- ❑ No
- ❑ Yes. Fill in the details.

	Where is the property?	Describe the property	Value
Owner's Name Number Street City State ZIP Code	Number Street City State ZIP Code		$

Part 10: Give Details About Environmental Information

For the purpose of Part 10, the following definitions apply:

- *Environmental law* means any federal, state, or local statute or regulation concerning pollution, contamination, releases of hazardous or toxic substances, wastes, or material into the air, land, soil, surface water, groundwater, or other medium, including statutes or regulations controlling the cleanup of these substances, wastes, or material.
- *Site* means any location, facility, or property that any environmental law defines, whether you now own, operate, or utilize it or used to own, operate, or utilize it, including disposal sites.
- *Hazardous material* means anything an environmental law defines as a hazardous waste, hazardous substance, toxic substance, hazardous material, pollutant, contaminant, or similar term.

Report all notices, releases, and proceedings that you know about, regardless of when they occurred.

23. **Has any governmental unit notified you that you may be liable or potentially liable under or in violation of an environmental law?**

- ❑ No
- ❑ Yes. Fill in the details.

	Governmental unit	Environmental law, if you know it	Date of notice
Name of site Number Street City State ZIP Code	Governmental unit Number Street City State ZIP Code		

24. **Have you notified any governmental unit of any release of hazardous material?**

- ❑ No
- ❑ Yes. Fill in the details.

	Governmental unit	Environmental law, if you know it	Date of notice
Name of site Number Street City State ZIP Code	Governmental unit Number Street City State ZIP Code		

25. **Have you been a party in any judicial or administrative proceeding under any environmental law?** Include settlements and orders.

- ❑ No
- ❑ Yes. Fill in the details.

	Court or agency	Nature of the case	Status of the case
Case title_____ _____ Case number	_____ Court Name _____ Number Street _____ City State ZIP Code		❑ Pending ❑ On appeal ❑ Concluded

Part 11: Give Details About Your Business or Connections to Any Business

26. **Within 4 years before you filed for bankruptcy, did you own a business or have any of the following connections to any business?**

- ❑ A sole proprietor or self-employed in a trade, profession, or other activity, either full-time or part-time
- ❑ Member of a limited liability company (LLC) or limited liability partnership (LLP)
- ❑ A partner in a partnership
- ❑ An officer, director, or managing executive of a corporation
- ❑ Owner of at least 5% of the voting or equity securities of a corporation

- ❑ No. None of the above applies. Go to Part 12.
- ❑ Yes. Check all that apply above and fill in the details below for each business.

	Describe the nature of the business	Employer Identification number Do not include Social Security number or ITIN.
_____ Business Name _____ Number Street _____ _____ City State ZIP Code		EIN: ___ ___ – ___ ___ ___ ___ ___ ___ ___
	Name of accountant or bookkeeper	**Dates business existed**
		From _____ To _____
	Describe the nature of the business	**Employer Identification number** Do not include Social Security number or ITIN.
_____ Business Name _____ Number Street _____ _____ City State ZIP Code		EIN: ___ ___ – ___ ___ ___ ___ ___ ___ ___
	Name of accountant or bookkeeper	**Dates business existed**
		From _____ To _____
	Describe the nature of the business	**Employer Identification number** Do not include Social Security number or ITIN.
_____ Business Name _____ Number Street _____ _____ City State ZIP Code		EIN: ___ ___ – ___ ___ ___ ___ ___ ___ ___
	Name of accountant or bookkeeper	**Dates business existed**
		From _____ To _____

27. **Within 2 years before you filed for bankruptcy, did you give a financial statement to anyone about your business?** Include all financial institutions, creditors, or other parties.

- ❑ No
- ❑ Yes. Fill in the details below.

	Date issued
_____ Name	_____ MM / DD / YYYY
_____ Number Street	
_____	
_____ City State ZIP Code	

Part 12: Sign Here

I declare under penalty of perjury that I have read the answers on this Statement of Financial Affairs and any attachments and that the answers are true and correct.

✘ _____
Signature of Debtor 1

Date _____

✘ _____
Signature of Debtor 2

Date _____

Did you attach additional pages to *Your Statement of Financial Affairs for Individuals Filing for Bankruptcy* (Official Form 107)?

- ❑ No
- ❑ Yes

COMMITTEE NOTE

Official Form 107*, Your Statement of Financial Affairs for Individuals Filing for Bankruptcy*, which applies only in cases of individual debtors, is revised in its entirety as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats. Therefore, many of the open-ended questions and multiple-part instructions have been replaced with more specific questions. In addition, the form is renumbered to distinguish it from the version to be used in non-individual cases, and stylistic changes were made throughout the form.

The form is derived from Official Form 7*, Statement of Financial Affairs*. The new form uses eleven sections likely to be more understandable to non-lawyers, groups questions of a similar nature together, and eliminates questions unrelated to individual debtors. The new form deletes the instruction, currently found in many questions, that married debtors filing under chapter 12 or chapter 13 must include information applicable to their spouse, even if their spouse is not filing with them, unless the spouses are separated.

Part 1, *Give Details About Where You Lived Before*, moves the questions regarding the debtor's prior addresses and residences in a community property state to the beginning of the form. The form eliminates the "name used" question in reference to prior addresses. Also, the debtor is no longer required to list the name of a spouse or former spouse who lived with the debtor in a community property state.

Part 2, *Explain the Sources of Your Income*, consolidates the questions regarding income, adding "wages, commissions, bonuses, tips" as a category for sources of income, and eliminates the option to report income on a fiscal year basis. In addition, the form provides examples of types of "other income." The time

period is changed from the prior two years to two calendar years plus the portion of the year in which the bankruptcy is filed.

Part 3, *List Certain Payments You Made Before You Filed for Bankruptcy*, includes questions related to payments made in the 90 days prior to bankruptcy, with a separate question for payments made to insiders within one year before filing for bankruptcy. The statutory definition of consumer debt is provided. The question regarding payments for consumer and non-consumer debts requires the debtor to use checkboxes to specifically indicate the purpose of the payment. The form instructs debtors to include payments for domestic support obligations in the section regarding insider payments. The form provides a separate question regarding payments or transfers on account of a debt that benefited an insider. For both questions regarding payments to insiders, the debtor is required to provide a reason for the payment.

Part 4, *Identify Legal Actions, Repossessions, Foreclosures, and Returns*, consolidates questions regarding actions against the debtor's property. The form provides examples of types of legal actions, and requires the debtor to indicate the status of any action. The form adds the requirement that a debtor include any property levied within a year of filing for bankruptcy, and that the debtor provide the last four digits of any account number for any setoffs. Also, a debtor must list any assignment for the benefit of creditors made within one year of filing for bankruptcy.

Part 5, *List Certain Gifts and Contributions*, changes the reporting threshold to $600 per person or charity, and increases the look-back period from one to two years.

Part 6, *List Certain Losses*, clarifies how to report insurance coverage for losses, providing that the debtor must include amounts of insurance that have been paid on this form, but must list pending insurance claims on Official Form 106A.

Part 7, *List Certain Payments or Transfers*, includes questions regarding payments or transfers of property by the debtor. The question regarding payments or transfers to anyone who was consulted about seeking bankruptcy or preparing a bankruptcy petition requires the person's email or website address,

as well as the name of the person who made the payment, if it was not the debtor. There is a separate question asked about payments or transfers to anyone who promised to help with creditors or make payments to creditors, reminding the debtors not to include any payments or transfers already listed. Also, the debtor must list any transfers of property, outright or for security purposes, within two years of filing for bankruptcy, unless the transfer is in the ordinary course of the debtor's business. There is a reminder not to list gifts or other transfers already included elsewhere on the form. The question regarding self-settled trusts includes a notation that such trusts are often referred to as asset-protection devices.

Part 8, *List Certain Financial Accounts, Safety Deposit Boxes, and Storage Units*, adds money market accounts to the examples provided for the question regarding financial accounts or instruments, and removes "other instruments" from the examples. Also, the form adds a question about whether the debtor has or had property stored in a storage unit within one year of filing for bankruptcy. The debtor must provide the name and address of the storage facility and anyone who has or had access to the unit, as well as a description of the contents and whether the debtor still has access to the storage unit. Storage units that are part of the building in which the debtor resides are excluded.

Part 9, *Identify Property You Hold or Control for Someone Else*, instructs that the debtor should include any property that the debtor borrowed from, is storing for, or is holding in trust for someone.

Part 10, *Give Details About Environmental Information*, adds any location, facility, or property that a debtor uses or used in the definition of "site." Also, the debtor must list the case title and nature of the case for any judicial or administrative proceedings under any environmental law, and must choose a checkbox option to indicate the status of the case.

Part 11, *Give Details About Your Business or Connections to Any Business*, eliminates any instructions that apply to corporations and partnerships. The debtor must indicate if, within four years (previously six years) before filing for bankruptcy, the debtor owned a business or had certain connections to a business,

with five categories of businesses provided as checkboxes. If the debtor has a connection to a business, the debtor must list the name, address, nature, and Employer Identification Number of the business, the dates of the business' existence, and the name of an accountant or bookkeeper for the business. Accounting information requested is truncated; the debtor is simply required to provide the name of the business bookkeeper or accountant.

Part 12, *Sign Here*, eliminates the signature boxes for a partnership or corporation and a non-attorney bankruptcy petition preparer. Also, the debtor is asked to indicate through checkboxes whether additional pages are attached to the form.

Fill in this information to identify your case:

Debtor 1 ____
First Name Middle Name Last Name

Debtor 2 ____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: ____________________ District of __________
(State)

Case number ________________________________
(If known)

❑ Check if this is an amended filing

Official Form 112

Statement of Intention for Individuals Filing Under Chapter 7

12/14

If you are an individual filing under Chapter 7 and creditors have claims secured by your property or you have leased personal property and the lease has not expired, you must fill out this form. You must file this form with the court within 30 days after you file your bankruptcy petition or by the date set for the meeting of creditors, whichever is earlier, unless the court extends the time for cause. You must also have delivered copies to the creditors and lessors you listed on the form.

If two married people are filing together in a joint case, both are equally responsible for supplying correct information. Both debtors must sign and date the form.

Be as complete and accurate as possible. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).

Part 1: List Your Creditors Who Hold Secured Claims

1. **For any creditors that you listed in Part 1 of *Schedule B*, fill in the information below.**

Identify the creditor and the property that is collateral		What do you intend to do with the property that is subject to a secured debt?	Did you claim the property as exempt on Schedule D?
Creditor's name:		Give the property to the creditor. Keep the property. *Check one*: I will redeem the property. I will sign a *Reaffirmation Agreement*. Other. Explain: ____________________ ______________________________	❑ No ❑ Yes
Description of property securing debt:			
Creditor's name:		Give the property to the creditor. Keep the property. *Check one*: I will redeem the property. I will sign a *Reaffirmation Agreement*. Other. Explain: ____________________ ______________________________	❑ No ❑ Yes
Description of property securing debt:			
Creditor's name:		Give the property to the creditor. Keep the property. *Check one*: I will redeem the property. I will sign a *Reaffirmation Agreement*. Other. Explain: ____________________ ______________________________	❑ No ❑ Yes
Description of property securing debt:			
Creditor's name:		Give the property to the creditor. Keep the property. *Check one*: I will redeem the property. I will sign a *Reaffirmation Agreement*. Other. Explain: ____________________ ______________________________	❑ No ❑ Yes
Description of property securing debt:			

Part 2: List Your Unexpired Personal Property Leases

For any unexpired personal property leases that you listed in *Schedule E*, fill in the information below. *Unexpired leases* are leases that are still in effect; the lease period has not yet ended. You may assume an unexpired personal property lease if the trustee does not assume it. 11 U.S.C. § 365(p)(2).

Describe your unexpired personal property leases		Will the lease be assumed?
Lessor's name:		❑ No ❑ Yes
Description of leased property:		
Lessor's name:		❑ No ❑ Yes
Description of leased property:		
Lessor's name:		❑ No ❑ Yes
Description of leased property:		
Lessor's name:		❑ No ❑ Yes
Description of leased property:		
Lessor's name:		❑ No ❑ Yes
Description of leased property:		
Lessor's name:		❑ No ❑ Yes
Description of leased property:		

Part 3: Sign Here

Under penalty of perjury, I declare that I have indicated my intention about any property of my estate that secures a debt and any personal property that is subject to an unexpired lease.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

COMMITTEE NOTE

Official Form 112*, Statement of Intention for Individuals Filing Under Chapter 7* is revised in its entirety as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. In addition, the form is renumbered, and stylistic changes were made throughout the form.

The form is derived from Official Form 8*, Chapter 7 Individual Debtor's Statement of Intention*. The new form has three parts which use language likely to be understandable to non-lawyers. In addition, the instructions are more extensive, advising an individual Chapter 7 debtor that the form must be completed and filed within 30 days, and that the debtor must deliver copies of the form to creditors and lessors listed on the form.

Part 1, *Your Creditors Who Hold Secured Claims*, refers to signing a "Reaffirmation Agreement" rather than asking whether the debtor intends to "reaffirm the debt." In addition, the debtor is asked if the property is claimed as exempt on Schedule C (Official Form 106C).

Part 2, *List Your Unexpired Personal Property Leases*, defines unexpired leases and explains that a debtor may assume an unexpired personal property lease if the trustee does not assume it.

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____ Chapter _____
(If known)

Official Form 119

Bankruptcy Petition Preparer's Notice, Declaration, and Signature 12/14

Bankruptcy petition preparers as defined in 11 U.S.C. § 110 must fill out this form. Only bankruptcy petition preparers should fill out this form. Bankruptcy petition preparers must fill out this form anytime they help prepare documents to be filed in the case. If more than one bankruptcy petition preparer helped with the documents, each must sign in Part 3. A bankruptcy petition preparer who does not comply with the provisions of title 11 of the United States Code and the Federal Rules of Bankruptcy Procedure may be fined and imprisoned.
11 U.S.C. § 110; 18 U.S.C. § 156.

Part 1: Notice to Debtor

Bankruptcy petition preparers must give the debtor a copy of this form and have the debtor sign it before they prepare any documents for filing or accept any compensation. A signed copy of this form must be filed with any document prepared.

Bankruptcy petition preparers are not attorneys and may not practice law or give you legal advice, including the following:

- Whether to file a petition under the Bankruptcy Code (11 U.S.C. § 101 et seq.);
- Whether filing a case under Chapter 7, 11, 12, or 13 is appropriate;
- Whether your debts will be eliminated or discharged in a case under the Bankruptcy Code;
- Whether you will be able to keep your home, car, or other property after filing a case under the Bankruptcy Code;
- The tax consequences that may arise because a case is filed under the Bankruptcy Code;
- Whether any tax claims may be discharged;
- Whether you may or should promise to repay debts to a creditor or enter into a reaffirmation agreement;
- How to characterize the nature of your interests in property or your debts; or
- Bankruptcy procedures and rights.

The bankruptcy petition preparer _____ **has notified me of**
Name
any maximum allowable fee before preparing any document for filing or accepting any fee.

_____ Date _____
Signature of Debtor 1, acknowledging receipt of this notice MM / DD / YYYY

_____ Date _____
Signature of Debtor 2, acknowledging receipt of this notice MM / DD / YYYY

Part 2: Declaration of the Bankruptcy Petition Preparer

Under penalty of perjury, I declare that:

- I am a bankruptcy petition preparer or the officer, principal, responsible person, or partner of a bankruptcy petition preparer;
- I or my firm prepared the documents listed below and gave the debtor a copy of them and the *Notice to Debtor by Bankruptcy Petition Preparer* as required by 11 U.S.C. §§ 110(b), 110(h), and 342(b); and
- if rules or guidelines are established according to 11 U.S.C. § 110(h) setting a maximum fee for services that bankruptcy petition preparers may charge, I or my firm have notified the debtor of the maximum amount before preparing any document for filing or before accepting any fee from the debtor.

_____ _____ _____
Printed name | Title, if any | Firm name, if it applies

_____
Number Street

_____ _____ _____ _____
City | State | ZIP Code | Contact phone

I or my firm prepared the documents listed below:

- ❑ Voluntary Petition (Form 101)
- ❑ Your Statement About Social Security Numbers (Form 102)
- ❑ A Summary of Schedules (Form 106-Summary)
- ❑ Schedule A (Form106A)
- ❑ Schedule B (Form 106B)
- ❑ Schedule C (Form106C)
- ❑ Schedule D (Form 106D)
- ❑ Schedule E (Form 106E)
- ❑ Schedule F (Form 106F)
- ❑ Schedule G (Form 106G)
- ❑ Schedule H (Form 106H)
- ❑ Statement of Financial Affairs (Form 107)
- ❑ Declaration About an Individual Debtor's Schedules (Form 106 Declaration)
- ❑ Debtor's Statement of Intention (Form 112)
- ❑ Statement of Current Monthly Income (Forms 108-1, 108-2,109, 110-1, 110-2)
- ❑ Application to Pay Filing Fee in Installments (Form 103A)
- ❑ Application to Have Chapter 7 Filing Fee Waived (Form 103B)
- ❑ A list of names and addresses of all creditors (*creditor or mailing matrix*)
- ❑ Other _____

Part 3: Sign Here

Bankruptcy petition preparers must sign and give their Social Security Numbers. If more than one bankruptcy petition preparer prepared the documents to which this declaration applies, the signature and Social Security Number of each preparer must be provided. 11 U.S.C. § 110.

_____ ___ ___ ___ -- ___ ___ -- ___ ___ ___ ___ Date _____
Signature of bankruptcy petition preparer or officer, principal, responsible person, or partner | Social Security Number of person who signed | MM / DD / YYYY

_____
Printed name

_____ ___ ___ ___ -- ___ ___ -- ___ ___ ___ ___ Date _____
Signature of bankruptcy petition preparer or officer, principal, responsible person, or partner | Social Security Number of person who signed | MM / DD / YYYY

_____
Printed name

COMMITTEE NOTE

Official Form 119*, Bankruptcy Petition Preparer's Notice, Declaration, and Signature*, applies only in cases of individual debtors. It is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. In addition, the form is renumbered, and stylistic changes were made throughout the form.

The form is derived from Official Form 19*, Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer*. An instruction is added to the form that provides statutory citations. Filers are advised that only bankruptcy petition preparers should use the form, and that if more than one bankruptcy petition preparer helped with the documents, each must sign the form.

Part 1, *Notice to Debtor*, is moved to the beginning of the form and revised. An instruction is added that bankruptcy petition preparers must give the debtor a copy of the form and have the debtor sign it before they prepare any documents for filing or accept compensation, and that the form must be filed with any document prepared. It warns the debtor that bankruptcy petition preparers are not attorneys and may not practice law or give legal advice, with a list of examples of advice that may not be provided by a bankruptcy petition preparer. The signature line includes a note that the debtor acknowledges receipt of the notice.

Part 2, *Declaration of Bankruptcy Petition Preparer*, revises the declaration by the bankruptcy petition preparer to include an officer, principal, responsible person, or partner of a bankruptcy petition preparer. The bankruptcy petition preparer must provide a firm name, if applicable, as well as a contact phone, and must indicate which documents the bankruptcy petition preparer prepared from a list of documents. An "other" option is provided if additional documents were prepared.

Part 3, *Sign Here*, provides spaces for the bankruptcy petition preparer to enter a social security number, and adds the

language regarding an officer, principal, responsible person or partner of the bankruptcy petition preparer on the signature line.

Fill in this information to identify your case:

United States Bankruptcy Court for the:

_____ District of _____
State

Case number (*If known*): _____

Draft October 3, 2012

Official Form 121

Your Statement About Your Social Security Numbers

12/14

Use this form to tell the court about any Social Security or federal Individual Taxpayer Identification Numbers you have used. Do not file this form as part of the public case file. This form must be submitted separately and must not be included in the court's public electronic records.

To protect your privacy, the court will not make this form available to the public. You should not include a full Social Security Number or Individual Taxpayer Number on any other document filed with the court. The court will make only the last four digits of your numbers known to the public. However, the full numbers will be available to your creditors, the U.S. trustee or bankruptcy administrator, and the trustee assigned to your case and to help creditors correctly identify a case, full Social Security Numbers may appear on an electronic version of some notices. Please consult local court procedures for submission requirements.

If you do not tell the truth on this form, you may be fined up to $250,000, you may be imprisoned for up to 5 years, or both.

Part 1: Tell the court about yourself and your spouse if your spouse is filing with you

	For Debtor 1:	**For Debtor 2 (Only If Spouse Is Filing):**
1. Your name	_____ First name _____ Middle name _____ Last name	_____ First name _____ Middle name _____ Last name

Part 2: Tell the court about all of your Social Security or federal Individual Taxpayer Identification Numbers

2. All Social Security Numbers you have used	__ __ __ – __ __ – __ __ __ __ __ __ __ – __ __ – __ __ __ __ You do not have a Social Security Number.	__ __ __ – __ __ – __ __ __ __ __ __ __ – __ __ – __ __ __ __ You do not have a Social Security Number.
3. All federal Individual Taxpayer Identification Numbers (ITIN) you have used	**9** __ __ – __ __ – __ __ __ __ **9** __ __ – __ __ – __ __ __ __ You do not have an ITIN.	**9** __ __ – __ __ – __ __ __ __ **9** __ __ – __ __ – __ __ __ __ You do not have an ITIN.

Part 3: Sign here

	Under penalty of perjury, I declare that the information I have provided in this form is true and correct. _____ Signature of Debtor 1 Date _____ MM / DD / YYYY	Under penalty of perjury, I declare that the information I have provided in this form is true and correct. _____ Signature of Debtor 2 Date _____ MM / DD / YYYY

COMMITTEE NOTE

Official Form 121, *Your Statement About Your Social Security Numbers*, is revised as part of the Forms Modernization Project. The form, which applies only in cases of individual debtors, replaces Official Form 21, *Statement of Social Security Number(s)*. It is renumbered to distinguish it from the forms used by non-individual debtors such as corporations and partnerships.

To make Form 121 easier to understand and complete, the form is divided into three sections and directions on the form are simplified. The debtors' address is eliminated from the form and the Employer Tax-Identification number (EIN) is moved from the caption to the body of the form.

Information to identify the case:

Debtor 1 _____ (First Name / Middle Name / Last Name)
Last 4 digits of Social Security Number or ITIN ___ ___ ___ ___
EIN __ __ - __ __ __ __ __ __ __

Debtor 2 (Spouse, if filing) _____ (First Name / Middle Name / Last Name)
Last 4 digits of Social Security Number or ITIN ___ ___ ___ ___
EIN __ __ - __ __ __ __ __ __ __

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number: _____

Order of Discharge

IT IS ORDERED: A discharge under 11 U.S.C. § 727 is granted to:

_____ [_____]

_____ (MM / DD / YYYY)

By the court: _____ (United States Bankruptcy Judge)

Notice to the creditors:

This order means that no one may make any attempt to collect a discharged debt from the debtors personally. For example, creditors with discharged debts cannot sue, garnish wages, assert a deficiency, or otherwise try to collect from the debtors personally. Creditors cannot contact the debtors by mail, phone, or otherwise in any attempt to collect the debt personally. Creditors who violate this order can be required to pay debtors damages and attorney's fees.

However, a creditor with a lien may enforce a claim against the debtors' property subject to that lien.

This order does not prevent debtors from paying any debt voluntarily or from paying reaffirmed debts according to the reaffirmation agreement. 11 U.S.C. § 524(c), (f).

This order does not close or dismiss the case, and it does not determine how much money, if any, the trustee will pay creditors.

Notice to the debtor:

This court order grants you (the debtor) a discharge. Most debts are covered by the discharge, but not all. Generally a discharge removes your personal liability for debts that you owed before you filed your bankruptcy case.

Also, if this case began under a different chapter of the Bankruptcy Code and was later converted to chapter 7, debts that existed before the conversion are discharged.

This order does not close or dismiss the case, and it does not determine how much money, if any, the trustee will pay creditors.

In a case involving community property: Special rules protect certain community property owned by the debtor's spouse, even if that spouse did not file a bankruptcy case.

For more information, see page 2 ►

Creditors cannot collect discharged debts from you

This order means that no one can make any attempt to collect from you personally a debt that has been discharged. For example, creditors with discharged debts cannot sue you, garnish your wages, assert a deficiency claim against you, or otherwise try to collect from you personally. They cannot contact you by mail, phone, or otherwise in any attempt to collect the debt as your personal liability.

A creditor who violates this order can be required to pay you damages and attorney's fees.

However, you may voluntarily pay any debt that has been discharged.

But creditors might collect for some debts

This discharge does not stop creditors from collecting debts that you reaffirmed or from any property in which they have a valid security interest.

Debts covered by a valid reaffirmation agreement are not discharged. When you signed a reaffirmation agreement, you chose to give up your discharge for that particular debt.

In addition, the creditor may have a right to enforce a lien against your property unless the lien was avoided or eliminated. For example, the creditor may have the right to foreclose a home mortgage or repossess an auto.

Also, this discharge does not stop creditors from collecting from anyone else who is also liable on the debt, such as your insurance company or a relative who cosigned or guaranteed a loan.

Some debts are not discharged

Examples of some debts that are not discharged are:

Debts that are domestic support obligations;

Debts for most student loans;

Debts for most taxes;

Debts that the bankruptcy court has decided or will decide are not discharged in this bankruptcy case;

Debts for most fines, penalties, forfeitures, or criminal restitution obligations;

Some debts which you did not properly list;

Debts for certain types of loans owed to pension, profit sharing, stock bonus, or retirement plans; and

Debts for death or personal injury caused by your operating a vehicle while intoxicated.

This information is only a general summary of the bankruptcy discharge; some exceptions exist. Because the law is complicated, you should consult an attorney to determine the exact effect of this discharge.

COMMITTEE NOTE

Official Form 318, *Order of Discharge*, is revised and renumbered as part of the Forms Modernization Project. The form is used to issue a discharge in chapter 7 cases filed by individuals or joint debtors. It replaces Official Form 18, *Discharge of Debtor*, Director's Procedural Form 18J, *Discharge of Joint Debtors*, and Director's Procedural Form 18JO, *Discharge of One Joint Debtor*.

To make the discharge order and the explanation of it easier to read and understand, legal terms are explained more fully or replaced with commonly understood terms and the form is reformatted.

Reaffirmed debts are explained more fully and debtors are informed that a discharge will not stop creditors from collecting debts from any property in which they have a valid security interest. In addition, debtors are advised that the discharge does not stop creditors from collecting from anyone else who is liable on the debt, such as cosigner on the loan or an insurance company.

Director's Procedural Forms 18J and 18JO are no longer needed because Form 318 specifies the names of the debtors, or debtor, to whom the discharge is issued.

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Official Form B423

Certification About a Financial Management Course

12/14

If you are an individual and you filed for bankruptcy under chapter 7 or 13, or under chapter 11 if § 1141(d)(3)(C) applies, you must take an approved course about personal financial management. In a joint case, each debtor must take the course. 11 U.S.C. 727(a)(11).

After you finish the course, the provider will give you a certificate. The provider may notify the court that you have completed the course. If the provider does not do so, then Debtor 1 and Debtor 2 must each file this form with the certificate number before your debts will be discharged.

If you filed under chapter 7 and you need to file this form, file it within 60 days after the first date set for the meeting of creditors under § 341 of the Bankruptcy Code.

If you filed under chapter 11 or 13 and you need to file this form, file it before you make the last payment that your plan requires or before you file a motion for a discharge under § 1141(d)(5)(B) or § 1328(b) of the Bankruptcy Code. Fed. R. Bankr. P. 1007(c).

In some cases, the court can waive the requirement to take the financial management course. To have the requirement waived, you must file a motion with the court and obtain a court order.

Part 1: Tell the Court About the Required Course

You must check one:

I completed an approved course in personal financial management:

Date I took the course _____
MM / DD / YYYY

Name of approved provider _____

Certificate number _____

I am not required to complete a course in personal financial management because the court has granted my motion for a waiver of the requirement based on *(check one)***:**

- ❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.
- ❑ **Disability.** My physical disability causes me to be unable to complete a course in personal financial management in person, by phone, or through the internet, even after I reasonably tried to do so.
- ❑ **Active duty.** I am currently on active military duty in a military combat zone.
- ❑ **Residence.** I live in a district in which the United States trustee (or bankruptcy administrator) has determined that the approved instructional courses cannot adequately meet my needs.

Part 2: Sign Here

I certify that the information I have provided is true and correct.

_____ _____ Date _____
Signature of debtor named on certificate Printed name of debtor MM / DD / YYYY

COMMITTEE NOTE

Official Form 423, *Certification About a Financial Management Course*, is revised as part of the Forms Modernization Project. The form replaces Official Form 23, *Debtor's Certification of Completion of Postpetition Instructional Course Concerning Personal Financial Management*. Form 423 is renumbered to distinguish it from the forms used by non-individual debtors such as corporations and partnerships.

To make Form 423 easier to understand, legal terms are explained more fully or replaced with commonly understood terms and the form is reformatted. Part 1, *Tell the Court About the Required Course*, provides definitions for "incapacity" and "disability," rather than providing statutory citations.

A statement is added that, in some cases, the court can waive the requirement to complete the financial management course. To have the requirement waived, the debtor must file a motion with the court and obtain a court order.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Draft
August 23, 2012

Official Form 427

Cover Sheet for Reaffirmation Agreement

12/14

Anyone who is a party to a reaffirmation agreement may fill out and file this form. Fill it out completely, attach it to the reaffirmation agreement, and file the documents within the time set under Bankruptcy Rule 4008.

Part 1: Explain the Repayment Terms of the Reaffirmation Agreement

1. **Who is the creditor?**	_____ Name of the creditor
2. **How much is the debt?**	On the date that the bankruptcy case is filed $_____ To be paid under the reaffirmation agreement $_____ $_____ per month for _____ months (if fixed interest rate)
3. **What is the annual percentage rate (APR) of interest?**	Before the bankruptcy case was filed _____% Under the reaffirmation agreement _____% ❑ Fixed rate ❑ Adjustable rate
4. **Does collateral secure the debt?**	No Yes. Describe the collateral. _____ Current market value $_____
5. **Does the creditor assert that the debt is nondischargeable?**	No Yes. Attach an explanation of the nature of the debt and the basis for contending that the debt is nondischargeable.

6. **Using information from *Schedule G: Your Income*** (Official Form 106G) **and *Schedule H: Your Expenses*** (Official Form 106H)**, fill in the amounts.**

Income and expenses reported on Schedules G and H		**Income and expenses stated on the reaffirmation agreement**	
6a. Combined monthly income from line 12 of Schedule G	$ _____	6e. Monthly income from all sources after payroll deductions	$ _____
6b. Monthly expenses from Column A, line 22 of Schedule H	– $ _____	6f. Monthly expenses	– $ _____
6c. Monthly payments on all reaffirmed debts not listed on Schedule H	– $ _____	6g. Monthly payments on all reaffirmed debts not included in monthly expenses	– $ _____
6d. **Scheduled net monthly income** Subtract lines 6b and 6c from 6a. If the total is less than 0, put the number in brackets.	$ _____	6h. **Present net monthly income** Subtract lines 6f and 6g from 6e. If the total is less than 0, put the number in brackets.	$ _____

7. **Are the income amounts on lines 6a and 6e different?**	No Yes. Explain why they are different and complete line 10._____ _____
8. **Are the expense amounts on lines 6b and 6f different?**	No Yes. Explain why they are different and complete line 10._____ _____
9. **Is the net monthly income in line 6h less than 0?**	No Yes. A presumption of hardship arises (unless the creditor is a credit union). Explain how the debtor will make monthly payments on the reaffirmed debt and pay other living expenses. Complete line 10. _____ _____
10. **Debtor's certification about lines 7-9** If any answer on lines 7-9 is *Yes*, the debtor must sign here. If all the answers on lines 7-9 are *No*, go to line 11.	I certify that each explanation on lines 7-9 is true and correct. ✘ _____ Signature of Debtor 1 ✘ _____ Signature of Debtor 2 (Spouse Only in a Joint Case)
11. **Did counsel represent the debtor in negotiating the reaffirmation agreement?**	No Yes. Has counsel executed a declaration or an affidavit to support the reaffirmation agreement? No Yes

Part 2: Sign Here

Whoever fills out this form must sign here.	**I certify that the attached agreement is a true and correct copy of the reaffirmation agreement between the parties identified on this *Cover Sheet for Reaffirmation Agreement*.** _____ Signature Date _____ MM / DD / YYYY _____ Printed Name Check one: Debtor or Debtor's Attorney Creditor or Creditor's Attorney

COMMITTEE NOTE

Official Form 427, *Cover Sheet for Reaffirmation Agreement,* is revised and renumbered as part of the Forms Modernization Project. The form replaces Official Form 27, *Reaffirmation Agreement Cover Sheet*. To make it easier to understand, the form is reformatted and legal terms are explained more fully or replaced with commonly understood terms.

The calculation of the debtor's net monthly income is expanded to include the debtor's net monthly income at the time the bankruptcy petition is filed as well as debtor's net monthly income at the time of the reaffirmation agreement. Rather than requiring filers to state their relationship to the case, checkboxes are provided for the debtor or the debtor's attorney and for the creditor or the creditor's attorney.

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APPENDIX A.2

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OFFICIAL FORMS Chart Draft -- 9.27.2012					
B 1	Voluntary Petition	B101	Voluntary Petition for Individuals Filing for Bankruptcy *(incorporates exhibits – carves out eviction judgment statement as new form B101AB)*	Fall 2012	August 2013
		B101A B101B	Your Statement About an Eviction Judgment Against You – Parts A and B *(was in Form B1)*	Fall 2012	August 2013
		B201	Voluntary Petition for Non-Individuals Filing for Bankruptcy		
	Exhibit A	B201A	Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy Under Chapter 11		
	Exhibit C	B101 B201	*Hazardous Property or Property That Needs Immediate Attention -- incorporated in Forms B101 and B201*		
	Exhibit D	B101	*Individual Debtor's Statement of Compliance with Credit Counseling Requirement – Incorporated in Form B101*		
B 2	Declaration under Penalty of Perjury on Behalf of a Corporation or Partnership	B202	Declaration Under Penalty of Perjury On Behalf of a Corporation or Partnership *(For petition, schedules, SOFA, etc)*		
B 3A	Application and Order to Pay Filing Fee in Installments	B103A	Application for Individuals to Pay the Filing Fee in Installments	Spring 2011	August 2012
B 3B	Application for Waiver of Chapter 7 Filing Fee	B103B	Application to Have the Chapter 7 Filing Fee Waived	Spring 2011	August 2012

B 4	List of Creditors Holding 20 Largest Unsecured Claims	B104	For Individual Chapter 11 Cases: The List of Creditors Who Have the 20 Largest Unsecured Claims Against You Who Are Not Insiders *(individuals)*	Fall 2012	August 2013
		B204	For Chapter 11 Cases: The List of Creditors Who Have the 20 Largest Unsecured Claims Against You Who Are Not Insiders *(non-individuals)*		
B 5	Involuntary Petition	B105	Involuntary Petition Against an Individual	Spring 2013	August 2013
		B205	Involuntary Petition Against a Non-Individual		
B6	Cover Sheet for Schedules	**No coversheet created**			
B6	Summary of Schedules (Includes Statistical Summary of Certain Liabilities)	B106 -- Summary	A Summary of Your Assets and Liabilities and Certain Statistical Information (*individuals)*	Fall 2012	August 2013
		B206 -- Summary	A Summary of Your Assets and Liabilities (*non-individuals)*		
B 6A	Schedule A - Real Property	B106-A	Schedule A: Property (Official Form 106A) (*combines real and personal property, individuals)*	Fall 2012	August 2013
B 6B	Schedule B - Personal Property	B206-A	Schedule A: Property (*combines real and personal property, non-individuals)*		
B 6C	Schedule C - Property Claimed as Exempt	B106-D	Schedule D: The Property You Claim as Exempt (*individuals)*	Fall 2012	August 2013
B 6D	Schedule D - Creditors Holding Secured Claims	B106-B	Schedule B: Creditors Who Hold Claims Secured By Property (*against individuals*)	Fall 2012	August 2013

			B206-B	Schedule B: Creditors Who Hold Claims Secured By Property *(against non-individuals)*		
B 6E	Schedule E - Creditors Holding Unsecured Priority Claims	}	B106C	Schedule C: Creditors Who Have Unsecured Claims *(against individuals, combines priority and non-priority)*	Fall 2012	August 2013
B 6F	Schedule F - Creditors Holding Unsecured Nonpriority Claims		B206C	Schedule C: Creditors Who Have Unsecured Claims (*against non-individuals, combines priority and non-priority)*		
B 6G	Schedule G - Executory Contracts and Unexpired Leases		B106E	Schedule E: Executory Contracts and Unexpired Leases (*individuals)*	Fall 2012	August 2013
			B206E	Schedule E: Executory Contracts and Unexpired Leases (*non-individuals)*		
B 6H	Schedule H - Codebtors		B106F	Schedule F: Your Codebtors (*individuals)*	Fall 2012	August 2013
			B206F	Schedule F: Your Codebtors (*non-individuals)*		
B 6I	Schedule I - Current Income of Individual Debtor(s)		B106G	Schedule G: Your Income (*individuals – published as B6I)*	Fall 2011	August 2012
				no non-individual version		
B 6J	Schedule J- Current Expenditures of Individual Debtor(s)		B106H	Schedule H: Your Expenses (*individuals- published as 6J)*	Fall 2011	August 2012
				no non-individual version		
B 6	Declaration Concerning Debtor's Schedules		B106 -- Declaration	Declaration About an Individual Debtor's Schedules	Fall 2012	August 2013
			B202	Declaration Under Penalty of Perjury On Behalf of a Corporation or Partnership *(For petition, schedules, SOFA, etc)*		

B 7	Statement of Financial Affairs	B107	Your Statement of Financial Affairs for Individuals Filing for Bankruptcy	Fall 2012	August 2013
		B207	Statement of Your Financial Affairs *(non-Individuals)*		
B 8	Chapter 7 Individual Debtor's Statement of Intention	B112	Statement of Intention for Individuals Filing Under Chapter 7	Fall 2012	August 2013
B 9	Notice of Commencement of Case under the Bankruptcy Code, Meeting of Creditors, and Deadlines	**No coversheet created.**			
B 9A	Chapter 7 Individual or Joint Debtor No Asset Case	B 309A	(For Individuals or Joint Debtors) Notice of Chapter 7 Bankruptcy Case – No Proof of Claim Deadline	Spring 2013	August 2013
B 9B	Chapter 7 Corporation/Partnership No Asset Case	B 309C	(For Corporations or Partnerships) Notice of Chapter 7 Bankruptcy Case – No Proof of Claim Deadline Set	Spring 2013	August 2013
B 9C	Chapter 7 Individual or Joint Debtor Asset Case	B 309B	(For Individuals or Joint Debtors) Notice of Chapter 7 Bankruptcy Case – Proof of Claim Deadline Set	Spring 2013	August 2013
B 9D	Chapter 7 Corporation/Partnership Asset Case (12/11)	B 309D	(For Corporations or Partnerships) Notice of Chapter 7 Bankruptcy Case – Proof of Claim Deadline Set	Spring 2013	August 2013
B 9E	Chapter 11 Individual or Joint Debtor Case	B 309E	(For Individuals or Joint Debtors) Notice of Chapter 11 Bankruptcy Case *(former Alt version combined with Form B309-E)*	Spring 2013	August 2013
B 9E(Alt.)	Chapter 11 Individual or Joint Debtor Case				
B 9F	Chapter 11 Corporation/Partnership Case	B 309F	(For Corporations or Partnerships) Notice of Chapter 11 Bankruptcy Case *(former Alt version combined with Form B309-F)*	Spring 2013	August 2013
B 9F(Alt.)	Chapter 11 Corporation/Partnership Case				
B 9G	Chapter 12 Individual or Joint Debtor Family Farmer	B 309G	(For Individuals or Joint Debtors) Notice of Chapter 12 Bankruptcy Case	Spring 2013	August 2013

B 9H	Chapter 12 Corporation/Partnership Family Farmer	B 309H	(For Corporations or Partnerships) Notice of Chapter 12 Bankruptcy Case	Spring 2013	August 2013
B 9I	Chapter 13 Case	B 309I	Notice of Chapter 13 Bankruptcy Case	Spring 2013	August 2013
B 10	Proof Of Claim	B 410	Proof Of Claim		
B 10A	Proof Of Claim, Attachment A	B 410A	Proof Of Claim, Attachment A		
B 10S1	Proof Of Claim, Supplement 1	B 410S1	Proof Of Claim, Supplement 1		
B 10S2	Proof Of Claim, Supplement 2	B 410S2	Proof Of Claim, Supplement 2		
B 11A	General Power of Attorney	B 411-A			
B 11B	Special Power of Attorney	B 411-B			
B 12	Order and Notice for Hearing on Disclosure Statement	B 312			
B 13	Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof	B 313			
B 14	Ballot for Accepting or Rejecting Plan	B 414			
B 15	Order Confirming Plan	B 315			
B 16A	Caption	B 416A			
B 16B	Caption (Short Title)	B 416B			
B 16C	[Abrogated]	N/A			
B 16D	Caption for Use in Adversary Proceeding other than for a Complaint Filed by a Debtor	B 416D			
B 17	Notice of Appeal under 28 U.S.C. §158(a) or (b) from a Judgment, Order or Decree of a Bankruptcy Court	B 417			
B 18	Discharge of Debtor	B 318	Discharge of Debtor in a Chapter 7 Case	Fall 2012	August 2013
B 19	Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer	B119	Bankruptcy Petition Preparer's Notice, Declaration and Signature *(was B 113)*	Fall 2012	August 2013

B 20A	Notice of Motion or Objection	B 420-A	Notice of Motion or Objection	Spring 2013	August 2013
B 20B	Notice of Objection to Claim	B 420-B	Notice of Objection to Claim	Spring 2013	August 2013
B 21	Statement of Social Security Number	B 121 *updated from B102*	Your Statement About Your Social Security Numbers	Fall 2012	August 2013
B 22A	Statement of Current Monthly Income and Means Test Calculation (Chapter 7)	B 108-1	Chapter 7 Statement of Your Current Monthly Income and Means-Test Calculation	Spring 2011	August 2012
		B 108-2	Chapter 7 Means Test Calculation	Spring 2011	August 2012
B 22B	Statement of Current Monthly Income (Chapter 11)	B 109	Chapter 11 Statement of Your Current Monthly Income	Spring 2011	August 2012
B 22C	Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income (Chapter 13)	B 110-1	Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period	Spring 2011	August 2012
		B 110-2	Chapter 13 Calculation of Your Disposable Income	Spring 2011	August 2012
B 23	Debtor's Certification of Completion of Instructional Course Concerning Financial Management	B 423	Certification About a Financial Management Course *(was B 113)*	Fall 2012	August 2013
B 24	Certification to Court of Appeals	B 424			
B 25A	Plan of Reorganization in Small Business Case under Chapter 11	B 425-A			
B 25B	Disclosure Statement in Small Business Case under Chapter 11	B 425-B			
B 25C	Small Business Monthly Operating Report	B 425-C			
B 26	Periodic Report Regarding Value, Operations and Profitability of Entities in Which the Debtor's Estate Holds a Substantial or Controlling Interest	B 426			

B 27	Reaffirmation Agreement Cover Sheet	B427	Cover Sheet for Reaffirmation Agreement	Fall 2012	August 2013
DIRECTOR FORMS					
B 13S	Order Conditionally Approving Disclosure Statement, Fixing Time for Filing Acceptances or Rejections of Plan, and Fixing the Time for Filing Objections to the Disclosure Statement and to the Confirmation of the Plan, Combined with Notice Thereof and of the Hearing on Final Approval of the Disclosure Statement and the Hearing on Confirmation of the Plan	B 1300-S			
B 15S	Order Finally Approving Disclosure Statement and Confirming Plan	B 1500-S			
B 18F	Discharge of Debtor After Completion of Chapter 12 Plan	B 1800-F			
B 18FH	Discharge of Debtor Before Completion of Chapter 12 Plan	B 1800-FH			
B 18J	Discharge of Joint Debtors (Chapter 7)	B 318	Order of Discharge *(combined with Forms 18 and 18JO)*		
B 18JO	Discharge of One Joint Debtor (Chapter 7)	B 318	Order of Discharge *(combined with Forms 18 and 18J)*		
B 18RI	Discharge of Individual Debtor in a Chapter 11 Case	B 1800-RI			
B 18W	Discharge of Debtor After Completion of Chapter 13 Plan	B 1800-W			
B 18WH	Order Discharging Debtor Before Completion of Chapter 13 Plan	B 1800-WH			
B 104	Adversary Proceeding Cover Sheet	B 1040			
B 131	Exemplification Certificate	B 1310			

B 132	Application for Search of Bankruptcy Records	B 1320			
B 133	Claims Register	B 1330			
B 200	Required Lists, Schedules, Statements and Fees	B 2000			
B 201A	Notice to Individual Consumer Debtor	B 2010			
B 201B	Certification of Notice to Individual Consumer Debtor(s)	B 101	Not needed because certification is in petition		
B 202	Statement of Military Service	B 2020			
B 203	Disclosure of Compensation of Attorney for Debtor	B 2030	Attorney's Disclosure of Compensation		
B 204	Notice of Need to File Proof of Claim Due to Recovery of Assets	B 2040			
B 205	Notice to Creditors and Other Parties in Interest	B 2050			
B 206	Certificate of Commencement of Case	B 2060			
B 207	Certificate of Retention of Debtor In Possession	B 2070			
B 210A	Transfer of Claim Other Than for Security	B 2100-A			
B 210B	Notice of Transfer of Claim Other Than for Security	B 2100-B			
B 230A	Order Confirming Chapter 12 Plan	B 2300-A			
B 230B	Order Confirming Chapter 13 Plan	B 2300-B			
B 231A	Order Fixing Time to Object to Proposed Modification of Confirmed Chapter 12 Plan	B 2310-A			
B 231B	Order Fixing Time to Object to Proposed Modification of Confirmed Chapter 13 Plan	B 2310-B			
B 240A	Reaffirmation Documents	B 2400-A			
B 240B	Motion for Approval of Reaffirmation Agreement	B 2400-B			
B 240C	Order on Reaffirmation Agreement	B 2400-C			
B 240A/B ALT	Reaffirmation Agreement	B 2400-A/B ALT			

B 240C ALT	Order on Reaffirmation Agreement	B 2400-C ALT			
B 250A	Summons in an Adversary Proceeding	B 2500-A			
B 250B	Summons and Notice of Pretrial Conference in an Adversary Proceeding	B 2500-B			
B 250C	Summons and Notice of Trial in an Adversary Proceeding	B 2500-C			
B 250D	Third-Party Summons	B 2500-D			
B 250E	Summons to Debtor in Involuntary Case	B 2500-E			
B 250F	Summons in a Chapter 15 Case Seeking Recognition of a Foreign Nonmain Proceeding	B 2500-F			
B 253	Order for Relief in an Involuntary Case	B 2530			
B 254	Subpoena for Rule 2004 Examination	B 2540			
B 255	Subpoena in an Adversary Proceeding	B 2550			
B 256	Subpoena in a Case Under the Bankruptcy Code	B 2560			
B 260	Entry of Default	B 2600			
B 261A	Judgment by Default	B 2610-A			
B 261B	Judgment by Default	B 2610-B			
B 261C	Judgment in an Adversary Proceeding	B 2610-C			
B 262	Notice of Entry of Judgment	B 2620			
B 263	Bill of Costs	B 2630			
B 264	Writ of Execution to the United States Marshal	B 2640			
B 265	Certification of Judgment for Registration in Another District	B 2650			
B 270	Notice of Filing of Final Report of Trustee, of Hearing on Applications for Compensation [and of Hearing on Abandonment of Property by the Trustee]	B 2700			
B 271	Final Decree	B 2710			

B 280	Disclosure of Compensation of Bankruptcy Petition Preparer	B 2800	Disclosure of Compensation of Bankruptcy Petition Preparer		
B 281	Appearance of Child Support Creditor or Representative	B 2810			
B 283	Chapter 13 Debtor's Certifications Regarding Domestic Support Obligations and Section 522(q)	B 283			

APPENDIX A.3

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Instructions

Bankruptcy Forms for Individuals

U.S. Bankruptcy Court | September 2012

About this Booklet of Instructions

This booklet provides instructions for completing selected forms that individuals filing for bankruptcy must submit to the U.S. Bankruptcy Court. You can download all of the required forms without charge from:

http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx.

The instructions are designed to accompany the forms and are intended to help you understand what information is required to properly file.

Completing the forms is only a part of the bankruptcy process. You are strongly encouraged to hire a qualified attorney not only to help you complete the forms but also to give you general advice about bankruptcy and to represent you in your bankruptcy case. If you cannot afford to pay an attorney, you might qualify for free legal services if they are provided in your area. Contact your state or local bar association for help in obtaining free legal services or in hiring an attorney. **Note: It is particularly difficult to succeed in a chapter 11, 12, or 13 case without an attorney.**

If an attorney represents you, you must provide information so the attorney can prepare your forms. Once the attorney prepares the forms, you must make sure that the forms are accurate and complete. These instructions may help you perform those tasks. If you are filing for bankruptcy without the help of an attorney, this booklet tells you which forms must be filed and provides information about them.

You should carefully read this booklet and keep it with your records. Review the individual forms as you read the instructions for each.

Although bankruptcy petition preparers can help you type the bankruptcy forms, they cannot file the documents for you and cannot give you legal advice. Court employees cannot give you legal advice either.

Read This Important Warning

Because bankruptcy can have serious long-term financial and legal consequences, including loss of your property, you should hire an attorney and carefully consider all of your options before you file. Only an attorney can give you legal advice about what can happen as a result of filing for bankruptcy and what your options are. If you do file for bankruptcy, an attorney can help you fill out the forms properly and protect you, your family, your home, and your possessions.

Although the law allows you to represent yourself in bankruptcy court, you should understand that many people find it difficult to represent themselves successfully. The rules are technical, and a misstep or inaction may harm you. If you file without an attorney, you are still responsible for knowing and following all of the legal requirements.

You may not file bankruptcy if you are not eligible to file or if you do not intend to file the documents necessary to complete the bankruptcy.

Bankruptcy fraud is a serious crime; you could be fined and imprisoned if you commit fraud in your bankruptcy case. If you deliberately make a false statement, you could be fined up to $250,000 or imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

About the bankruptcy forms and filing bankruptcy

Use the forms that are numbered in the 100 series to file bankruptcy for an individual or a married couple. Use the forms that are numbered in the 200 series if you are preparing a bankruptcy on behalf of a non-individual, such as a corporation, partnership, or limited liability company (LLC).

When a bankruptcy is filed, the U.S. Bankruptcy Court opens a case and reviews information. It is important that the answers to the questions on the forms be complete and accurate so that the case proceeds smoothly. A person filing bankruptcy who gives false information could be charged with a federal crime or could lose all the benefits of filing for bankruptcy.

You should understand that filing a bankruptcy case is not private. Anyone has a right to see your bankruptcy forms after you file them. However, in some circumstances, if a court issues a protective order to keep your address, telephone number, or other information from being disclosed to the public, it may be possible to protect your information under 11 U.S.C. § 107 and Bankruptcy Rule 9037.

Understand the terms used in the forms

The forms for individuals use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. For example, if a form asks, "Do you own a car?" the answer would be *yes* if either debtor owns a car. When information is needed about the spouses separately, the forms use *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

To understand other terms used in the forms and the instructions, see the *Glossary* at the end of this booklet.

Things to remember when filling out these forms

- Be as complete and accurate as possible.
- If more space is needed, attach a separate sheet to the form. On the top of any additional pages, write your name and case number (if known).
- If two married people are filing together, both are equally responsible for supplying correct information.
- For your records, be sure to keep a copy of your bankruptcy documents and all attachments that you file.
- Do not file these instructions with the bankruptcy forms that you file with the court.
- Do not list a minor child's full name. Instead, fill in only the child's initials and the full name and address of the child's parent or guardian. For example, write A.B., a minor child (*John Doe, parent, 123 Main St., City, State*). 11 U.S.C. § 112; Bankruptcy Rule 1007(m) and 9037.

About the Process for Filing a Bankruptcy Case for Individuals

Before you file your bankruptcy case

Before you file for bankruptcy, you must do several things:

- **Receive a briefing about credit counseling from an approved agency** within 180 days before you file. (If you and your spouse are filing together, each of you must receive a briefing before you file. Failure to do so will almost certainly result in the dismissal of your case.) You may have a briefing about credit counseling one-on-one or in a group, by telephone, or by internet.

  For a list of approved providers, go to: http://www.justice.gov/ust/eo/bapcpa/ccde/cc_approved.htm

  In Alabama and North Carolina, go to: http://www.uscourts.gov.

  After you finish the briefing, you will receive a certificate that you will need to file in your bankruptcy case.

- **Find out in which bankruptcy court you must file your bankruptcy case**. It is important that you file in the correct district within your state. To find out which district you are in, go to: http://www.uscourts.gov/courtlinks

- **Check the court's local website** for any specific local requirements that you might have to meet. Go to: http://www.uscourts.gov/courtlinks

- **Find out which chapters of the Bankruptcy Code you are eligible for**. For descriptions of each chapter, review the information contained in the notice, *Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy* (Form B2010), which is included in this booklet.

***Note:* It is particularly difficult to succeed in a chapter 11, 12, or 13 case without an attorney.**

To file for bankruptcy, you must give the court several forms and documents. Some must be filed at the time you file the case. Others may be filed up to 14 days later.

When you file your bankruptcy case

You must file the forms listed below on the date you open your bankruptcy case. For copies of the forms listed here, go to http://www.uscourts.gov. (The list continues on the next page.):

- *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101). This form opens the case. Directions for filling it out are included in the form itself.
- *Your Statement About Your Social Security Numbers* (Official Form 102). This form gives the court your full Social Security number or federal Individual Taxpayer Identification number. To protect your privacy, the court will make only the last four digits of your number known to the general public. However, the court will make your full number available to your creditors, the U.S. trustee or bankruptcy administrator, and the trustee assigned to your case. This form has no separate instructions.
- Your filing fee. If you cannot pay the entire filing fee, you must also include:
  - *Application for Individuals to Pay the Filing Fee in Installments* (Official Form B103A), or
  - *Application to Have the Chapter 7 Filing Fee Waived* (Official Form B103B). Use this form only if you are filing under chapter 7 and you meet the criteria to have the chapter 7 filing fee waived.
- A list of names and addresses of all of your creditors, formatted as a mailing list according to instructions from the bankruptcy court in which you file. (Your court may call this a *creditor matrix* or *mailing matrix*.)
- Your credit counseling certificate from an approved credit counseling agency. (See *Before you file your bankruptcy case*, above). If you have received the briefing about credit counseling but have not yet received the certificate, file it when you receive it. If you have not already received the briefing and believe you are entitled to a temporary waiver from receiving it or that you are not required to receive the briefing, see line 15 of the *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101). Waivers are rare and if you do not qualify for a waiver, your case will be dismissed.
- *For Individual Chapter 11 Cases: The List of Creditors Who Have the 20 Largest Unsecured Claims Against You Who Are Not Insiders* (Official Form 104). Fill out this form only if you file under chapter 11.
- *Your Statement About an Eviction Judgment Against You–Parts A and B* (Official Form 101A and B). Use this form if your landlord has an eviction judgment against you and you want to stay in your residence after you file your forms to open your bankruptcy case.
- *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119) and *Disclosure of Compensation of Bankruptcy Petition Preparer* (Form 2800). Use these forms if a bankruptcy petition preparer helped you fill out your forms.

When you file your bankruptcy case or within 14 days after you file

You must file the forms listed below either when you file your bankruptcy case or within 14 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101). If you do not do so, your case may be dismissed. Although it is possible to open your case by submitting only the documents that are listed under *When you file your bankruptcy case*, you should file the entire set of forms at one time to help your case proceed smoothly.

Although some forms may ask you similar questions, you must fill out all of the forms completely to protect your legal rights.

The list below shows the forms that all individuals must file as well as the forms that are specific to each chapter. For copies of the official forms listed here, go to http://www.uscourts.gov.

All individuals who file for bankruptcy must file these forms and the forms for the specific chapter:

- ❑ *Schedules of Assets and Liabilities* (Official Form 106) which includes these forms:
  - ❑ *Schedule A: Property* (Official Form 106A)
  - ❑ *Schedule B: Creditors Who Hold Claims Secured by Your Property* (Official Form 106B)
  - ❑ *Schedule C: Creditors Who Have Unsecured Claims* (Official Form 106C)
  - ❑ *Schedule D: The Property You Claim as Exempt* (Official Form 106D)
  - ❑ *Schedule E: Executory Contracts and Unexpired Leases* (Official Form 106E)
  - ❑ *Schedule F: Your Codebtors* (Official Form 106F)
  - ❑ *Schedule G: Your Income* (Official Form 106G)
  - ❑ *Schedule H: Your Expenses* (Official Form 106H)
  - ❑ *A Summary of Your Schedules for Individuals Filing for Bankruptcy* (Official Form 106 Summary). This form gives an overview of the totals on the schedules
  - ❑ *Declaration About an Individual Debtor's Schedules* (Official Form 106 Declaration)
- ❑ *Your Statement of Financial Affairs for Individuals Filing for Bankruptcy* (Official Form 107)
- ❑ *Disclosure of Compensation to Debtor's Attorney* (Form 2030)
- ❑ Credit counseling certificate that you received from an approved credit counseling agency
- ❑ Copies of all payment advices (*pay stubs*) or other evidence of payment that you received within 60 days before you filed your bankruptcy case. Some local courts may require that you submit these documents to the trustee assigned to your case rather than filing them with the court. Check the court's local website to find out if local requirements apply. Go to http://www.uscourts.gov/courtlinks.

If you file under chapter 7, you must also file:

- ❑ *Statement of Intention for Individuals Filing Under Chapter 7* (Official Form 112)
- ❑ *Chapter 7 Statement of Your Current Monthly Income* (Official Form 108-1)
- ❑ If necessary, *Chapter 7 Means Test Calculation* (Official Form 108-2).

If you file under chapter 11, you must also file:

- ❑ *Chapter 11 Statement of Your Current Monthly Income* (Official Form 109)

If you file under chapter 11 and are a small business debtor (that is, if you are self-employed and your debts are less than $2,343,300), within 7 days after you file your bankruptcy forms to open your case, you must also file your most recent:

- ❑ Balance sheet
- ❑ Statement of operations
- ❑ Cash-flow statement
- ❑ Federal income tax return

If you do not have these documents, you must file a statement made under penalty of perjury that you have not prepared either a balance sheet, statement of operations, or cash-flow statement or you have not filed a federal tax return.

If you file under chapter 11, you must also file additional documents.

If you file under chapter 12, you must also file:

- ❑ Chapter 12 Plan (within 90 days after you file your bankruptcy forms to open your case)

If you file under chapter 13, you must also file:

- ❑ *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 110-1)
- ❑ If necessary, *Chapter 13 Calculation of Your Disposable Income* (Official Form 110-2)
- ❑ Chapter 13 Plan (Many bankruptcy courts require you to use a local form plan. Check the court's local website for any specific form that you might have to use. Go to http://www.uscourts.gov/courtlinks.)

Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy (Form 2010)

This notice is for you if:

You are an individual filing for bankruptcy, and

Your debts are primarily consumer debts. *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

The types of bankruptcy that are available to individuals

Individuals who meet the qualifications may file under one of four different chapters of the Bankruptcy Code:

- Chapter 7 — Liquidation
- Chapter 11— Reorganization
- Chapter 12— Voluntary repayment plan for family farmers or fishermen
- Chapter 13— Voluntary repayment plan for individuals with regular income

You should have an attorney review your decision to file for bankruptcy and the choice of chapter.

Chapter 7: Liquidation

	$245	filing fee
	$46	administrative fee
+	$15	trustee surcharge
	$306	total fee

Chapter 7 is for individuals who have financial difficulty and cannot pay their debts. The primary purpose for a debtor to file under chapter 7 is to have your debts discharged. The bankruptcy discharge relieves you from having to pay any of your pre-bankruptcy debts unless an exception to discharge applies to particular debts.

However, if the court finds that you have committed certain kinds of improper conduct described in the Bankruptcy Code, the court may deny your discharge.

You should know that even if you receive a discharge, some debts are not discharged under the law. Therefore, you may still be responsible to pay:

- most taxes;
- most student loans;
- domestic support and property settlement obligations;
- most fines, penalties, forfeitures, and criminal restitution obligations; and
- certain debts that are not properly listed in your bankruptcy papers.

You may also be required to pay debts arising from:

- fraud or theft;
- breach of fiduciary duty;
- intentional injuries that you inflicted; and
- death or personal injury caused by operating a motor vehicle, vessel, or aircraft while intoxicated from alcohol or drugs.

If your debts are primarily consumer debts, the court can dismiss your chapter 7 case if it finds that you have income to repay creditors a certain amount. You must file *Chapter 7 Statement of Your Current Monthly Income* (Official Form 108–1) if you are an individual filing for bankruptcy under Chapter 7. This form will determine your current monthly income and compare whether your income is more than the median income that applies in your state.

If your income is not above the median for your state, you will not have to fill out the second form *Chapter 7 Means Test Calculation* (Official Form 108–2).

If your income is above the median for your state, you must file that form. The calculations on the form—sometimes called the *Means Test*—deduct from your income living expenses and payments on certain debts to determine any amount available to pay unsecured creditors. If your income is more than the median income for your state of residence and family size, depending on the results of the *Means Test*, the U.S. trustee, bankruptcy administrator, or creditors can file a motion to dismiss your case under § 707(b) of the Bankruptcy Code. If a motion is filed, the court will decide if your case should be dismissed. To avoid dismissal, you may choose to proceed under another chapter of the Bankruptcy Code.

If you are an individual filing for bankruptcy, the law may allow you to keep some property, or it may entitle you to part of the proceeds if the property is sold after your case is filed. Property that the law permits you to keep is called *exempt property*. For example, exemptions may enable you to keep your home, a car, clothing, and household items.

Exemptions are not automatic. To be considered exempt, you must list the property on *Schedule D: The Property You Claim as Exempt* (Official Form 106D). If you do not list the property, the trustee may sell it and pay all of the proceeds to your creditors.

Chapter 11: Reorganization

	$1,167	filing fee
+	$46	administrative fee
	$1,213	total fee

Chapter 11 is for reorganizing a business but is also available to individuals. The provisions of chapter 11 are too complicated to summarize briefly.

Chapter 12: Repayment plan for family farmers or fishermen

	$200	filing fee
+	$46	administrative fee
	$246	total fee

Similar to Chapter 13, Chapter 12 permits family farmers and fishermen to repay their debts over a period of time using future earnings.

Chapter 13: Repayment plan for individuals with regular income

	$235	filing fee
+	$46	administrative fee
	$281	total fee

Chapter 13 is for individuals who have regular income and would like to pay all or part of their debts in installments over a period of time. You are only eligible for chapter 13 if your debts are not more than certain dollar amounts set in 11 U.S.C. § 109.

Under chapter 13, you must file with the court a plan to repay your creditors all or part of the money that you owe them, using your future earnings. The court must approve your plan and may allow you to repay your debts within 3 years or 5 years, depending on your income and other factors.

After you make the payments under your plan, your debts are generally discharged. However, you may still be responsible to pay:

- domestic support obligations,
- most student loans,
- certain taxes,
- most criminal fines and restitution obligations,
- certain debts that are not properly listed in your bankruptcy papers,
- certain debts for acts that caused death or personal injury, and
- certain long-term secured obligations.

Bankruptcy crimes have serious consequences

- If you knowingly and fraudulently conceal assets or make a false oath or statement under penalty of perjury—either orally or in writing—in connection with a bankruptcy case, you may be fined, imprisoned, or both.
- All information you supply in connection with a bankruptcy case is subject to examination by the Attorney General acting through the Office of the U.S. Trustee, the Office of the U.S. Attorney, and other offices and employees of the U.S. Department of Justice.

Warning: File Your Forms on Time

Section 521(a)(1) of the Bankruptcy Code requires that you promptly file detailed information about your creditors, assets, liabilities, income, expenses and general financial condition. The court may dismiss your bankruptcy case if you do not file this information within the deadlines set by the Bankruptcy Code, the Bankruptcy Rules, and the local rules of the court.

For more information about the documents and their deadlines, go to: http://www.uscourts.gov/bkforms/bankruptcy_forms.html#procedure.

Make sure the court has your mailing address

The bankruptcy court sends notices to the mailing address you list on *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101). To ensure that you receive information about your case, Bankruptcy Rule 4002 requires that you notify the court of any changes in your address.

A married couple may file a bankruptcy case together—called a *joint case*. If you file a joint case and each spouse lists the same mailing address on the bankruptcy petition, the bankruptcy court generally will mail you and your spouse one copy of each notice, unless you file a statement with the court asking that each spouse receive separate copies.

Understand which services you could receive from credit counseling agencies

The law generally requires that you receive a credit counseling briefing from an approved credit counseling agency. 11 U.S.C. § 109(h). With limited exceptions, you must receive it within the 180 days ***before*** you file your bankruptcy petition. This briefing is usually conducted by telephone or on the Internet.

The clerk of the bankruptcy court has a list of approved agencies. If you are filing a joint case, both spouses must receive the briefing.

In addition, after filing a bankruptcy case, you generally must complete a financial management instructional course before you can receive a discharge. The clerk also has a list of approved financial management instructional courses. If you are filing a joint case, both spouses must complete the course.

Read This Warning

Because bankruptcy can have serious long-term financial and legal consequences, including loss of your property, you should hire an attorney and carefully consider all of your options before you file. An attorney can explain to you what can happen as a result of filing for bankruptcy and what your options are. If you do file for bankruptcy, an attorney can help you fill out the forms properly and protect you, your family, your home, and your possessions. Bankruptcy petition preparers can only help you type the forms required; they cannot give you legal advice of any kind.

Although the law allows you to represent yourself in bankruptcy court, you should understand that many people find it extremely difficult to represent themselves successfully. The rules are very technical, and a misstep or inaction may affect your rights. If you file without an attorney, you are still responsible for knowing and following all of the legal requirements.

You may not file bankruptcy if you are not eligible to file or if you do not intend to file the documents necessary to complete the bankruptcy.

Bankruptcy fraud is a serious crime; you could be fined and imprisoned if you commit fraud in your bankruptcy case. If you make a false statement, you could be fined up to $250,000 or imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

Instructions for Selected Forms

Schedule A: Property (Official Form 106A)

Schedule A: Property (Official Form 106A) lists property interests that are involved in a bankruptcy case. All individuals filing for bankruptcy must honestly list everything they own or have a legal or equitable interest in. *Legal or equitable interest* is a broad term and includes all kinds of property interests in both tangible and intangible property, whether or not anyone else has an interest in that property.

The information in this form is grouped by category and includes several examples for many items. Note that those examples are meant to give you an idea of what to include in the categories. They are not intended to be complete lists of everything within that category. Make sure you list everything you own or have an interest in.

You must verify under penalty of perjury that the information you provide is complete and accurate. If you fail to list any property, you may lose the property, lose your bankruptcy discharge, be fined up to $250,000, and be imprisoned for up to 5 years. 11 U.S.C. §§ 554, 727; 18 U.S.C. §§ 152, 157, 3559, 3571, and 3581.

Understand the terms used in this form

Community property — Type of property ownership available in certain states for property owned by spouses and, in some instances, legal equivalents of spouses. Community property states and territories include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, and Wisconsin.

Current value — In this form, report the *current value* of the property that you own in each category. *Current value* is sometimes called *fair market value* and, for this form, is the fair market value as of the date of the filing of the petition. *Current value* is how much the property is worth, which may be more or less than when you purchased the property. *Property you own* includes property you have purchased, even if you owe money on it, such as a home with a mortgage or an automobile with a lien.

Report the current value of the portion you own

For each question, report the current value of the portion of the property that you own. To do this, you would usually determine the current value of the entire property and the percentage of the property that you own. Multiply the current value of the property by the percentage that you own. Report the result where the form asks for *Current value of the portion you own*. For example:

- If you own a house by yourself, you own 100% of that house. Report the entire current value of the house.
- If you and a sister own the house equally, report 50% of the value of the house (or half of the value of the house).

In certain categories, current value may be difficult to figure out. When you cannot find the value from a reputable source (such as a pricing guide for your car), estimate the value and be prepared to explain how you determined it.

List items once on this form

List items only once on this form; do not list them in more than one category. List all real estate in Part 1 and other property in the other parts of the form.

Where you list similar items of minimal value (such as clothing), add the value of the items and report a total.

Be specific when you describe each item. If you have an item that you think could fit into more than one category, select the most suitable category and list the item there.

Separately describe and list individual items worth more than $500.

Match the values to the other schedules

Make sure that the values you report on this form match the values you report on *Schedule B: Creditors Who Hold Claims Secured by Your Property* (Official Form 106B) and *Schedule D: The Property You Claim as Exempt* (Official Form 106D).

On this form, do not list any interests you may have in executory contracts (for example, an unexpired lease for your apartment, a contract for improvements or repairs for your home, a real estate listing agreement, or a lease for your car). List those contracts or leases on *Schedule E: Executory Contracts and Unexpired Leases* (Official Form 106E).

Schedule B: Creditors Who Hold Claims Secured by Property (Official Form 106B)

The people or organizations to whom you owe money are called your *creditors*. A *claim* is a creditor's right to payment. When you file for bankruptcy, the court needs to know who all your creditors are and what types of claims they have against you.

Typically in bankruptcy cases, there are more debts than assets to pay those debts. The court must know as much as possible about your creditors to make sure that their claims are properly treated according to the rules.

Creditors may have different types of claims:

- **Secured claims**. Report these on *Schedule B: Creditors Who Hold Claims Secured by Property* (Official Form 106B).
- **Unsecured claims**. Report these on *Schedule C: Creditors Who Have Unsecured Claims* (Official Form 106C).

If your debts are not paid, creditors with secured claims may be able to get paid from specific property in which that creditor has an interest, such as a mortgage or a lien. That property is sometimes called *collateral* for your debt and could include items such as your house, your car, or your furniture. Creditors with unsecured claims do not have rights against specific property.

Many claims have a specific amount, and you clearly owe them. However, some claims are uncertain when you file for bankruptcy, or they become due only after you file. You must list all claims in your schedules, even if the claims are contingent, unliquidated, or disputed.

Claims may be contingent, unliquidated, or disputed

Claims may be:

- Contingent claims,
- Unliquidated claims, or
- Disputed claims.

A claim is *contingent* if you are not obligated to pay it unless a particular event occurs after you file for bankruptcy. You owe a contingent claim, for example, if you cosigned someone else's loan. You may not have to pay unless that person later fails to repay the loan.

A claim is *unliquidated* if the amount of the debt cannot be readily determined, such as by referring to an agreement or by a simple computation. An unliquidated claim is one for which there may be a definite liability but where the value has not been set. For instance, if you were involved in a car accident, the victim may have an unliquidated claim against you because the amount of damages has not been set.

A claim is *disputed* if you disagree about whether you owe the debt. For instance, your claim is disputed if a bill collector demands payment for a bill you believe you already fully paid.

A single claim can have one, more than one, or none of these characteristics.

On *Schedule B: Creditors Who Hold Claims Secured by Property* (Official Form 106B), list all creditors who have a claim that is secured by your property.

Do not leave out any secured creditors

In alphabetical order, list anyone who has judgment liens, garnishments, statutory liens, mortgages, deeds of trust, and other security interests against your property. When listing creditors who hold secured claims, be sure to include all of them. For example, include the following:

- Your relatives or friends who hold a lien or security interest in your property;
- Car or truck lenders, stores, banks, credit unions, and others who made loans to enable you to finance the purchase of property and who have a lien against that property;
- Anyone who holds a mortgage or deed of trust on real estate that you own;
- Contractors or mechanics who have liens on property you own because they did work on the property and were not paid;
- Someone who won a lawsuit against you and has a judgment lien;
- Another parent or a government agency that has a lien for unpaid child support;
- Doctors or attorneys who have liens on the outcome of a lawsuit;
- Federal, state, or local government agencies such as the IRS that have tax liens against property for unpaid taxes; and
- Anyone who is trying to collect a secured debt from you, such as collection agencies and attorneys.

List the debt in Part 1 only once and list any others that should be notified about that debt in Part 2. For example, if a collection agency is trying to collect from you for a debt you owe to someone else, list the person to whom you owe the debt in Part 1, and list the collection agency in Part 2. If you are not sure who the creditor is, list the person you are paying in Part 1 and list anyone else who has contacted you about this debt in Part 2.

If a creditor's full claim is more than the value of your property securing that claim—for instance, a car loan in an amount greater than the value of the car—the creditor's claim may be partly secured and partly unsecured. In that situation, list the claim only once on *Schedule B: Creditors Who Hold Claims Secured by Property* (Official Form 106B). Do not repeat it on *Schedule C: Creditors Who Hold Unsecured Claims* (Official Form 106C). List a creditor in *Schedule B* even if it appears that there is no value to support that creditor's secured claim.

Determine the unsecured portion of secured claims

To determine the amount of a secured claim, compare the amount of the claim to the value of the property that supports the claim. If the value of the property is greater than the amount of the claim, then the entire amount of the claim is secured. But if the value of the property is less than the amount of the claim, the difference is an *unsecured portion*. For example, if the outstanding balance of a car loan is $10,000 and the car is worth $8,000, the car loan has a $2,000 unsecured portion.

If there is more than one secured claim against the same property, the claim that is entitled to be paid first must be subtracted from the property value to determine how much value remains for the next claim. For example, if a home worth $300,000 has a first mortgage of $200,000 and a second mortgage of $150,000, the first mortgage would be fully secured, and there would be $100,000 of property value for the second mortgage, which would have an unsecured portion of $50,000.

	$300,000	value of a home
-	$200,000	first mortgage
	$100,000	remaining property value
	$150,000	second mortgage
-	$100,000	remaining property value
	$ 50,000	unsecured portion of second mortgage

Schedule C: Creditors Who Have Unsecured Claims (Official Form 106C)

The people or organizations to whom you owe money are called your *creditors*. A *claim* is a creditor's right to payment. When you file for bankruptcy, the court needs to know who all your creditors are and what types of claims they have against you.

Typically in bankruptcy cases, there are more debts than assets to pay those debts. The court must know as much as possible about your creditors to make sure that their claims are properly treated according to the rules.

Use *Schedule C: Creditors Who Have Unsecured Claims* (Official Form 106C) to identify everyone who holds an unsecured claim against you when you file your bankruptcy petition, unless you have already listed them on *Schedule B: Creditors Who Hold Claims Secured by Your Property* (Official Form 106B).

Creditors may have different types of claims:

- **Secured claims**. Report these on *Schedule B: Creditors Who Hold Claims Secured by Property* (Official Form 106B).
- **Unsecured claims**. Report these on *Schedule C: Creditors Who Have Unsecured Claims* (Official Form 106C).

If your debts are not paid, creditors with secured claims may be able to get paid from specific property in which that creditor has an interest, such as a mortgage or a lien. That property is sometimes called *collateral* for your debt and could include items such as your house, your car, or your furniture. Creditors with unsecured claims do not have rights against specific property.

Many claims have a specific amount, and you clearly owe them. However, some claims are uncertain when you file for bankruptcy, or they become due only after you file. You must list all claims in your schedules, even if the claims are contingent, unliquidated, or disputed.

Claims may be contingent, unliquidated, or disputed

Claims may be:

- Contingent claims,
- Unliquidated claims, or
- Disputed claims.

A claim is *contingent* if you are not obligated to pay it unless a particular event occurs after you file for bankruptcy. You owe a contingent claim, for example, if you cosigned someone else's loan. You may not have to pay unless that person later fails to repay the loan.

A claim is *unliquidated* if the amount of the debt cannot be readily determined, such as by referring to an agreement or by a simple computation. An unliquidated claim is one for which there may be a definite liability but where the value has not been set. For instance, if you were involved in a car accident, the victim may have an unliquidated claim against you because the amount of damages has not been set.

A claim is *disputed* if you disagree about whether you owe the debt. For instance, your claim is disputed if a bill collector demands payment for a bill you believe you already fully paid.

A single claim can have one, more than one, or none of these characteristics.

Creditors with unsecured claims do not have liens on or other security interests in your property. Secured creditors have a right to take property if you do not pay them. Common examples are lenders for your car, your home, or your furniture.

Do not leave out any unsecured creditors

List all unsecured creditors in each part of the form in alphabetical order. Even if you plan to pay a creditor, you must list that creditor. When listing creditors who hold unsecured claims, be sure to include all of them. For instance, include the following:

- Your relatives or friends to whom you owe money;
- Your ex-spouse, if you are still obligated under a divorce decree or settlement agreement to pay joint debts;
- A credit card company, even if you intend to fully pay your credit card bill;
- A lender, even if the loan is cosigned;
- Anyone who holds a loan or promissory note that you cosigned for someone else;
- Anyone who has sued or may sue you because of an accident, dispute, or similar event that has occurred; or
- Anyone who is trying to collect a debt from you such as a bill collector or attorney.

Unsecured claims could be priority or nonpriority claims

What are priority unsecured claims?

In bankruptcy cases, *priority unsecured claims* are those debts that the Bankruptcy Code requires to be paid before most other unsecured claims are paid. The most common priority unsecured claims are certain income tax debts and past due alimony or child support. Priority unsecured claims include those you owe for:

- **Domestic support obligations**—If you owe domestic support to a spouse or former spouse; a child or the parent, legal guardian, or responsible relative of a child; or a governmental unit to whom such a domestic support claim has been assigned.
  11 U.S.C. § 507(a)(1).

- **Taxes and certain other debts you owe the government**—If you owe certain federal, state, or local government taxes, customs duties, or penalties.
  11 U.S.C. § 507(a)(8).

- **Claims for death or personal injury that you caused while you were intoxicated—**If you have a claim against you for death or personal injury that resulted from your unlawfully operating a motor vehicle or vessel while you were unlawfully intoxicated from alcohol, drugs, or another substance. This priority does not apply to claims for property damage.
  11 U.S.C. § 507(a)(10).

- **Other:**

  - **Deposits by individuals**—If you took money from someone who planned to purchase, lease, or rent your property or use your services but you never delivered or performed. For the debt to have priority, the property or services must have been intended for personal, family, or household use (only the first $2,600 per person is a priority debt). 11 U.S.C. § 507(a)(7).

  - **Wages, salaries, and commissions**—If you owe wages, salaries, and commissions, including vacation, severance, and sick leave pay and those amounts were earned within 180 days before you open your bankruptcy case or ceased business. In either instance, only the first $11,775 per claim is a priority debt. 11 U.S.C. § 507(a)(4).

  - **Contributions to employee benefit plans**—If you owe contributions to an employee benefit plan for services an employee rendered within 180 days before you file your bankruptcy petition, or within 180 days before your business ends. Count only the first $11,775 per employee, less any amounts owed for wages, salaries, and commissions. 11 U.S.C. § 507(a)(5).

  - **Certain claims of farmers and fishermen—**Only the first $5,775 per farmer or fisherman is a priority debt. 11 U.S.C. § 507(a)(6).

What are nonpriority unsecured claims?

Nonpriority unsecured claims are those debts that generally will be paid after priority unsecured claims are paid. The most common examples of nonpriority unsecured claims are credit card bills, medical bills, and educational loans.

What if a claim has both priority and nonpriority amounts?

If a claim has both priority and nonpriority amounts, list that claim in Part 2 and show both priority and nonpriority amounts. Do not list it again in Part 3.

In Part 3, list all of the creditors you have not listed before. You must list every creditor that you owe, regardless of the amount you owe and even if you plan to pay a particular debt. If you do not list a debt, it may not be discharged.

What is needed for statistical purposes?

For statistical reasons, the court must collect information about some specific categories of unsecured claims.

The categories for priority unsecured claims are:

- **Domestic support obligations**
- **Taxes and certain other debts you owe the government**
- **Claims for death or personal injury that you caused while you were intoxicated**

The categories for nonpriority unsecured claims are:

- **Student loans—**If you owe money for any loans that you used to pay for your education;
- **Obligations arising out of a separation agreement or divorce that you did not report as priority claims—**If you owe debts for separation or divorce agreements or for domestic support and you did not report those debts in Part 2; and
- **Debts to pension or profit-sharing plans and other similar debts**—If you owe money to a pension or profit-sharing plan.

Schedule D: The Property You Claim as Exempt
(Official Form 106D)

How exemptions work

If you are an individual filing for bankruptcy, the law may allow you to keep some property, or it may entitle you to part of the proceeds if the property is sold after your case is filed. Property that the law permits you to keep is called *exempt* property. For example, exemptions may enable you to keep your home, a car, clothing, and household items.

Exemptions are not automatic. To be considered exempt, you must list the property on *Schedule D: The Property You Claim as Exempt* (Official Form 106D). If you do not list the property, the trustee may sell it and pay all of the proceeds to your creditors.

You may unnecessarily lose property if you do not claim exemptions to which you are entitled. You are strongly encouraged to hire a qualified attorney to advise you.

Determine which set of exemptions you will use

Before you fill out this form, you must learn which set of exemptions you can use. In general, exemptions are determined on a state-by-state basis. Some states permit you to use the exemptions provided by the Bankruptcy Code. 11 U.S.C. § 522.

The Bankruptcy Code provides that you use the exemptions in the law of the state where you had your legal home for 730 days before you file for bankruptcy. Special rules may apply if you did not have the same home state for 730 days before you file.

You may lose property if you do not use the best set of exemptions for your situation.

If your spouse is filing with you and you are filing in a state in which you may choose between state and federal sets of bankruptcy exemptions, you both must use the same set of exemptions.

Claiming exemptions

Using the property and values that you listed on *Schedule A: Property* (Official Form 106A) as your source, list on this form the property that you claim as exempt.

Listing the amount of each exemption

For each item of property you claim as exempt, you must specify the amount of the exemption you claim. Usually, a specific dollar amount is claimed as exempt, but in some circumstances, the amount of the exemption claimed might be indicated as 100% of fair market value. For example, a debtor might claim 100% of fair market value for an exemption that is unlimited in dollar amount, such as some exemptions for health aids.

Listing which laws apply

In the last column of the form, you must identify the laws that allow you to claim the property as exempt. If you have questions about exemptions, consult a qualified attorney.

Schedule E: Executory Contracts and Unexpired Leases (Official Form 106E)

Use *Schedule E: Executory Contracts and Unexpired Leases* (Official Form 106E) to identify your ongoing leases and certain contracts. List all of your executory contracts and unexpired leases.

Executory contracts are contracts between you and someone else in which neither you nor the other party has performed all of the requirements by the time you file for bankruptcy. *Unexpired leases* are leases that are still in effect; the lease period has not yet ended.

You must list all agreements that may be executory contracts or unexpired leases, including the following:

- Residential leases (for example, a rental agreement for a place where you live or vacation, even if it is only a verbal or month-to-month arrangement);
- Service provider agreements (for example, contracts for cell phones and personal electronic devices);
- Internet and cable contracts;
- Vehicle leases;
- Supplier or service contracts (for example, contracts for lawn care or home alarm or security systems);
- Timeshare contracts or leases that you did not list on *Schedule A: Property* (Official Form 106A);
- Rent-to-own contracts;
- Employment contracts;
- Realtor listing agreements;
- Contracts to sell a residence, building, land, or other real property;
- Equipment leases;
- Leases for business or investment property;
- Supplier and service contracts for your business;
- Copyright and patent license agreements; and
- Development contracts.

Schedule F: Your Codebtors (Official Form 106F)

If you have any debts that someone else may also be responsible for paying, these people or entities are called *codebtors*. Use *Schedule F: Your Codebtors* (Official Form 106F) to list any codebtors who are responsible for any debts you have listed on the other schedules.

To help fill out this form, use both *Schedule B: Creditors Who Hold Claims Secured by Property* (Official Form 106B) and *Schedule C: Creditors Who Have Unsecured Claims* (Official Form 106C).

List all of your codebtors and the creditors to whom you owe the debt. For example, if someone cosigned for the car loan that you owe, you must list that person on this form.

If you are filing a joint case, do not list either spouse as a codebtor.

Other codebtors could include the following:

- Cosigner;
- Guarantor;
- Former spouse;
- Unmarried partner;
- Joint contractor; or
- Nonfiling spouse—even if not the spouse a cosigner—where the debt is for necessities (such as food or medical care) if state law makes the nonfiling spouse legally responsible for debts for necessities.

Schedule G: Your Income (Official Form 106G)

In *Schedule G: Your Income* (Official Form 106G), you will give the details about your employment and monthly income as of the date you file this form. If you are married and your spouse is living with you, include information about your spouse even if your spouse is not filing with you. If you are separated and your spouse is not filing with you, do not include information about your spouse.

How to report employment and income

If you have nothing to report for a line, write $0.

In Part 1, line 1, fill in employment information for you and, if appropriate, for a nonfiling spouse. If either person has more than one employer, attach a separate page with information about the additional employment.

In Part 2, give details about the monthly income you currently expect to receive. Show all totals as monthly payments, even if income is not received in monthly payments.

If your income is received in another time period, such as daily, weekly, quarterly, annually, or irregularly, calculate how much income would be by month, as described below.

If either you or a nonfiling spouse has more than one employer, calculate the monthly amount for each employer separately, and then combine the income information for all employers for that person on lines 2-7.

If all or part of your income is sporadic, such as overtime or commissions, include your best estimate of the monthly amount you expect to receive.

One easy way to calculate how much income you receive per month is to total the payments earned in a year, then divide by 12 to get a monthly figure. For example, if you are paid annually, you would simply divide your annual salary by 12 to get the monthly amount.

Below are other examples of how to calculate monthly amount.

Example for weekly payments:

If you are paid $1,000 every week, figure your monthly income in this way:

	$1,000	income every week
X	52	number of pay periods in the year
	$52,000	total income for the year

$52,000 (*income for year*) / 12 (number of months in year) = $4,333 monthly income

Example for bi-weekly payments:

If you are paid $2,500 every other week, figure your monthly income in this way:

	$2,500	income every other week
X	26	number of pay periods in the year
	$65,000	total income for the year

$65,000 (income for year) / 12 (number of months in year) = $5,417 monthly income

Example for daily payments:

If you are paid $75 a day and you work about 8 days a month, figure your monthly income in this way:

	$75	income a day
X	96	days a year
	$7,200	total income for the year

$7,200 (income for year) = $600 monthly income
12 (number of months in year)

or this way:

	$75	income a day
X	8	payments a month
	$600	income for the month

Example for quarterly payments:

If you are paid $15,000 every quarter, figure your monthly income in this way:

	$15,000	income every quarter
X	4	pay periods in the year
	$60,000	total income for the year

$60,000 (income for year) = $5,000 (number of months in year)
12 monthly income

Example for irregular payments:

If you are paid $4,000 8 times a year, figure your monthly income in this way:

	$4,000	income a payment
X	8	payments a year
	$32,000	income for the year

$32,000 (income for year) = $2,667 monthly income
12 (number of months in year)

In Part 2, line 11, fill in amounts that other people provide to pay the expenses you list on *Schedule H: Your Expenses*. For example, if you and a person to whom you are not married deposit the income from both of your jobs into a single bank account and pay all household expenses and you list all your joint household expenses on *Schedule H*, you must list the amounts that person contributes monthly to pay the household expenses on line 11. If you have a roommate and you divide the rent and utilities, do not list the amounts your roommate pays on line 11 if you have listed only your share of those expenses on *Schedule H*. However, if you have listed the cost of the rent and utilities for your entire house or apartment on *Schedule H*, you must list your roommate's contribution to those expenses on *Schedule G*, line 14. Do not list line 11 contributions that you already disclosed on line 5.

Note that the income you report on *Schedule G* may be different from the income you report on other bankruptcy forms. For example, the *Chapter 7 Statement of Your Current Monthly Income* (Official Form 108-1), *Chapter 11 Statement of Your Current Monthly Income* (Official Form 109), and the *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 110-1) all use a different definition of income and apply that definition to a different period of time. *Schedule G* asks about the income that you are now receiving and expect to receive, while the other forms ask about income you received in the applicable time period before filing. So the amount of income reported in any of those forms may be different from the amount reported here.

Schedule H: Your Expenses (Official Form 106H)

Use Column A of *Schedule H: Your Expenses* (Official Form 106H) to estimate the monthly expenses, as of the date you file for bankruptcy, for you, your dependents, and the other people in your household whose income is included on *Schedule G: Your Income* (Official Form 106G).

If you are filing under chapter 13, you must also complete Column B. In Column B, itemize what your monthly expenses would be under the plan that you are submitting with this schedule or, if no plan is being submitted now, under the most recent plan you previously submitted.

Include your nonfiling spouse's expenses unless you are separated. If both spouses are filing but one of you keeps a separate household, fill out separate *Schedule H* for Debtor 1 and Debtor 2 and write *Debtor 1* or *Debtor 2* at the top of page 1 of the form.

Do not include expenses that other members of your household pay directly from their income if you did not include that income on *Schedule G*. For example, if you have a roommate and you divide the rent and utilities and you have not listed your roommate's contribution to household expenses in line 11 of *Schedule G*, you would list only your share of these expenses on *Schedule H*.

Show all totals as monthly payments. If you have weekly, quarterly, or annual payments, calculate how much you would spend on those items every month.

Do not list as expenses any payments on credit card debts incurred before filing bankruptcy.

Do not include business expenses on this form. You have already accounted for those expenses as part of determining net business income on *Schedule G*.

On line 20, do not include expenses for your residence or for any rental or business property. You have already listed expenses for your residence on lines 4 and 5 of this form. You listed the expenses for your rental and business property as part of the process of determining your net income from that property on *Schedule G* (line 8a).

If you have nothing to report for a line, write $0.

A Summary of Your Assets and Liabilities and Certain Statistical Information (Official Form 106-Summary)

When you file for bankruptcy, you must summarize certain information from the following forms:

- *Schedule A: Property* (Official Form 106A)
- *Schedule B: Creditors Who Have Claims Secured by Property* (Official Form 106B)
- *Schedule C: Creditors Who Have Unsecured Claims* (Official Form 106C)
- *Schedule G: Your Income* (Official Form 106G)
- *Schedule H: Your Expenses* (Official Form 106H)
- *Chapter 7 Statement of Your Current Monthly Income* (Official Form 108-1), *Chapter 11 Statement of Your Current Monthly Income* (Official Form 109), or *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 110-1)

After you fill out all of the forms, complete *A Summary of Your Assets and Liabilities and Certain Statistical Information* (Official Form 106-Summary) to report the totals of certain information that you listed in the forms.

If you are filing an amended version of any of these forms at some time after you file your original forms, you must fill out a new *Summary* to ensure that your information is up to date and you must check the box at the top.

Your Statement of Financial Affairs if You Are an Individual Filing for Bankruptcy (Official Form 107)

Your Statement of Financial Affairs provides a summary of your financial history over certain periods of time before you file for bankruptcy. If you are an individual in a bankruptcy case, you must fill out this statement.
11 U.S.C. § 521(a) and Bankruptcy Rule 1007(b)(1).

If you are married and your spouse is not filing this case with you, you need only provide information on this form about your spouse if you are filing under chapter 12 or chapter 13 and are not separated from your spouse.

If you are in business as a sole proprietor, partner, family farmer, or self-employed professional, you must provide the information about all of your business and personal financial activities.

Although this statement may ask you questions that are similar to some questions on the schedules, you must fill out all of the forms completely to protect your legal rights.

Understand the terms used in this form

Legal equivalent of a spouse — A person whom applicable nonfederal law recognizes as having a relationship with the debtor that grants legal rights and responsibilities equivalent, in whole or in part, to those granted to a spouse.

Chapter 7 Statement of Your Current Monthly Income and Means Test Calculation (Official Forms 108–1 and 108–2)

If you are filing under chapter 11, 12, or 13, do not fill out this form.

Official Forms 108–1 and 108–2 determine whether your income and expenses create a presumption of abuse that may prevent you from obtaining relief from your debts under chapter 7 of the Bankruptcy Code. Chapter 7 relief can be denied to a person who has primarily consumer debts if the court finds that the person has enough income to repay creditors a portion of their claims according to a formula set out in the Bankruptcy Code.

You must file Official Form 108–1, the *Chapter 7 Statement of Your Current Monthly Income* if you are an individual filing for bankruptcy under chapter 7. This form will determine your current monthly income and compare whether your income is more than the median income for households of the same size in your state. If your income is not above the median, there is no presumption of abuse and you will not have to fill out the second form.

If your income is above the median, you must file the second form, Official Form 108 –2, *Chapter 7 Means Test Calculation*. The calculations on this form—sometimes called the *Means Test*—reduce your income by living expenses and payment of certain debts, resulting in an amount available to pay other debts. If this amount is high enough, it will give rise to a *presumption of abuse*. A presumption of abuse does not mean you are actually trying to abuse the bankruptcy system. Rather, the presumption simply means that you are presumed to have enough income that you should not be granted relief under chapter 7. You may overcome the presumption by showing special circumstances that reduce your income or increase your expenses.

If you cannot obtain relief under chapter 7, you may be eligible to continue under another chapter of the Bankruptcy Code and pay creditors over a period of time.

Read each question carefully. You may not be required to answer every question on this form. For example, your military status may determine whether you must fill out the entire form. The instructions will alert you if you may skip questions.

If you have nothing to report for a line, write $0.

Some of the questions require you to go to other sources for information. In those cases, the form has instructions for where to find the information you need.

If you and your spouse are filing together, you and your spouse may file a single statement. However, if an exclusion in Parts 1 or 2 applies to either of you, separate statements may be required. 11 U.S.C. § 707(b)(2)(C).

Chapter 11 Statement of Your Current Monthly Income (Official Form 109)

If you are filing under chapter 7, 12, or 13, do not fill out this form.

You must file the *Chapter 11 Statement of Your Current Monthly Income* (Official Form 109) if you are an individual filing for bankruptcy under chapter 11.

If you have nothing to report for a line, write $0.

Chapter 13 Statement of Your Current Monthly Income, Calculation of Commitment Period and Chapter 13 Calculation of Your Disposable Income
(Official Forms 110–1 and 110–2)

If you are filing under chapter 7, 11, or 12, do not fill out this form.

Official Forms 110─1 and 110─2 determine the commitment period for your payments to creditors, how the amount you may be required to pay to creditors is established, and, in some situations, how much you must pay.

You must file 110─1, the *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 110─1) if you are an individual and you are filing under chapter 13. This form will report your current monthly income and determine whether your income is at or below the median income for households of the same size in your state. If your income is equal to or less than the median, you will not have to fill out the second form. Form 110-1 also will determine your applicable commitment period─the time period for making payments to your creditors.

If your income is above the median, you must file the second form, 110─2, *Chapter13 Calculation of Your Disposable Income*. The calculations on this form—sometimes called the *Means Test*—reduce your income by living expenses and payment of certain debts, resulting in an amount available to pay unsecured debts. Your chapter 13 plan may be required to provide for payment of this amount toward unsecured debts.

Read each question carefully. You may not be required to answer every question on this form. The instructions will alert you if you may skip questions.

Some of the questions require you to go to other sources for information. In those cases, the form has instructions for where to find the information you need.

Generally, if you and your spouse are filing together, you should file one statement together.

Statement of Intention for Individuals Filing Under Chapter 7 (Official Form 112)

If you are filing under chapter 11, 12, or 13, do not fill out this form.

You must fill out the *Statement of Intention for Individuals Filing Under Chapter 7* (Official Form 112) if you are an individual filing under chapter 7 or if your case has been converted to chapter 7 and creditors have claims secured by your property or you have any unexpired leases of personal property. The Bankruptcy Code requires you to state your intentions about such claims and provides for early termination of the automatic stay as to personal property if the statement is not timely filed. The same early termination of the automatic stay applies to any unexpired lease of personal property unless you state that you intend to assume the unexpired lease if the trustee does not do so.

To help fill out this form, use the information you have already provided on the following forms:

- *Schedule B: Creditors Who Hold Claims Secured by Property* (Official Form 106B),
- *Schedule D: The Property You Claim as Exempt* (Official Form 106D), and
- *Schedule E: Executory Contracts and Unexpired Leases* (Official Form 106E).

Explain what you intend to do with your property that is collateral for a claim

If you have property that is collateral (or security) for a claim, you must state what you intend to do with that property.

You may choose to either give the property to the creditor, or keep the property. Below is more information about each of these options.

You may give the property to the creditor. If you give the property to the creditor (*you surrender the property*), your bankruptcy discharge will protect you from any claim for a deficiency if the property is worth less than what you owe the creditor, unless the court determines that the debt is non-dischargeable.

You may want to keep the property. If you want to keep your secured personal property, you may be able to reaffirm the debt, redeem the property, or take other action (for example, avoid a lien using 11 U.S.C. 522(f)).

- **You may be able to reaffirm the debt.** You may decide to remain legally obligated to pay a debt so that you can keep the property securing the debt. This is called *reaffirming a debt*. You may reaffirm the debt in full on its original terms or you and the creditor may agree to change the terms. For example, if you want to keep your car, you may reaffirm a car loan, stating that you will continue to make monthly payments for it. **Only reaffirm those debts that you are confident you can repay.** You may seek to reaffirm the debt if you sign a *Reaffirmation Agreement*, which is a contract between you and a creditor and you follow the proper

procedure for the *Reaffirmation Agreement.* 11 U.S.C. § 524. The procedure is explained in greater detail in the Disclosures that are part of the reaffirmation documents.

- **You may be able to redeem your property.** 11 U.S.C. § 722. You can redeem property only if all of the following apply:

  - The property secures a debt that is a *consumer debt* ─ you incurred the debt primarily for personal, family, or household use.

  - The property is *tangible personal property* ─ the property is physical, such as furniture, appliances, and cars.

  - You are either claiming the property as exempt or the trustee has abandoned it.

  To obtain court authorization to redeem your property, you must file a motion to redeem. If the court grants your motion, you pay the creditor the value of the property or the amount of the claim, whichever is less. The payment will be a single lump-sum payment.

Explain what you intend to do with your leased personal property

If you lease personal property such as your car, you may be able to continue your lease if the trustee does not assume the lease. To continue your lease, you can write to the lessor that you want to assume your lease. The creditor may respond by telling you whether it agrees that you may assume the lease and may require you to pay any past-due amounts before you can do so. If the lessor agrees to your request to assume the lease, you must write to the lessor within 30 days stating that you assume the lease.
11 U.S.C. § 365(p)(2).

File the *Statement of Intention* before the deadline

You must file this form either within 30 days after you file your bankruptcy petition or by the date set for the meeting of creditors, whichever is earlier. You must also deliver copies of this statement to the creditors and lessors you listed on the form. Bankruptcy Rule 1007(b)(2).

If two married people are filing together in a joint case, both are equally responsible for supplying correct information. Both debtors must sign and date the form.

Application for Individuals to Pay the Filing Fee in Installments (Official Form 103A)

If you cannot afford to pay the full filing fee when you first file for bankruptcy, you may pay the fee in installments. However, in most cases, you must pay the entire fee within 120 days after you file, and the court must approve your payment timetable. Your debts will not be discharged until you pay your entire fee.

Do not file this form if you can afford to pay your full fee when you file.

If you are filing under chapter 7 and cannot afford to pay the full filing fee at all, you may be qualified to ask the court to waive your filing fee.

See *Application to Have Your Chapter 7 Filing Fee Waived* (Official Form 103B).

If a bankruptcy petition preparer helped you complete this form, make sure that person fills out the *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 113); include a copy of it when you file this application.

Application to Have the Chapter 7 Filing Fee Waived (Official Form 103B)

The fee for filing a bankruptcy case under chapter 7 is $306. If you cannot afford to pay the entire fee now in full or in installments within 120 days, use this form. If you can afford to pay your filing fee in installments, see *Application for Individuals to Pay the Filing Fee in Installments* (Official Form 103A).

If you file this form, you are asking the court to waive your fee. After reviewing your application, the court may waive your fee, set a hearing for further investigation, or require you to pay the fee in installments or in full.

For your fee to be waived, all of these statements must be true:

- You are filing for bankruptcy under chapter 7.
- You are an individual.
- The total combined monthly income for your family is less than 150% of the official poverty guideline last published by the U.S. Department of Health and Human Services (DHHS). (For more information about the guidelines, go to http://www.uscourts.gov.)
- You cannot afford to pay the fee in installments.

Your family includes you, your spouse, and any dependents listed on *Schedule H.* Your family may be different from your *household*, referenced on *Schedules G* and *H*. Your household may include your unmarried partner and others who live with you and with whom you share income and expenses.

If a bankruptcy petition preparer helped you complete this form, make sure that person fills out *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 113); include a copy of it when you file this application.

If you have already completed the following forms, the information on them may help you when you fill out this application:

- *Schedule A: Property* (Official Form 106A)
- *Schedule G: Your Income* (Official Form 106G)
- *Schedule H: Your Expenses* (Official Form 106H)

For Individual Chapter 11 Cases: The List of Creditors Who Have the 20 Largest Unsecured Claims Against You Who Are Not Insiders (Official Form 104)

If you are filing under chapter 7, 12, or 13, do not fill out this form.

The people or organizations to whom you owe money are called your *creditors*. A *claim* is a creditor's right to payment. If you are an individual filing for bankruptcy under chapter 11, you must fill out the *For Individual Chapter 11 Cases: The List of Creditors Who Have the 20 Largest Unsecured Claims Against You Who Are Not Insiders* (Official Form 104).

Creditors may have different types of claims:

- Secured claims, or
- Unsecured claims.

If your debts are not paid, creditors with secured claims may be able to get paid from specific property in which that creditor has an interest, such as a mortgage or a lien. If a creditor has security in your property, but the value of the security available to pay the creditor is less than the amount you owe the creditor, the creditor has both a secured and unsecured claim against you. The amount of the unsecured claim is the total claim minus the value of the security that is available to pay the creditor.

Generally, creditors with unsecured claims do not have rights against specific property, or the specific property in which the creditor has rights is not worth enough to pay the creditor in full. For example, if you owe a creditor $30,000 for your car and the creditor has a security interest in your car but the car is worth only $20,000, the creditor has a $20,000 secured claim and a $10,000 unsecured claim.

	$30,000	Total amount you owe creditor
–	$20,000	Amount your car is worth (amount of secured claim)
	$10,000	Amount of unsecured claim

Many claims have a specific amount, and you clearly owe them. However, some claims are uncertain when you file for bankruptcy, or they become due only after you file. You must include such claims when listing your 20 largest unsecured claims on this list.

Claims may be contingent, unliquidated, or disputed.

The form asks you to identify claims that are:

- Contingent claims,
- Unliquidated claims, or
- Disputed claims.

A claim is *contingent* if you are not obligated to pay it unless a particular event occurs after you file for bankruptcy. You owe a contingent claim, for example, if you cosigned someone else's loan. You may not have to pay unless that person later fails to repay the loan.

A claim is *unliquidated* if the amount of the debt cannot be readily determined, such as by referring to an agreement or by a simple computation. An unliquidated claim is one for which there may be a definite liability but where the amount has not been set. For instance, if you were involved in a car accident, the victim may have an unliquidated claim against you because the amount of damages has not been set.

A claim is *disputed* if you do not agree that you owe the debt. For instance, your claim is disputed if a bill collector demands payment for a bill you believe you already fully paid.

A single claim can have one, more than one, or none of these characteristics.

On this form, list the creditors with the 20 largest unsecured claims who are not insiders

You must file this form when you file your chapter 11 bankruptcy case with the court.

When you list the 20 largest unsecured creditors, include all unsecured creditors, except for the following two types of creditors, even if you plan to pay them. Do not include:

- Anyone who is an *insider*. *Insiders* include relatives; general partners of you or your relatives; corporations of which you are an officer, director, or person in control; and any managing agent. 11 U.S.C. § 101(31).
- Secured creditors, unless the unsecured claim resulting from inadequate collateral value places the creditor among the holders of the 20 largest unsecured claims.

Make sure that all of the creditors listed on this form are also listed on either *Schedule B: Creditors Who Hold Claims Secured by Property* (Official Form 106B) or *Schedule C: Creditors Who Have Unsecured Claims* (Official Form 106C).

On the form, you will fill in what the claim is for. Examples include trade debts, bank loans, professional services, and government contracts.

Glossary

Definitions Used in the Forms for Individuals Filing for Bankruptcy

Here are definitions for some of the important terms used in the forms for individuals who are filing for bankruptcy. See *Bankruptcy Basics* (http://www.uscourts.gov/FederalCourts) for more information about filing for bankruptcy and other important terms you should know.

Annuity — A contract for the periodic payment of money to you, either for life or for a number of years.

Bankruptcy petition preparer — Any person or business, other than a lawyer or someone who works for a lawyer, that charges a fee to prepare bankruptcy documents. Under your direction and control, the bankruptcy petition preparer generates bankruptcy forms for you to file by typing them. Because they are not attorneys, they cannot give legal advice or represent you in bankruptcy court. Also called *typing services*.

Business debt — Debt that you incurred to obtain money for a business or investment or through the operation of the business or investment.

Claim — A creditor's right to payment.

Codebtor — If you have any debts that someone else may also be responsible for paying, this person or entity is called a *codebtor*.

Collateral for your debt — If your debts are not paid, creditors with secured claims such as a mortgage or a lien may be able to get paid from specific property in which that creditor has an interest.

Community property — Type of property ownership available in certain states for property owned by spouses and, in some instances, legal equivalents of spouses. Community property states and territories include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, and Wisconsin.

Consumer debt — Debt incurred by an individual primarily for a personal, family, or household purpose.

Contingent claim — Debt you are not obligated to pay unless a particular event occurs after you file for bankruptcy. You owe a contingent claim, for example, if you cosigned someone else's loan. You may not have to pay unless that person later fails to repay the loan.

Creditor matrix or mailing matrix — A list of names and addresses of all of your creditors, formatted as a mailing list according to instructions from the bankruptcy court in which you file.

Creditor — The person or organization to whom you owe money.

Creditor with secured claims — Creditors who have a right to take property if you do not pay them. Common examples are lenders for your car, your home, or your furniture.

Creditor with unsecured claims — Creditor who does not have lien on or other security interest in your property.

Current value, fair market value, or value — Generally, the fair market value as of the date of the filing of the petition. It is how much the property is worth, which may be more or less than when you purchased the property. See the instructions for specific forms regarding whether the value requested is as of the date of the filing of the petition, the date you complete the form, or some other date.

Debtor 1 — A debtor filing alone or one person in married couple who is filing a bankruptcy case with a spouse.

Debtor 2 — The second person in a married couple who is filing a bankruptcy case with a spouse.

Dependent — The term *dependent* generally means people who are economically dependent on the debtor regardless of whether they can be claimed as a dependent on the debtor's federal tax return. However, *Chapter 7 Means Test Calculation*, (Official Form 108-2) and *Chapter 13 Calculation of Your Disposable Income*, (Official Form 110-2) use the term in a more limited way. See the instructions on those forms.

Discharge — A discharge in bankruptcy relieves you from having to pay debts that you owed before you filed your bankruptcy case. Most debts are covered by the discharge, but not all. (The instruction booklet explains more about common debts that are excepted from discharge.)

Only your personal liability is removed by the discharge; creditors with discharged debts cannot sue you, garnish your wages, assert a deficiency against you, or otherwise try to collect from you personally.

But a discharge does not stop creditors from collecting debts from any property in which they have a security interest—such as foreclosing a home mortgage or repossessing an auto. Similarly, a discharge does not stop creditors from collecting from anyone else who is also liable on the debt, such as a relative who cosigned or guaranteed a loan.

Even if a debt has been discharged, you can choose to repay it by either *reaffirming the debt* (see the definition below) or by voluntarily paying the debt. The creditor may negotiate a reaffirmation agreement with you, but may not suggest that you make voluntary payment.

Disputed claim — If you disagree about whether you owe a debt. For instance, your claim is disputed if a bill collector demands payment for a bill you believe you already fully paid.

Eviction judgment — Your landlord has obtained a judgment for possession in an eviction, unlawful detainer action, or similar proceeding.

Executory contract — Contract between you and someone else in which neither you nor the other party has performed all of the requirements by the time you file for bankruptcy.

Exempt property — Property that the law permits you to keep.

Individual debtor — You are a person who is filing for bankruptcy by yourself or with your spouse.

Joint case — A single case filed by a married couple.

Legal equivalent of a spouse — A person whom applicable nonfederal law recognizes as having a relationship with the debtor that grants legal rights and responsibilities equivalent, in whole or in part, to those granted to a spouse.

Legal or equitable interest — A broad term that includes all kinds of property interests in both tangible and intangible property, whether or not anyone else has an interest in that property.

Negotiable instrument — Include personal checks, cashiers' checks, promissory notes, and money orders.

Non-individual debtor — You are filing for bankruptcy on behalf of a non-individual, such as a corporation, partnership, or limited liability company (LLC).

Non-negotiable instrument — Financial instrument that you cannot transfer to someone by signing or delivering it.

Nonpriority unsecured claim — Debt that generally will be paid after priority unsecured claims are paid. The most common examples are credit card bills, medical bills, and educational loans.

Payment advice — A statement such as a pay stub or earnings statement from your employer that shows all earnings and deductions from your pay.

Presumption of abuse — A legal determination meaning you may have too much income to be granted relief under chapter 7. You may overcome the presumption by showing special circumstances that reduce your income or increase your expenses.

Priority unsecured claim — Debt that the Bankruptcy Code requires to be paid before most other unsecured claims are paid. The most common examples are certain income tax debts and past due alimony or child support.

Property you own — Includes property you have purchased, even if you owe money on it, such as a home with a mortgage or an automobile with a lien.

Reaffirming a debt — You may agree to repay a debt that would otherwise be discharged by entering into a reaffirmation agreement with the creditor. A reaffirmation agreement may allow you to keep property that a creditor has the right to take from you because it secures the debt being reaffirmed. For a reaffirmation agreement to be effective, you must enter into it before discharge. You may ask the court to delay your discharge if you need more time to complete your reaffirmation agreement. The court may have to find that the agreement is not an undue burden on you before it can become effective.

Sole proprietorship — A business you own as an individual, rather than a separate legal entity such as a corporation, partnership, or LLC.

Unexpired lease — Lease that is still in effect; the lease period has not yet ended.

Unliquidated claim — If the amount of a debt cannot be readily determined, such as by referring to an agreement or by a simple computation. An unliquidated claim is one for which there may be a definite liability but where the value has not been set. For instance, if you were involved in a car accident, the victim may have an unliquidated claim against you because the amount of damages has not been set.

You — A debtor filing alone or one person in married couple who is filing a bankruptcy case with a spouse.

TAB 5B

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ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 20 - 21, 2012
Portland, Oregon

(DRAFT MINUTES)

The following members attended the meeting:

Bankruptcy Judge Eugene R. Wedoff, Chair
Circuit Judge Sandra Segal Ikuta
Circuit Judge Adalberto Jordan (by telephone)
District Judge Karen Caldwell
District Judge Jean Hamilton
District Judge Robert James Jonker
Bankruptcy Judge Arthur I. Harris
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Judith H. Wizmur
Professor Edward R. Morrison (by telephone)
Michael St. Patrick Baxter, Esquire
Richardo I. Kilpatrick, Esquire
J. Christopher Kohn, Esquire
David A. Lander, Esquire
John Rao, Esquire

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Troy A. McKenzie, assistant reporter
Circuit Judge Edward Levi, former chair
District Judge James A. Teilborg, liaison from the Committee on Rules of Practice and Procedure (Standing Committee)
Chief Bankruptcy Judge Pamela Pepper, Eastern District of Wisconsin
Peter G. McCabe, secretary of the Standing Committee
Patricia S. Ketchum, advisor to the Committee
Ramona D. Elliott, Deputy Director /General Counsel, Executive Office for U.S. Trustees (EOUST)
Lisa Tracy, Associate General Counsel, EOUST
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
Jonathan Rose, Rules Committee Support Officer, Administrative Office of the U.S. Courts (Administrative Office)
Benjamin Robinson, Administrative Office
James H. Wannamaker, Administrative Office
Scott Myers, Administrative Office
Molly Johnson, Federal Judicial Center
Debra L. Miller, Chapter 13 Trustee, South Bend, IN

Raymond J. Obuchowski, Esquire, on behalf of the National Association of Bankruptcy Trustees

Habbo G. Fokkens, Senior Counsel, Law Division, Wells Fargo

Introductory Items

The Chair asked participants to introduce themselves, and then he announced that this would be Mr. Rao's last meeting. He thanked Mr. Rao for his six years of service to the Committee and in particular for his stewardship of the model chapter 13 plan that was being presented to the Committee at this meeting.

2. Approval of minutes of Phoenix meeting of March 29 - 30, 2012.

The Committee approved the Phoenix minutes with several minor changes.

3. Oral reports on meetings of other committees.

(A) June 2012 meeting of the Committee on Rules of Practice and Procedure, including approval of the amendments to Civil Rules 37 and 45, which are scheduled to take effect on December 1, 2013.

The Chair said the Standing Committee adopted all the proposals put forth by the Advisory Committee. With respect to the pending amendments to Civil Rules 37 and 45, the Reporter said that no changes in the bankruptcy versions would be necessary. In response to a question about e-filing, the Reporter added that the Advisory Committee had been encouraged to move forward in its consideration of rules governing the use of electronic signatures for bankruptcy filings.

(B) June 2012 meeting of the Committee on the Administration of the Bankruptcy System.

The Chair said that the primary focus of the June meeting of the Bankruptcy Administration Committee was cost containment and the reduction of funding for bankruptcy courts. He said bankruptcy courts were being encouraged to pursue shared services with district courts in order to deal with reduced funding.

(C) Upcoming November 2012 meeting of the Advisory Committee on Civil Rules.

Judge Harris said that he would report on the November 2012 Civil Rules meeting when the Advisory Committee meets in the spring.

(D) April 2012 meeting and upcoming October 2012 meeting of the Advisory Committee on Evidence Rules.

Judge Wizmur said that at its spring 2012 meeting the Evidence Advisory Committee approved for public comment several rules dealing with the hearsay exception. She added that the Standing Committee has adopted the recommendation and that the rules have been published for comment. She said that electronic discovery rules will be discussed at a symposium in conjunction with the fall 2012 Evidence Committee meeting.

(E) April 2012 meeting and upcoming September 2012 meeting of the Advisory Committee on Appellate Rules.

The Reporter said that Appellate Rule 6 was currently published for public comment with changes designed to coordinate with the bankruptcy appellate rules that are also published for comment.

(F) Bankruptcy CM/ECF Working Group and the CM/ECF NextGen Project.

Judge Perris said the last big release for CM/ECF will be delivered to the courts in the next few weeks, and that the first release of NextGen is scheduled for early 2014.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

(A) Recommendation concerning Suggestion 12-BK-I by Judge John E. Waites (on behalf of the Bankruptcy Judges Advisory Group) to amend Rule 1006(b) to provide that courts may require a minimum initial payment with requests to pay filing fees in installments.

Judge Harris said the Subcommittee considered a suggestion by the Bankruptcy Judges Advisory Group (BJAG) to amend Rule 1006(b) to make clear that a court may require a minimum initial payment when approving requests to pay filing fees in installments. Some courts require an initial payment when a filing is made, Judge Harris said, because of concerns about collecting the filing fee if the case is dismissed before the full fee is paid. Courts do not construe Rule 1006(b) uniformly, however. The BJAG suggestion pointed out that some courts read the rule to prohibit requiring payment of a first installment at filing, and courts that require payment of a first installment at filing vary as to its amount.

BJAG suggested that uncertainty about the practice could be eliminated by amending Rule 1006(b) to clearly state that courts may require a minimum payment to accompany an application to pay in installments. BJAG also recommended that the rule set a maximum amount

for the first installment of 25% of the filing fee as a fair balance between maintaining debtor access to bankruptcy relief and reducing the court burden of collecting unpaid fees.

The Subcommittee concluded that the current language of Rule 1006(b)(1) is inconsistent with a local rule that requires an initial payment with an application to pay in installments. The Subcommittee considered whether to recommend that efforts be made to bring courts requiring an initial installment into conformity with Rule 1006(b), but ultimately concluded that that the national rule should be changed to permit a local practice of requiring an upfront payment of a reasonable amount with an application to pay in installments. Subcommittee members favored a flexible approach so long as the initial payment would not be so great as to discourage applications to pay in installments or to prompt more requests for fee waivers. Accordingly, the Subcommittee accepted BJAG's recommendation of 25% of the total filing fee as the maximum amount that could be required by local rule.

The Subcommittee also discussed but could not come to a consensus on whether the clerk's office should be affirmatively authorized to reject a filing if an initial installment payment required by local rule is not tendered at the time of filing.

Judge Harris said that he had reconsidered his own position since the Subcommittee discussed the BJAG's suggestion, and he thought it would be more equitable to debtors to set a national initial installment amount. Other members also supported a national minimum first installment. Mr. Rao, however, pointed out that an initial installment requirement might actually drive up requests for fee waivers in chapter 7. He said that approximately 30% of chapter 7 filers are eligible to request a fee waiver, but only 2-3% actually request a waiver. After additional discussion, most members favored revising Rule 1006 either to allow or to require a minimum first installment of some amount, but several members thought that additional research should be done to determine the scope of the problem and the likelihood that requiring an initial installment will drive up chapter 7 fee waiver requests. **The Subcommittee agreed to investigate and to report back in the spring.** The Subcommittee was also asked to consider procedures for dealing with any failure to pay an installment when due. No member supported a procedure that allowed the clerk to reject a filing for failure to provide a required initial payment, but there was support for immediately setting a hearing on dismissal.

(B) Recommendation concerning Suggestion 11-BK-N by for a rule and form for applications to waive fees other than filing fees, under 28 U.S.C. § 1930(f)(2) and (f)(3).

David Yen, an attorney at the Legal Assistance Foundation of Chicago, submitted a suggestion (11-BK-N) regarding the waiver of bankruptcy fees other than the ones that Rule 1006(c) and Official Form 3B currently address. That rule and form govern the waiver of filing fees by individual chapter 7 debtors, as authorized by 28 U.S.C. § 1930(f)(1). Subsection (f)(2) of that statute authorizes waiver of other bankruptcy fees for debtors who qualify for a filing-fee

waiver under (f)(1). And subsection (f)(3) provides that subsection (f) "does not restrict the district court or the bankruptcy court from waiving . . . fees prescribed under this section for other debtors and creditors."

Mr. Yen proposes that procedures and Official Forms be adopted for (1) debtors who have qualified for a filing-fee waiver and who seek the waiver of additional fees, and (2) debtors as well as creditors who seek fee waivers but who are not entitled to a filing-fee waiver under section 1930(f)(1). Mr. Yen gives some suggestions for the content of these forms.

The Subcommittee concluded that there was no need for a national form to process "other fee" waiver requests from debtors who had already been granted a filing fee waiver under subsection (f)(1) because the information reported in Official Form 3B would either be sufficient for the court to process the request or could be easily updated at the time the new request was made. The Subcommittee also did not think that an official form for waivers under 28 U.S.C. § 1930(f)(3) was necessary, but recommended that the Forms Subcommittee consider the creation of a director's form for such waivers that could be used by courts if they thought it would be useful to parties seeking fee waivers. **After discussing the Subcommittee's analysis, the Advisory Committee referred to the Forms Subcommittee the issue of creating a director's form for fee waivers other than for the chapter 7 filing fee.**

(C) Recommendation concerning Suggestion 12-BK-B Matthew T. Loughney (on behalf of the Bankruptcy Noticing Working Group) to amend Rule 2002(f)(7) to require notice of the confirmation of the debtor's chapter 13 plan.

Judge Harris gave the report. He said it is not clear why chapter 13 was omitted from the requirement in Rule 2002(f)(7) to notice confirmation orders, and that members of the Subcommittee saw potential benefits in providing notice of confirmation orders in chapter 13 cases. The Subcommittee also identified two concerns with the suggestion. First, the omission of chapter 13 cases from Rule 2002(f)(7) has not created any confusion in the case law, and nothing prevents courts from invoking their authority in appropriate cases to order service of notice of confirmation on creditors. Second, there is a concern that the costs of requiring notice will outweigh the benefits, particularly if the burden of noticing the confirmation order is placed on the debtor. **After a short discussion, the Advisory Committee deferred consideration and asked the Subcommittee to contact clerks' offices about whether notice is already being made already under local practice and, if so, whether the court, the trustee, or the debtor bears the cost of the noticing.**

(D) Oral report concerning Suggestion 12-BK-D Judge S. Martin Teel, Jr., to amend Rule 7001(1) as it concerns compelling the debtor to deliver the value of property to the trustee.

The Reporter said that the Judge Teel's suggestion would allow a trustee to seek turnover of the value of property, in addition to property itself, by a turnover motion against a debtor. Judge Teel's concern arose because sometimes the property subject to a turnover motion has already been disposed of by the time the trustee learns about it, and adding the recovery of the value of property to this procedure would eliminate the requirement for the trustee to file a separate adversary proceeding against the debtor. **The Reporter said that there were concerns about whether this was a sufficiently significant problem to require rule changes and that the Subcommittee would consider the issue further and report back at the spring meeting.**

5. Joint Report by the Subcommittees on Consumer Issues and Forms.

> Oral report on the mini-conference to gather input on new Rules 3001(c) and 3002.1 and the new mortgage forms –Form 10 (Attachment A), Form 10 (Supplement 1), and Form 10 (Supplement 2).

The Reporter explained that the day before the meeting the Advisory Committee's Consumer and Forms Subcommittees held a mini-conference on users' experiences with the new mortgage rules (Bankruptcy Rules 3001(c) and 3002.1) and forms (B10 Attachment, B10 Supplement 1, and B10 Supplement 2). Attorneys for consumer debtors and mortgage servicers, chapter 13 trustees, bankruptcy judges, and a bankruptcy clerk participated in the mini-conference and provided constructive feedback about their experiences with the rules and forms.

The participants were divided into panels, and each panel met by phone before the mini-conference to discuss pre-assigned topics. The panels then presented their topics to the rest of the participants at the meeting. The presentations revealed general acceptance of the disclosure requirements in the rules and forms, but also a desire to eliminate ambiguities and to make adjustments to facilitate compliance and provide additional information.

There was general agreement among the participants on the following topics:

- A detailed payment history should be attached to the proof of claim. The payment history should be in a form that can be automated.
- Disclosure requirements should be uniform nationwide with no local variations permitted.
- The proof of claim attachment should include the amount of the mortgage payment as of the petition date.
- Home equity lines of credit (HELOCs) should be treated differently from other types of claims secured by the debtor's principal residence.
- There should be a procedure for objecting to payment changes.
- An official form should be adopted for the Trustee's Notice of Final Cure Payment.

- Rule 3002.1 should specify when the creditor's notice obligation terminates if the residence is surrendered or the stay is lifted.
- Rule 3002.1 should state clearly that it applies whenever a plan provides for maintenance of current mortgage payments, even if there is no arrearage to be cured.
- The attachment to the proof of claim should be revised so that it calculates the claim amount.

Some of the participants agreed to gather additional information for the Advisory Committee's benefit, and others indicated that they would continue to engage in discussions in an effort to arrive at agreement on additional suggestions.

The Consumer and Forms Subcommittees will carefully consider the feedback received at the mini-conference and report at the spring 2013 meeting of the Advisory Committee on any proposals they recommend for amending the mortgage rules or forms.

6. Report by the Chapter 13 Form Plan Working Group.

> Recommendation concerning adopting an official form for chapter 13 plans; amending Rules 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009 in connection with adopting an official form; and contacting interest groups to obtain reactions to the proposed official form and rules amendments.

Mr. Rao said that a working group has been working on a proposal for an official form for chapter 13 plans. He said the working group started by surveying the many form plans used in districts across the country. It has attempted to incorporate common provisions from those plans into an official form and to provide a structure that allows for easy discovery of uncommon provisions.

In its deliberations, the working group also concluded that amendments to the bankruptcy rules would be helpful – if not essential – to an effective national form. Mr. Rao said that the working group has now created an initial draft of a proposed official form as well as proposed amendments to eight rules (Rules 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009), all of which were included in the agenda materials.

Mr. Rao said that the working group is now seeking feedback from the Advisory Committee on the draft proposals. He said he anticipated that the working group and the Consumer and Forms Subcommittees would use the feedback in revising the proposed plan and rules and would present a recommendation to the Advisory Committee at its spring meeting about publication for public comment. Mr. Rao said the working group members also recommend seeking feedback over the winter from outside groups, such as the National

Association of Chapter 13 Trustees and consumer and creditor attorney groups that practice in chapter 13.

Mr. Rao reviewed the draft plan and rules in the agenda materials and received a number of comments from members identifying issues with the proposals or suggesting improvements to the drafts. One proposal that generated significant discussion among members was the treatment of secured claims under the proposed rules and official form. Mr. Rao explained that a proposed change to the rules that would require secured creditors to file a proof of claim before the plan confirmation hearing date was designed to facilitate resolution of any differences between the plan and the proof of claim and thereby enhance the plan confirmation process.

Mr. Rao said that the Advisory Committee previously agreed in concept to a proposed rule amendment that would require secured creditors to file proofs of claim by a specified deadline. Some Advisory Committee members questioned whether the requirement should apply across all chapters, however, or only in chapter 13, and the question of whether it should apply in chapter 11 cases was referred to the Business Subcommittee. Mr. Rao said the Working Group favored applying the requirement to all chapters, and that the proposed amendment to Rule 3002(a) in the agenda materials would do that. The working group also proposed that the deadline for filing proofs of claim under Rule 3002(c) – which deals with claims in chapters 7, 12, and 13 – be reduced from 90 days after the first date set for the § 341 meeting of creditors to 60 days after the filing of the petition to ensure that claims are filed before the confirmation hearing in chapter 12 or chapter 13. He noted that a different time period is set out for involuntary chapter 7 cases, and that, consistent with the limitation in section 502(b)(9) of the Code, the proposed deadline would not apply to governmental creditors.

Judge Wizmur reviewed concerns considered by the Business Subcommittee about requiring secured creditors to file claims in chapter 11 cases. She said a memo discussing the issues was in the agenda materials at Tab 8A. The main concern, she said, is that there is nothing in chapter 11 practice that would be "fixed" by requiring secured creditors to file a proof of claim and that such a requirement might have unintended consequences. Under 11 U.S.C. § 1111(a), she said, all claims are "deemed filed" if scheduled by the debtor in a chapter 11 case unless they are scheduled as "disputed, contingent or unliquidated." Accordingly, if the creditor is satisfied with how its claim is scheduled, it does not need to file a proof of claim.

Judge Wizmur said that one perceived advantage of not filing a claim is that the creditor can avoid subjecting itself to the jurisdiction of the bankruptcy court. But, she pointed out, that strategy only works if the creditor is willing to accept how the debtor scheduled the claim. If the creditor wishes to dispute how the claim is scheduled, it must file a proof of claim in order to get the bankruptcy court to resolve the dispute, and, in so doing, will subject itself to bankruptcy court jurisdiction. Judge Wedoff added that changing Rule 3002(a) to require a deadline for filing such a claim just establishes a timeframe for bringing the dispute to the attention of the court. Section 1111(a) along with Rule 3003(c) would still allow the creditor to take advantage

of the "deemed filing" status, and thereby avoid the jurisdiction of the bankruptcy court, if there is no dispute. After further discussion, members who had initially expressed concern about applying a requirement for secured proofs of claim in chapter 11 said their concerns had been addressed.

Members also discussed proposed changes to Rule 9009. Judge Perris explained that the need for the proposed changes stemmed from past experience with the current language which says that, except as provided in Rule 3016(d), the Official Forms "shall be observed and used with alterations as may be appropriate." She said that some courts have interpreted "with alternations as may be appropriate" as allowing them to require a local variation of a form instead of the official version, and that filers sometimes modified Official Forms without clearly showing the modification. As an example, she said that some creditors simply refused to incorporate the new signature block that was added to the proof of claim form in 2011, and instead used an older version of the signature block. Judge Perris said that the version of Rule 9009 in the agenda materials was amended with the following principles in mind: (1) require courts to accept the official forms, (2) allow users to alter some forms to eliminate questions that are not relevant, (3) prohibit alteration of some forms, such as the proposed official form chapter 13 plan and the proposed detailed loan payment history being considered as a replacement for the official form attachment to the proof of claim form, and (4) allow a court to create local versions of official forms, as long as the court does not require use of a local version instead of the national version.

Members generally agreed with the objectives of the proposed changes to Rule 9009. There was concern, however, about whether the draft in the agenda materials clearly met the objectives. One member said that the phrase "shall be observed and used" seemed imprecise and suggested instead stating simply "shall be used." Some members pointed out that it may be necessary to go through the forms one by one to decide which should be alterable and which should not. Then Rule 9009 could state a general principle that the Official Forms should (or should not) be alterable, with a carve-out listing the forms to which the general principle does not apply. Another member suggested stating in the rule a general principle of non-alterability that would apply unless the Official Form itself allows for different treatment.

The Reporter pointed out that in deciding whether some official forms should be alterable, and others not alterable, the Subcommittee should be mindful that several rules have different phrasing regarding the use of official forms, such as "prepared as prescribed by the appropriate Official Form," or "shall conform to the appropriate Official Form" or "conform substantially to the appropriate Official Form." Finally, Ms. Ketchum pointed out that many of the forms that are designed to be altered, such as the forms used in chapter 11 cases, might be reclassified as director's forms so it is clear that alterations are not restricted by Rule 9009.

Members also discussed several options for obtaining feedback from outside groups about the proposed rules and form chapter 13 plan. **The Advisory Committee decided that the**

best approach to develop dialog among different chapter 13 constituencies would be to hold a one day mini-conference in Chicago on January 17, 2013, the day before the planned public hearing in Chicago on the bankruptcy rules currently published for comment. [After the meeting concluded, the proposed date was changed to **January 18, 2013,** the same date as the scheduled public hearing in Chicago].

7. Report by the Subcommittee on Forms and the Forms Modernization Project.

(A) Report on the status of the Forms Modernization Project.

Judge Perris gave an overview of the progress of the Forms Modernization Project (FMP) since its inception in 2008. She noted that the fee forms, income and expense forms, and means test forms were all approved for publication by the Standing Committee at its June meeting and were out for public comment now. She said that there was one comment so far (positive) but that she expected more feedback by the end of the comment period, February 15, 2013.

Judge Perris said the FMP was largely done with the individual filing package, and the agenda materials included the most recent versions of the following forms: proposed new Official Forms B101, B101AB, B102, B104, B106-Summary, B106A, B106B, B106C, B106D, B106E, B106F, B106-Declaration, B107, B112, B119, B318, B423, and B427 and the committee notes and instructions. She said the new numbering system was a result of creating different forms for filing individual and non-individual bankruptcy cases. She said that the 1XX series was used for forms filed early in individual bankruptcy cases, the 2XX series was for forms filed early in non-individual cases, the 3XX series was for orders and court notices, and the 4XX series was for forms filed later in the case. She added that because all the new official forms would be three digits, the director's forms (which currently use three digits) would use four digits, generally by adding a zero to the end of the current three-digit number.

Judge Perris explained that general instructions were now in the form of a booklet, rather than associated with each particular form, to avoid repetition of common instructions and to more clearly separate the instructions from the forms that would be filed. She said her purpose in bringing the forms to the Advisory Committee for this meeting was to solicit feedback to consider along with any comments received on the FMP forms that are currently out for public comment. She added that she anticipated resubmission of revised versions at the spring meeting with a request for publication.

Judge Perris explained the development of the non-individual forms is well underway, and those forms would likely look much different than the individual forms. The non-individual forms are being designed with the following guiding principles:

- Eliminate requests for information that pertains only to individuals.

- To the extent possible, parallel how businesses commonly keep their financial records.
- Include information identifying where and how the requested information departs from information maintained according to standard accounting practices.
- Provide better instructions about how to value assets on the schedules, and provide a valuation methodology that will allow people who commonly sign schedules to respond without needing expert valuations of assets.
- Revise the secured debt schedule to clarify the status of debts that are cross-collateralized and the relative priority of secured creditors.
- Require responsive information to be set out in the forms themselves and not simply included as attachments.
- Use a more open-ended response format, as compared to the draft individual debtor forms.
- Keep inter-district variations to a minimum, particularly with respect to the mailing matrix.

Judge Perris said that it was not yet clear when the non-individual forms would be ready to publish for comment, and that further consideration would be appropriate at the spring meeting. A likely possibility is that the individual and non-individual forms will have to be published in successive years. That means, Judge Perris said, that the Advisory Committee will have to decide whether to recommend that each group of forms go into effect in the normal course (i.e., in successive years), or if instead it would be less disruptive to the bankruptcy community to hold the effective date for the individual forms for a year to allow both individual and non-individual forms to go into effect at the same time.

The Advisory Committee reviewed the individual forms in the agenda materials and had the following comments:

B102: A member noted that there are missing checkboxes on questions 2 and 3. Another member asked whether including the leading "9" in the space for the debtor's Individual Taxpayer Identification Number (to be filled out if the debtor has an ITIN instead of a social security number) might be confusing to some debtors because there were only eight digits left to fill out. Another member suggested that it might be clearer if the "9" were underlined, and members agreed to defer to the judgment of the FMP's forms consultant.

B104 CN: A member suggested adding an "s" to "eliminate" in first line of last paragraph of the Committee Note for the list of 20 Largest Unsecured Creditors.

B106-Summary: The Advisory Committee discussed replacing "married people" with "spouses" because "married" is not in the Bankruptcy Code, but most members favored using "married people."

B106A: A member pointed out that there are missing checkboxes on question 1a. Another member suggested that the form ask for the purchase price of listed vehicles as a check on the accuracy of the figure reported for current value, but most members thought auto valuation books already provided a sufficient check on reported current value.

B106C: Judge Perris explained that the form combines both priority and non-priority unsecured claims, which are currently on separate forms, into a single form. One member suggested that, although it is clear from the layout and instructions on B106B that the unsecured portion of a secured claim should be reported on that form, a cross reference in the instructions for this form might also be helpful.

B106D: Judge Perris said that form incorporates a proposed change addressing *Schwab v. Reilly*, 130 S. Ct. 2652 (2010), that is further discussed at Tab 7B of the Agenda Book.

After the Advisory Committee reviewed all of the individual schedules, one member asked for reconsideration of the proposed numbering scheme as it pertains to the schedules. The suggestion would change Schedule B106A to B106AB, to signal that it is derived from current schedules A and B, and change B106C to B106EF to signal that it is derived from current schedules E and F. The proposed changes would allow the remaining schedules to retain the same letter designation as current versions which could be less disruptive. No other member seconded the proposal for reconsideration of the new numbering scheme.

B112: A member noted that checkboxes are missing from the first column in the middle of the first page of the form.

Instruction Book: A member said the table of contents should be updated, and noted that page numbers in the table of contents for the glossary seem to show only the leading digit (i.e., "4" instead of "40").

After further discussion, the Advisory Committee decided to include the individual forms, related committee notes, and instruction book in its report to the Standing Committee with a request for preliminary comments.

(B) Recommendation concerning revision of the exemption schedule as a result of the Supreme Court's holding in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010).

The Reporter explained that last spring, based on concerns raised during the public comment period, the Committee withdrew a proposed amendment to the exemption schedule that was designed to implement the holding in *Schwab*. The proposal would have added a checkbox to the form to allow debtors to state the value of a claimed exemption as the "full fair market value of the exempted property"—as an alternative to stating "Exemption limited to $_____."

The Reporter said that the FMP, and the Consumer and Forms Subcommittees, subsequently developed an alternative approach that was incorporated into the version of the exemption schedule included with the new FMP form at Tab 7A. **Because the Advisory Committee is not being asked to take action on any of the FMP forms at this meeting, however, the Chair tabled the recommendation regarding the *Schwab* holding until the spring meeting.**

8. Report by the Subcommittee on Business Issues.

(A) Report concerning amending the Bankruptcy Rules to require the filing of proofs of secured claims in chapter 11 cases.

See discussion at Tab 6.

(B) Recommendation concerning Suggestion 11-BK-M by attorney Jim F. Spencer, Jr., on behalf of the Advisory Committee to the Uniform Local Rules for the Northern and Southern Districts of Mississippi, to amend Rule 9027 to require that a notice of removal be filed with the bankruptcy clerk for the district and division where the civil action to be removed is pending.

Judge Wizmur said that the Subcommittee recommends no action on this item because the majority of the case law now holds that a notice of removal should be filed with the bankruptcy court, and because Bankruptcy Rule 9013 defines "clerk" as the bankruptcy clerk. **The Committee declined to take any action.**

9. Report by the Subcommittee on Privacy, Public Access, and Appeals.

Recommendation concerning Suggestion 12-BK-H by Professor Alan N. Resnick to amend the Bankruptcy Rules in response to *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

Judge Jordon said that the Subcommittee recommends reconsidering the suggestion at a future meeting because the Advisory Committee's *Stern*-related rules amendments are still out for public comment, because case law is still developing on *Stern,* and because a number of courts have created local rules that address the suggestion. **The Advisory Committee agreed to reconsider suggestion 12-BK-H at a future meeting**.

10. Report by the Subcommittee on Technology and Cross Border Insolvency.

Report concerning adopting a bankruptcy rule establishing standards for electronic signatures by parties other than attorneys.

Mr. Baxter said that, as described in the agenda materials, the Subcommittee has considered two options for the use of electronic signatures by debtors or others who are not part of the CM/ECF system: a declaration procedure similar to the one used in the Northern District of Illinois, or an amendment to Bankruptcy Rule 5005(b) that would allow electronic filing for documents filed and signed in accordance with Judicial Conference procedures. He said that, since there are not currently any Judicial Conference filing procedures for electronic signatures, the Subcommittee favored the declaration procedure as being easier to implement. The Subcommittee would like to do further research to determine how many other bankruptcy courts are already using declaration procedures like the one in Illinois, and to evaluate the experiences the three courts that are testing the pro se electronic filing pilot in NextGen. Dr. Johnson has agreed to undertake this research and will report her findings to the Subcommittee. **The Subcommittee will report back at the spring 2013 meeting.**

11. Oral report by the Subcommittee on Attorney Conduct and Health Care.

Mr. Rao said that the Subcommittee had no assignments.

Discussion Items

12. Oral report on the revision of Interim Rule 1007-I to conform the Interim Rule to the proposed amendment to Rule 1007, which is scheduled to take effect on December 1, 2012.

The Committee agreed that the Director should advise the courts to amend their local rule version of Interim Rule 1007-I so that it conforms to the pending Rule 1007 changes that are scheduled to go into effect on December 1, 2012.

13. Oral report on Suggestion 12-BK-E by Judge Richard Schmidt to amend Rules 7008, 7012, 9014, 9027, and 9033 in response to the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

The Chair said that part of the suggestion has already been incorporated into the *Stern*-amendments that are currently out for public comment, and that the Advisory Committee previously considered and rejected the possibility of requiring a litigant to affirmatively demand an Article III judge or face waiver of that right. **No further action required by the Committee.**

14. Oral report on Suggestion 12-BK-L by Judge Neil P. Olack to amend Rule 7008(b) to clarify the pleading requirements to recover statutory attorney's fees.

The Chair said this matter has already been considered and the current amendments published for public comment would eliminate 7008(b) in its entirety and replace it with 7054. **No further action required.**

Information Items

15. Oral report on the status of bankruptcy-related legislation, including the revision of Forms B200 and B201 as a result of the enactment of the Temporary Bankruptcy Judgeships Extension Act of 2012 (Pub. L. No. 112-121).

Mr. Wannamaker reviewed pending legislation. He explained that in light of the upcoming election it was unlikely that anything would pass this year, but that much of the legislation would probably be reintroduced in the next legislative session. He said that the Temporary Bankruptcy Judgeships Extension Act of 2012 did pass and has been enacted as Pub. L. No. 112-121. He said the new law would have a minor impact on two Director's Forms, B200 and B201, both of which would need to be updated to reflect an increase in the Chapter 11 filing fee that occurred to pay for the extended judgeships.

16. Oral update on opinions interpreting section 109(h) of the Bankruptcy Code.

The Reporter said that 11 U.S.C. § 109(h) requires individual debtors to complete an approved course on credit counseling in order to be a debtor under title 11. She said that courts were split on the meaning of the original language of that subsection and whether it allowed the debtor to file a petition on the same day as taking the course (so long as the course was completed prior to filing) or if it instead required the debtor to wait a calendar day before filing. The Reporter said that a technical amendment made to section 109(h) in 2011 was apparently designed to settle the court split by making clear that the debtor may file a case the same day as completing the required course. Unfortunately, however, the technical amendment introduced a new ambiguity, and might now be read to allow the debtor to file the petition and then complete the counseling course later in the day.

The Reporter said that if courts interpreting section 109(h) allow completion of the credit counseling course on the same day but after the petition is filed, the Advisory Committee may need to consider amendments to Rule 1007 and Official Form 23. She said no changes were needed yet, however, because the two bankruptcy courts that have reviewed the new language so far have both concluded that the credit counseling course must be completed before the bankruptcy petition is filed. She said she would report on further case law developments at the spring 2013 meeting.

17. *Bull Pen.*

Amendment to Official Form 23 to implement the proposed amendment to Rule 1007(b)(7) which would authorize providers of financial management course providers to file notification of the debtor's completion of the course, approved at September 2010 meeting.

The proposed amendment is scheduled to go forward at the spring 2013 meeting.

18. Rules Docket.

Mr. Wannamaker asked members to review the Rules Docket and to let him know if any changes are needed.

19. Future meetings: Spring 2013 meeting, April 2 – 3, in New York City. Possible locations for the fall 2013 meeting.

The Chair suggested Minneapolis for the fall 2013 meeting.

20. New business.

The Chair expressed his profound thanks to District Judge James A. Teilborg, who was attending his last meeting as liaison from the Standing Committee.

21. Adjourn.

Respectfully submitted,

Scott Myers

TAB 6

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TAB 6A

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MEMORANDUM

To: **Hon. Jeffrey S. Sutton, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Hon. Reena Raggi, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

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

Date: **November 26, 2012**

I. Introduction

Because of Hurricane Sandy, the Advisory Committee on the Federal Rules of Criminal Procedure ("the Committee") was unable to meet as scheduled on October 29-30 in Washington, D.C. The fall meeting was not rescheduled because of the difficulty of securing overlapping hotel accommodations and conference space at the Administrative Office for early to mid-November on such short notice, as well as the busy schedule of members.

This report discusses briefly two information items: (1) the proposed amendments to Rules 12 and 34 regarding pretrial motions, which were published for public comment and are being studied further by the Committee, and (2) a new proposal by the Department of Justice to amend Rule 4 to permit effective service of a summons on a foreign organization that has no agent or principal place of business within the United States.

II. Information Items

A. Rules 12 and 34

Proposed amendments to Rule 12 (which governs pretrial motions) and conforming changes to Rule 34 were published for public comment in August 2011, and numerous submissions were received, including detailed objections and suggestions from defense bar organizations.

Since the close of the comment period in February 2012, the Rule 12 Subcommittee (chaired by Judge Morrison England) and the Reporters have been studying the comments and discussing possible changes. The Reporters prepared an extensive memorandum, totaling more than 80 pages, analyzing the comments and discussing possible changes in the amendments as published. The Rule 12 Subcommittee discussed this memorandum and the concerns raised by the public comments at a half-day meeting held in conjunction with the full Committee's April meeting in San Francisco. The Reporters were asked to prepare additional materials, and following receipt of the additional materials the Rule 12 Subcommittee met again by teleconference in preparation for the Committee's October meeting. The Subcommittee reaffirmed the need for the amendment, but it concluded that several changes were warranted based on the public comments. With those changes, the Subcommittee has recommended to the Advisory Committee that the amended proposal be approved and transmitted to the Standing Committee.

As noted, Hurricane Sandy made it impossible to hold the Committee's fall meeting, and consideration of the Rule 12 Subcommittee's report has been deferred until the Committee's April meeting.

B. Rule 4

The Department of Justice has submitted a proposal to amend Rule 4 to permit effective service of a summons on a foreign organization that has no agent or principal place of business within the United States. The Department recommends that Rule 4 be amended in two key respects:

> (1) to remove the requirement that a copy of the summons be sent to the organization's last known mailing address within the district or principal place of business within the United States, and
>
> (2) to provide the means to serve a summons upon an organization located outside the United States.

The Department argues the proposed amendments are necessary to ensure that organizations committing domestic offenses are not able to avoid liability through the simple expedient of declining to maintain an agent, place of business and mailing address within the United States.

Because of the cancellation of the October meeting, the Committee has not yet discussed the Department's proposal. It will be on the agenda for the April meeting.

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TAB 7

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168 F.R.D. 679

Federal Rules Decisions
December, 1995

A SELF-STUDY OF FEDERAL JUDICIAL RULEMAKING
A REPORT FROM THE SUBCOMMITTEE ON LONG RANGE PLANNING TO THE COMMITTEE ON RULES OF PRACTICE, PROCEDURE AND EVIDENCE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

***680 COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

TO: The Committee on Rules of Practice and Procedure

FROM: Daniel R. Coquillette, Reporter

RE: Self-Study (Report of the Subcommittee on Long Range Planning.)

DATE: May 10, 1996

At the Committee's meeting on January 12-13, 1996, the Hon. Frank H. Easterbrook presented the Final Report of the Subcommittee on Long Range Planning, including the Subcommittee's *A Self-Study of Federal Judicial Rulemaking* prepared by himself and Professor Thomas E. Baker (the "Self-Study"). After discussion, a motion was made and passed as amended that: 1) the Subcommittee report be "received" by the Committee, 2) that the report be published as "received" and 3) that the Subcommittee be discharged. There was an expression of thanks to Judge Easterbrook and Professor Baker for their hard work.

On request of the Hon. Thomas S. Ellis, III, The Hon. Alicemarie H. Stotler, Chair, stated that the Committee would examine the document again at the June, 1996 meeting. Members should read the last draft carefully, and submit to the Reporter any last comments before final action at the June, 1996 meeting. See the Memorandum of February 20, 1996 from the Chair to the Committee soliciting comments. Helpful comments were received from the Chair and from Professor Edward Cooper, Reporter, Civil Rules Advisory Committee. These have been circulated. No further comments were received from members of the Committee.

RECOMMENDATION

On close examination, eight of the sixteen recommendations of the Self-Study have already been implemented, or are no longer necessary due to other changes, including the outcome of a meeting with the Chief Justice on December 13, 1995. (See "*Discussion,*" below.) Five more are within the special authority of the Chair of the Committee, who has taken careful note of the recommendations made. (See *Recommendations 4, 5, 6,* and *11*). This leaves just three recommendations. *Recommendations 8* and *10* express a concern about "the effects of creating local options in the national rules." *Recommendation 16* suggests a change in the rule making process to a biennial cycle "as the norm." These three recommendations can be acted upon at any time by motion of a member of the Committee, and will certainly be reexamined in the context of the pending 1996 Rand Study and the termination of the Civil Justice Reform Act at the end of this year.

The Self-Study has already proved most useful as a source of insight to both the Chair and Committee in making decisions. Like any good planning document, it is already being passed by events. Under these circumstances, ***681** there is no point in formally debating the document or adopting any specific recommendation. The Self-Study should be "received" as voted on January 13, 1996, with special gratitude expressed to Judge Easterbrook and Professor Baker.

DISCUSSION

Recommendations 1, 3, 7, 9, 12, 13, 14, and *15* all concern matters on which action has already been taken, or are currently unnecessary due to other changes. *Recommendation 1* and *9* suggests recommendations to the Chief Justice as to the "personal and professional diversity" of appointments to the Advisory and Standing Committees. These concerns have been brought to the Chief Justice's attention. *Recommendation 3* concerns the need for longer terms for Chairs. This was discussed with the Chief Justice on December 13, 1995.

Recommendation 7 concerns the effective use of data gathered by the Civil Justice Reform Act of 1990. This is already a matter of high urgency to the Chair and Reporter, and will be discussed at length when the Rand Report is in hand later this year. *Recommendations 12* and *13* suggest monitoring the growing demands on the Reporter and continuing the practice of appointing liaison members from the Standing Committee to the Advisory Committees. Both are being done.

Recommendation 14 suggests that the Committee "should continue to improve the style of new and amended rules, and should use its experience to decide whether to revise each set of federal rules fully." All new rules are being amended pursuant to the new style guidelines and under the oversight of the style Subcommittee. The issue of full restyling of complete sets of federal rules was discussed at length with the Chief Justice on December 13, 1995. He agreed that the Federal Rules of Appellate Procedure should be released for public comment in a completely restyled format, and suggested that restylization of other complete sets of federal rules should be held pending experience with the Appellate Rules. This is being done.

Recommendation 15 was to "abolish the Subcommittee on Long Range Planning" and to reassign "issues regarding long range planning" to the Reporter. This was done on January 13, 1996.

Recommendations 2, 4, 5, 6 and *11* are within the power of the Chair of the Committee to implement at anytime, and she has taken careful note of them. *Recommendation 2* suggests orientation meetings with new members. This has already been implemented by the Standing Committee, and has been recommended to the Advisory Committees: *Recommendation 4* suggests using Advisory Committee Reporters to circulate pertinent articles and organizing in-house seminars. This is also being encouraged. *Recommendations 5* and *6* suggest the use of electronic technology to improve the work of the Committees and the better use and development of available data. This is under continuous study, in consultation with the Administrative Office. *Recommendation 11* suggests that "the Standing Committee ..., must be mindful that the primary responsibility for drafting rules changes is assigned to the Advisory Committee" and that "substantial ***682** changes" by the Standing Committee be returned to the Advisory Committee for "further consideration." This is the present policy of the Chair.

All that remains are *Recommendations 8* and *10,* concerning the "effect of creating local options in the national rules" and *Recommendation 16,* suggesting a change in the rulemaking cycle to a "biennial cycle" as "the norm." As indicated above under "*Recommendation,*" these suggestions can be brought forward by motion of any member of the Committee in the context of specific rule changes. A more general discussion is also certain to result this year on the release of the 1996 Rand Study and the termination of the Civil Justice Reform Act of 1990.

In short, the Self-Study has been a most useful project. It is best "received" as an on-going resource for the Committee, rather than "accepted" as a fixed, rigidly applied policy. Special gratitude should be extended to Judge Easterbrook and to Professor Baker for their hard work and wisdom.

*683 Introduction

At the June 1993 meeting, the Standing Committee directed the Subcommittee on Long Range Planning to undertake a thorough study of the federal judicial rulemaking procedures, including: (1) a description of existing procedures; (2) a summary of criticisms and concerns; (3) an assessment of how existing procedures might be improved; and (4) appropriate proposed recommendations.

The self-study was deferred in anticipation of the January 1994 executive session and related discussion. At that meeting, the Standing Committee decided to solicit public comments. Appendix A to this Report contains a summary of the comments received. In addition, the Subcommittee canvassed the secondary literature. Appendix B to this Report is an annotated bibliography. An interim report was circulated in anticipation of the June 1994 meeting of the Standing Committee. The interim report raised several issues for preliminary discussion at that meeting and solicited further written comments from those in attendance. Drafts were circulated to the Standing Committee in January and July of 1995. After receiving comments from the Advisory Committees, the Subcommittee lays before the Standing Committee this final report, for consideration at the January 1996 meeting.

The following sections organize this Self-Study Report on the federal judicial rulemaking procedures: a History of the origins of modern rulemaking; a description of Current Procedures; a discussion of Evaluative Norms; the Issues and Recommendations for reforms; and a brief Conclusion.

History [1]

Modern federal judicial rulemaking dates from 1958. A few paragraphs of history inform our understanding of current practice.

The Judiciary Act of 1789 first authorized federal courts to fashion necessary rules of practice. [2] A lesser known statute enacted a few days later provided that in actions at law the federal procedure should be the same as in the state courts. [3] This created a system that seems odd to us today: a distinctly national procedure for equity and admiralty, coupled with a static procedure, conforming to the procedure in each state as of September 1789, for actions at law. Procedure for actions at law in federal ***684** courts was frozen, while state courts altered their procedures. The system became more odd, or at least more uneven, in 1828, when a statute required federal courts in subsequently admitted states to conform to 1828 state procedures. The same statute provided that all federal courts were to follow 1828 state procedures, with some discretion, in proceedings for writs of execution and other enforcement procedures. [4] This unsatisfactory system prevented the federal courts from following state procedural reform such as the New York Code of 1848, which merged law and equity and simplified pleading. [5]

The next legislative change came in 1872 when Congress required all actions at law to follow the corresponding state forum's rules and procedures. [6] Under the Conformity Act there were as many different sets of federal rules and procedures as there were states. [7]

This Report is not the place to retell the history of the Federal Rules of Civil Procedure, a story "told in large part in terms of dedicated individuals who worked and campaigned to bring them into existence." [8] What bears emphasis is that until 1938, that is, for the Nation's first 150 years, things were very different from what they are today.

Before 1938, the federal courts followed state procedural law, state substantive statutes, and federal substantive common law, even in diversity cases. Of course, the substantive common law of the forum state was recognized to be controlling in the famous 1938 Supreme Court diversity decision of *Erie Railroad Co. v. Tompkins,* [9] overruling *Swift v. Tyson*, which had stood since 1842. [10] And in the same year, after more than two decades of effort, national rules of procedure were adopted by the

Supreme Court, which embraced the work of an ad hoc Advisory Committee it had appointed under the Rules Enabling Act of 1934. [11] Thus 1938 marked an inversion in diversity cases: henceforth there would be federal procedural law and state substantive law. Those 1938 rules—recognizable today despite numerous amendments—established a nationally-uniform set of federal procedures, abolished the distinction between law and equity, created ***685** one form of action, provided for liberal joinder of claims and parties, and authorized extensive discovery.

The Supreme Court's ad hoc Advisory Committee comprised distinguished lawyers and law professors. While the ad hoc Committee members have been lionized for their accomplishment of drafting the rules, their more subtle but equally lasting achievement was to establish the basic traditions of federal procedural reform. [12] Two features of that experience have characterized federal judicial rulemaking ever since. First, the ad hoc Committee took care to elicit the thinking and the experience of the bench and bar by widely distributing drafts and soliciting comments, evincing willingness to reconsider and redraft its recommendations. Second, "the work of the Committee was viewed as intellectual, rather than a mere exercise in counting noses." [13] The ad hoc Committee recommended to the Supreme Court what it considered the best rules rather than rules that might be supported most widely or might appease special interests. Although the rulemaking process has been revised over the years since, these traditions have endured.

This positive experience located rulemaking responsibility inside the judicial branch, but the modern rulemaking process continues to evolve. A year after the new rules went into effect, the Supreme Court called on the ad hoc Advisory Committee to submit amendments, which the Court accepted and sent to Congress, and which became effective in 1941. [14] The next year, the Supreme Court designated the ad hoc Committee as a continuing Advisory Committee, which thereafter periodically submitted rules amendments through the 1940s and early 1950s. [15] But rumblings of dissatisfaction were heard, attributable in part to a perception that the Supreme Court merely rubber-stamped the recommendations from the Advisory Committee. Several of the Justices agreed with that criticism, dissenting from orders to complain that the proposals were not actually the work of the Court. [16] Other observers had misgivings about the tenure and influence of the members of the Advisory Committee, who served until resignation or death. In 1955 the Advisory Committee submitted an extensive report to the Supreme Court with numerous proposed amendments. The Court neither acted on the Report nor explained its inaction. Instead, the Justices ordered the Committee "discharged with thanks" and revoked its authority as a continuing body. [17]

The resulting void in rulemaking led the American Bar Association, the ***686** Judicial Conference, and other groups to express concern. [18] At the time, there was no small controversy over whether the Court should designate a new committee and how the members might be selected. A consensus emerged that some ongoing rulemaking process was desirable, but that the process had to be reformed. The replacement rulemaking procedures were designed by Chief Justice Earl Warren, Justice Tom C. Clark, and Chief Judge John J. Parker of the Fourth Circuit, during their cruise to attend the 1957 American Bar Association Convention. Justice Clark recalled: "On our daily walks around the deck of the Queen Mary, we thrashed out the problem thoroughly, finally agreeing that the Chief Justice, as the Chair of the Judicial Conference, should appoint the committees which would give them the tag of 'Chief Justice Committees.' " [19] This "Queen Mary Compromise" led to a statutory amendment by which Congress assigned responsibility to the Judicial Conference for advising the Supreme Court regarding changes in the various sets of federal rules—admiralty, appellate, bankruptcy, civil and criminal—which only the Court had formal statutory authority to amend. [20] The rulemaking process today follows the basic 1958 design. [21] Only two developments in rulemaking since then are sufficiently noteworthy to deserve brief mention in this history.

First, there was a showdown over the Federal Rules of Evidence. An Advisory Committee on Rules of Evidence was created in 1965. Following standard rulemaking procedures, after extensive study, the Advisory Committee promulgated a set of proposed rules in 1972. Those proposed rules were highly controversial, especially the rules dealing with evidentiary privileges. Congress postponed the rules of evidence pending further legislation. Then Congress made substantial revisions before enacting rules of evidence into law, effective in 1975. [22] The legislative veto provision attached to all rules of evidence has since been discarded, but the applicable statute still provides that any revision of the rules governing evidentiary privileges shall have no force unless

approved by Congress. [23] The Chief Justice reestablished an Advisory Committee on the Rules of Evidence in 1993, after a 20-year hiatus. This committee has embarked on a comprehensive review of the subject, but has decided not to reopen the privileges question.

***687** Second, Congress amended the Rules Enabling Act in 1988 to require the rules committees to hold open meetings, maintain public minutes, and afford wider notice of proposals and longer periods for public commentary on proposed rules. [24] Rulemaking today is more accessible to interested parties than ever before. It is also slower, and the exchange is not an unmixed blessing. In the wake of the 1988 changes, only Congress can change rules with dispatch. This means that any group with a perceived pressing need seeks its forum in the legislature rather than the judiciary, and today Congress regularly demonstrates its interest in federal rules matters by holding committee hearings and amending the rules themselves.

Current Procedures [25]

Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence, subject to an expressly reserved legislative power to reject, modify, or defer any judicially-made rules. This statutory authorization is found in the Rules Enabling Act. [26] Pursuant to this statutory authorization and responsibility, the judicial branch has developed an elaborate committee structure with attendant rulemaking procedures. The *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure* describe the current procedures for judicial rulemaking. [27] These rulemaking procedures were adopted by the Judicial Conference of the United States. They govern the operations of the Standing Committee and the various Advisory Committees in drafting and recommending new rules or amendments to the present sets of federal rules of practice and procedure.

The Judicial Conference of the United States consists of the Chief Justice of the United States, the chief judges of the 13 United States courts of appeals, the Chief Judge of the Court of International Trade, and 12 district judges chosen for a term of 3 years by the judges of each circuit. The Judicial Conference meets twice every year to consider administrative problems and policy issues affecting the federal judiciary and to make recommendations to Congress concerning legislation affecting the federal judicial system. [28] It also acts through an Executive Committee on some matters.

By statute, the Judicial Conference is charged with carrying on a "continuous study of the operation and effect of the general rules of practice and procedure." [29] The Conference is empowered to recommend changes and ***688** additions in the federal rules "from time to time" to the Supreme Court, in order to "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay." [30]

To perform these responsibilities of study and drafting, the Judicial Conference has created the Committee on Rules of Practice, Procedure, and Evidence (Standing Committee) [31] and various Advisory Committees (currently one each on Appellate Rules, Bankruptcy Rules, Civil Rules, Criminal Rules and Evidence Rules). All appointments are made by the Chief Justice of the United States, for a three-year, once-renewable term. Members are federal and state judges, practicing attorneys, and scholars. On recommendation of the Advisory Committee's chair, the Chief Justice appoints a reporter, usually from the academy, to serve the committee as an expert advisor. The reporter coordinates the committee's agenda and drafts the rules amendments and the explanatory committee notes.

The Standing Committee coordinates the rulemaking responsibilities of the Judicial Conference. The Standing Committee reviews the recommendations of the various Advisory Committees and makes recommendations to the Judicial Conference for proposed rules changes "as may be necessary to maintain consistency and otherwise promote the interest of justice." [32] The Secretary to the Standing Committee, currently the Assistant Director for Judges Programs of the Administrative Office of the U.S. Courts, coordinates the operational aspects of the entire rulemaking process and maintains the official records of the rules

committees. The Rules Committee Support Office of the Administrative Office provides day-to-day administrative and legal support for the Secretary and the various committees. [33] The Federal Judicial Center provides staff assistance, particularly with respect to research. [34]

Rulemaking procedures are elaborate:

> The pervasive and substantial impact of the rules on the practice of law in the federal courts demands exacting and meticulous care in drafting rule changes. The rulemaking process is time-consuming and involves a minimum of seven stages of formal comment and review. From beginning to end, it usually takes two to three years for a suggestion to be enacted. [35]

***689** By delegation from the Judicial Conference, each Advisory Committee is charged to carry out a "continuous study of the operation and effect of the general rules of practice and procedure" in its particular field. [36] An Advisory Committee considers suggestions and recommendations received from any source, new statutes and judicial decisions affecting the rules, and other relevant legal commentary. "Proposed changes in the rules are suggested by judges, clerks of court, lawyers, professors, government agencies, or other individuals and organizations." [37] Copies or summations of all written recommendations and suggestions that are received are first acknowledged in writing and then forwarded to each member. The Advisory Committees meet at the call of the chair. Each meeting is preceded by notice of the time and place, including publication in the *Federal Register,* and meetings are open to the public. [38] Upon considering a suggestion for a rules change, the Advisory Committee has several options, including: (1) accepting the suggestion, either completely or with modifications or limitations; (2) deferring action on the suggestion or seeking additional information regarding its operation and impact; (3) rejecting the suggestion because it does not have merit or would be inconsistent with other rules or a statute; or (4) rejecting the suggestion because, while it may have some merit, it is not really necessary or sufficiently important to warrant a formal amendment. [39]

The Reporter to the Advisory Committee, under the direction of the Advisory Committee or its Chair, prepares the initial drafts of rules changes and "Committee Notes" explaining their purpose or intent. The Advisory Committee then meets to consider and revise these drafts and submits them, along with an Advisory Committee Report which includes any minority or separate views, to the Standing Committee. The reporters of all the Advisory Committees are encouraged to work together, with the reporter to the Standing Committee, to promote clarity and consistency among the various sets of federal rules; the Standing Committee has created a Style Subcommittee, with its own Consultant, that works with the Advisory Committees to help achieve clear and consistent drafts of proposed amendments.

Once the Standing Committee approves the drafts for publication, the proposed rules changes are printed and circulated to the bench and bar, and to the public generally. Every effort is made to publish the proposed rules widely. More than 10,000 persons and organizations are on the mailing list, including: federal judges and other federal court officials; United States Attorneys; other federal government agencies and officials; state chief justices; state attorneys general; law schools; bar associations; and interested lawyers, individuals and organizations who request to be included on the distribution list. [40] A notice is published in the *Federal Register* and the proposed rules changes also are reproduced with explanatory committee ***690** notes and supporting documents in the West Publishing Company's advance sheets of *Supreme Court Reporter, Federal Reporter,* and *Federal Supplement.* [41] As a matter of routine, copies are provided to other legal publishing firms. Anyone who requests a copy of any particular set of proposed changes may obtain one.

The comment period runs six months from the *Federal Register* notice date. The Advisory Committee usually conducts public hearings on proposed rule changes, again preceded by widely-published notice. The hearings typically are held in several geographically diverse cities to allow for regional comment. Transcripts of the hearings are generally available. The six-month time period may be abbreviated, and the public hearing cut out, only if the Standing Committee or its Chair determines that the administration of justice requires that the process be expedited.

At the conclusion of the comment period, the reporter prepares a summary of the written comments received and the testimony presented at public hearing for the Advisory Committee, which may make additional changes in the proposed rules. If there are substantial new changes, there may be an additional period for public notice and comment. The Advisory Committee then submits the proposed rule changes and Committee Notes to the Standing Committee. Each submission is accompanied by a separate report of the comments received which explains any changes made subsequent to the original publication. The report also includes the minority views of Advisory Committee members who chose to have their separate views recorded.

The Standing Committee coordinates the work of the several Advisory Committees, individually and jointly. Although on occasion the Standing Committee suggests actual proposals to be studied, its chief function is to review the proposed rules changes recommended by the Advisory Committees. Meetings of the Standing Committee are open to the public and are preceded by public notice in the *Federal Register*. [42] Minutes of all meetings are maintained as public records and made available to interested parties.

The Chair and Reporter of each Advisory Committee attend the meetings of the Standing Committee to present the proposed rules changes and Committee Notes. The Standing Committee may accept, reject, or modify a proposal. If a Standing Committee modification effects a substantial change, the proposal may be returned to the Advisory Committee with appropriate instructions, including the possibility of a second publication for another period of public comment and public hearings. The Standing Committee transmits the proposed rule changes and Committee Notes approved by it, together with the Advisory Committee report, to the Judicial Conference. The Standing Committee's report to the Judicial Conference includes its recommendations and explanations of any changes it has made, along with the minority views of any members who wish to record separate statements.

The Judicial Conference, in turn, transmits those recommendations it approves to the Supreme Court of the United States. Formally, the ***691** Supreme Court retains the ultimate responsibility for the adoption of changes in the rules, accomplished by an Order of the Court. [43] The Supreme Court has at times played an active part, refusing to adopt rules proposed to it and making changes in the text of rules. [44] In practice, however, the Advisory Committees and the Standing Committee are the main engines for procedural reform in the federal courts. Under the enabling statutes, [45] amendments to the rules may be reported by the Chief Justice to the Congress at or after the beginning of a regular session of Congress but not later than May 1st. The amendments become effective no earlier than December 1 of the year of transmittal, if Congress takes no action. [46]

Since 1958 this rulemaking procedure has been followed regularly. [47] Spirited debates have been generated, from time to time, over particular proposals and sets of amendments. Some of these controversies have been resolved within the Third Branch. In recent years, these rulemaking procedures have been followed with the result that particular proposals have been rejected at each level of consideration—at the Advisory Committees, at the Standing Committee, at the Judicial Conference, and at the Supreme Court—often with attendant public debate and occasionally with high controversy. Debate likewise has attended proposals that have been approved. For example, the thorough changes to the civil discovery provisions in 1993 drew a separate statement from one member of the Supreme Court and a dissenting statement from three others.

Other controversies have played out in the Congress. For example, the 1993 amendments were the subject of hearings in both the Senate and the House of Representatives. A bill to rescind some of the discovery rules changes in that package passed the House but did not reach the floor of the Senate. Most recently, Congress included three new rules of evidence in the Violent Crime Control and Law Enforcement Act of 1994. [48] But over the years judges and the judiciary regularly have been heard to urge that ***692** Congress should feel obliged to exercise greater self-restraint in this regard and defer to the Rules Enabling Act process.

Evaluative Norms [49]

It is worth a few pages to consider rulemaking procedures from a normative vantage, to ask what are the explicit and implicit norms that overlay the entire enterprise of federal judicial rulemaking, beyond the more familiar first level of abstraction that would consider the policy underlying some specific rule change. This vantage includes rulemaking norms as they are currently understood as well as how they might be "reimagined." If rulemaking procedures are a meta-procedure, in the sense they are the procedures followed to promulgate new court procedures, then this segment of this Report, for what it is worth, might be described as a meta-meta-procedure. To describe it this way is to admit that this part has the smell of the lamp about it.

Inadequacies. Some argue that the existing norms to be found in the federal rules are not adequate and do not contemplate all that must be taken into account in a meaningful assessment of rulemaking as a process. Rule 1's goal for the federal civil rules is the "just, speedy, and inexpensive determination of every action." Although the three specified norms of justice, speed, and economy in civil litigation are rooted in common sense, they beg some of the most important questions that face rulemakers.

In a world in which time is money, speed and economy are two sides of the same figurative coin—and the sides are indistinguishable. Standing alone, they would argue for deciding every case by the quickest (and therefore cheapest) means possible—such as the flip of a more conventional coin on which the head does not mirror the tail. Of course a "heads or tails" system of resolving civil disputes would be intolerable, because it would be unjust. But the norm of justice lends itself more easily to condemnation of offered measures, rather than to a constructive way to sort proffered reforms, because it conceals at least two competing conceptions of what justice requires.

On the one hand, justice has something to do with fairness to individuals. Civil cases ought to reach the "right" result—the outcome that would follow if every relevant fact were known with absolute accuracy, if all uncertainty in meaning or application were wrung out of every relevant proposition of law, and if society itself could by some extraordinary plebiscite resolve whether the application of the general law to the unique circumstances of a particular case should be tempered by overriding concerns of the situational equity.

On the other hand, justice also has something to do with concerns of equality and aggregate social efficiency. If we were to allocate all of our resources to attaining the Nth degree of accuracy and absolute equity in our determinations of legal liability in a particular case, there would be far less, if any, resources left to adjudicate other deserving cases, let alone to ***693** accomplish all of the other functions government performs besides deciding civil disputes. Moreover, if equity were given a standing veto over pre-existing legal rules as applied to the actual facts of any given case, we would subvert the system of reliance on protected expectations that permits a society to function amid a welter of conflicting interests without every such conflict becoming a contested dispute brought into court.

The fact that Rule 1 speaks of a just determination in *every* case, not only the one before a judge at any given moment, is more a reminder of the inevitable tension between concerns of fairness and efficiency than a criterion for resolving that tension. It should therefore be no surprise that the history of federal civil procedure under the Federal Rules has featured a continuous but seldom explicitly elaborated struggle between what might be labeled the "primacy of fairness" versus the "primacy of efficiency." The "primacy of fairness" argues for subordination of procedural rules in favor of reaching the merits of the parties' dispute under the substantive law, and conditioning the finality of determination on liberal opportunities for amendment of pleadings, reconsideration by the trial court, and appellate review. The "primacy of efficiency" argues for rigorous enforcement of procedural rules to narrow the range of the parties' dispute and to expedite decision, and limiting the opportunity for, and scope of, appellate review.

Alternatives. What alternative or additional norms might be imagined for federal judicial rulemaking, beyond the norms that might be considered for the particular rules and procedures themselves? Federal rules of procedure should be adopted, construed, and administered to promote five related norms: efficiency, fairness, simplicity, consensus, and uniformity.

The application of the norm of efficiency to the rulemaking process requires an assessment of how costly it is to initiate consideration of a rule change and for that proposal to proceed to implementation by the federal courts. That assessment is

itself rather complicated, requiring, for instance, consideration of the social cost of the rulemaking process in terms of how much more time the rulemakers would have spent adjudicating cases, representing clients, or teaching students and conducting research, had they not been involved in the rulemaking process.

The assessment of the efficiency of the rulemaking process is further complicated by being interactive with assessment of the efficiency of the actual rules the rulemaking process produces. A conservative and time-consuming process of rulemaking may be less costly than fast-track rulemaking that taxes the litigation system with a constant need for retraining and a high rate of error attributable to unfamiliarity with as-yet unconstrued new rules, unless it can be shown that the long-run efficiency gains of new rules are consistently high. The inefficiency of frequently changing the rules might argue either for keeping the rulemaking process inefficient and thus resistant to proposals for change, or for adopting some form of staging process by which rule changes are limited, absent exceptional circumstances, to a prescribed schedule of once every so many years. Moreover, since the Judicial Conference does not have monopoly power in rulemaking, the relative efficiency of either an inert or a volatile judicial rulemaking process will be determined, in part, by the efficiency or inefficiency of the rules likely to be produced by direct Congressional action, or by ***694** Congressional delegation of local rulemaking power to individual district courts, should centralized rulemaking by the Judicial Conference committee structure be deemed unduly torpid.

As applied to the rulemaking process, the norm of fairness calls not only for receptivity to proposals for change by those not directly vested with rulemaking power, but also for access to the process of implementing a proposed rule change by those whose interests are most likely to be affected by any proposed change. How seriously is public comment encouraged and facilitated, and is this a pro forma gesture or is there evidence that adverse public comment makes a difference in the progression of a proposal into a rule change? As applied to the rules that the process produces, the norm of fairness requires evaluation of whether changes in the rules promote or retard the likelihood that individual cases will come to the right result, whether by adjudication or pro tanto by settlement, in relation to the efficiency gains or losses that result from such changes. Is the rulemaking system biased in favor of ratcheting up efficiency at the expense of fairness, or vice versa?

The norm of simplicity, specified in 28 U.S.C. § 331, serves the related interests of both efficiency and fairness. Unduly complex rules of procedure not only increase the cost of training, compliance, and enforcement, but also increase the likelihood of mistaken and hence unfair application. Any rulemaking process that regularly produces unduly complex rules of procedure or unduly complicates existing simple rules threatens the systemic goals of efficiency and fairness.

As applied to the rulemaking process, the norm of consensus overlaps, but does not duplicate, the norm of fairness. The norm of consensus demands, first, that the rulemaking process be sufficiently open to public input to be fairly representative of, or at least sensitive to, the interests of those who will be most affected by the rules it produces. But this norm demands more than mere notice and the opportunity to be heard. There must be some sharing of, or at least constraint upon, the power to make new rules, so that a lack of consensus about the wisdom of problematic proposed rules will normally suffice to block the adoption of such rules. Consensus should not be too strong a norm, however, because it favors the status quo. At the same time, the expectation for consensus should render the rulemaking process sufficiently inert to resist utopian reform by policymakers who are so detached from the arena of litigation to which the rules are directed that they are indifferent to the practical impact of rule changes upon those most affected by them.

The norm of uniformity is fundamental to the rulemaking process first set in place by the 1934 Rules Enabling Act. The Act was intended to promote a system of federal procedure that was not only trans-substantive but, with minor local variations, uniform in application in all federal district courts. Geographical uniformity is more important than trans-substantive application of the federal rules. Deviations from trans-substantive uniformity can, where necessary and appropriate, be expressly specified within the rules. Current examples are the special rules for class actions brought derivatively by shareholders, and the entire set of discrete rules of procedure for bankruptcy cases. But geographical disuniformity, even when expressly ***695** permitted by local opt-out provisions inserted into the national rules, operates insidiously and often covertly to impair the norms of both efficiency and fairness.

The norm of uniformity demands that the procedure for litigating actions in federal courts remain essentially similar nationwide. If each district court's rules of civil procedure are allowed to become sufficiently distinct that venue may affect outcome and that a special aptitude in local procedure becomes essential to competent representation in that court, forum-shopping would be encouraged. Moreover, litigants must either risk the unfairness of inadvertent mistake in conforming to localized rules of procedure or incur inefficient costs of insuring against the idiosyncrasies of local practice by ad hoc procedural research or the prophylactic retention of local counsel.

Issues and Recommendations

In this section of this Report, we turn to issues, analyses, and recommendations. [50] We take up issues related to the five entities in rulemaking: Advisory Committees; Standing Committee; Judicial Conference; Supreme Court; and Congress. The report concludes with a discussion of the time line of rulemaking.

A. Advisory Committees

Memberships: Criticisms have been leveled at the composition of the various rules committees. First, there have been allegations of an under-representation of the bar, particularly active practitioners, and of other identifiable interest groups within the bar, such as public interest lawyers. The often implied but sometimes explicit objection is that the Advisory Committees are dominated by federal judges. Second, there have been allegations of a lack of diversity of members. The argument is that the Advisory Committees ought to mirror the diversity of the federal bar, which includes more women and minorities than are currently found on the federal bench.

These are considerations for the attention of the appointing authority, the Chief Justice. In recent years, the Advisory Committees have been enlarged to include more non-judges. Whether they (and the Standing Committee) have already become too large for sustained exchanges and careful discussion is an interesting question; drafting by large committees is rarely successful. We doubt that they should be larger; perhaps they should be smaller. At all events, the rules committees are committees of the Judicial Conference of the United States, the policy-making entity of the Third Branch. They are not “bar” committees. “Representativeness”—seats on the Advisory Committee for major identifiable factions of the bar—is incompatible with the tradition of federal rulemaking based on a disinterested expertise, as opposed to interest-group politics. Rulemaking ought not follow public opinion or the ratio of specialties at the bar.

***696** Federal judges ought to remain a majority of the members of the Advisory Committees. They have the knowledge and time to act in the best interest of the public those courts serve. They are of course lawyers too, with experience on both sides of the bench. The ability to compare these two experiences makes judges especially appropriate rulemakers. This is not to say that the appointing power ought to be exercised without regard to the concerns we have mentioned. It is enough to suggest that these considerations be given appropriate attention and that efforts be made to identify well-qualified candidates with diverse personal and professional experiences. Some recognition may appropriately be given to enduring divisions in the practice of law. For example, the Advisory Committee on the Criminal Rules includes a representative of the Department of Justice and a Federal Public Defender. Analogously, the Civil Justice Reform Act of 1990 required that advisory groups be “balanced and include attorneys and other persons who are representative of major categories of litigants” in each district. [51]

To help achieve these goals, the Chief Justice now solicits advice widely from within the federal judiciary and the Administrative Office of the U.S. Courts. The Chief Justice could consider seeking suggestions from the American Bar Association and similar other organizations as well. [52]

[1] Recommendation to the Chief Justice: Appointments to the Advisory Committees should reflect the personal and professional diversity in the federal bench and bar.

Length of terms: Members' terms on the Advisory Committee should be long enough to maintain continuity and to allow a member to see a proposal through to adoption, but not so long as to create inflexibility and to render rulemaking an “insider's game.” The current practice is to appoint members for an initial three-year term followed by a second three-year term. On balance, this seems a reasonable normal term of years for members, but the Chief Justice should retain his existing discretion to make exceptions when appropriate to help committees follow through with extended rulemaking projects.

Members must master a potentially bewildering number of proposals within a complex process. The Chair, Reporter, and veteran members of the Advisory Committee can be of great assistance. The rotation on and off of the Advisory Committee affords new members a break-in period. This by-product is reason to maintain the staggered terms. Still, more formal assistance might be appropriate. This might take the form of an orientation meeting scheduled the day before the regular meeting of the Advisory Committee, attended by the new members, the Chair, and the Reporter, and perhaps others. Additionally, the Standing Committee and the Advisory Committees should continue to invite members whose terms have expired to attend the meeting after their term ends, in order to promote continuity.

***697 [2] Recommendation to the Advisory Committees: Chairs and Reporters of the Advisory Committees should schedule orientation meetings with new members.**

Somewhat different considerations obtain for Chairs. Rulemaking projects take three years from beginning to end. A Chair with a three-year term therefore can see a project through only if it commences at the outset of his or her tenure. A leader ought to be granted some time to think through proposals, to make them, and still have time to see them through. Reporters now serve indefinitely. Making a non-member of the committee the only enduring voice is questionable. A Chair, too, ought to provide continuity within the Advisory Committee and the Standing Committee. It is not uncommon for the Chairs to represent the judicial branch before the Congress. The practice of elevating an experienced member to the Chair is appropriate. If a Chair is designated at the end of one three-year term, a term of five years as Chair would be appropriate, increasing total service to eight years. This duration is not out of line in a life time-tenured institution. The shorter terms of members preserve sufficient opportunity for widespread involvement in rulemaking.

[3] Recommendation to the Chief Justice: The term for Chairs of the Advisory Committees should be five years.

Resources and support: Members of the Advisory Committees need sufficient resources and support for their part-time but nonetheless important duties. The permanent staff from the Administrative Office provides necessary logistical support for attending meetings and related duties. The Reporters provide important expertise and drafting assistance. Members exchange information about new developments as a matter of routine. Liaison members of the Standing Committee also contribute to the smooth operation of the committee system. The paper-flow through the Advisory Committees is substantial. The relevant literature in each of these areas of the law is growing rapidly.

Because committee members are part-time rulemakers it might be useful to provide them with some regular entrée to the secondary literature, including law journals and social-science publications that have some bearing on their responsibilities. The Reporters are the most logical bibliographers.

Various Advisory Committees have planned in-house seminars, presentations by panels of experts in their field, to bring members up-to-date on recent developments. These “continuing education” events should be continued.

[4] Recommendation to the Advisory Committees: Each Advisory Committee ought to consider adding to the Reporter's duties two tasks: first, regularly circulating law journal articles, social-science publications, and other pertinent articles; second, arranging and organizing in-house seminars.

Outreach and intake: One frequently heard criticism of federal rulemaking is that it is a closed process dominated by insiders and elites. The twin complaints are that some worthy proposals go begging for lack of a sponsor and some equally unworthy proposals are pushed through the process by ***698** members with an agenda. In fact, anyone can suggest a rules amendment; the Committees' meetings are open to the public, periods for public comment and public hearings are routine steps; proposed rules changes are widely published and distributed; [53] and the official records of the various rulemaking entities are public documents. Unless a flood of comments prevents it, the Advisory Committee (through its Secretary) acknowledges correspondence and later advises every correspondent of the action taken on his or her proposal. But even inaccurate perceptions have a way of overtaking reality, and they cannot go unchallenged. The Administrative Office's brochure entitled *The Federal Rules of Practice and Procedure—A Summary for Bench and Bar* is a good example of the ongoing effort to correct misconceptions about federal rulemaking. In August 1994 the Chair of the Standing Committee wrote the presidents of all state bar associations, requesting them to designate persons to receive drafts and make comments; so far 42 of the state bars have done this. Advisory Committees have established some independent points of contact.

To promote both the appearance and reality of openness, greater uses of technology should be explored. The extensive mailing list for requests for comments on proposed rules changes usually generates only a few dozen responses. Not infrequently, public hearings scheduled for proposals are canceled for lack of interest.

There are alternate ways to reach interested persons. For example, the public hearing before the April 1994 meeting of the Advisory Committee on the Criminal Rules was broadcast on C-SPAN. Other things might be tried. Public hearings might be conducted relying on closed-circuit television. Proposed rules changes, traditionally distributed in print media, can be made available on the Internet at low cost. Most universities and agencies of the federal government already have access to the Internet —although most federal judges do not. Law firms are increasingly likely to be connected to the Internet. The most recent set of proposed amendments published for comment has been made available via the Administrative Office's home page. [54] Persons should be permitted to lodge their comments online for collection and transmittal to the Advisory Committee. The Advisory Committees and the Standing Committee could communicate by e-mail and other electronic means. Distribution of documents by fax can be discontinued and replaced by distribution of attachments to e-mail messages.

[5] Recommendation to the Administrative Office: Electronic technologies should be used to promote rapid dissemination of proposals, receipt of comments, and the work of the rules committees.

***699 The need for research:** It is frequently asserted, most often by academic critics, [55] that federal rulemaking today is too dependent on anecdotal information rather than empirical research. Rules changes more often than not depend on the legal research of the Reporters combined with the informed judgment of the members of the rules committees. To make this argument is not necessarily to find fault with the model of disinterested experts as rulemakers. Nor does the argument deny the not-infrequent, well-documented instances when rulemakers have relied on empirical research. [56] Yet not enough has been done to incorporate empirical research into rulemaking on a regular basis. The major difficulties: research is expensive, it takes a long time, and the results are of doubtful utility when they come from survey research or from demonstration projects. Controlled experiments are rare indeed, and sophisticated econometric analysis of variation (the subject of the next section) is difficult to conduct.

We cannot expect members of the rules committees to be experts in empirical research techniques, although a few have been. We can expect the Reporters to be well-versed in the literature related to their expertise, including interdisciplinary writings and studies in other disciplines that have some bearing. Indeed, this ought to be a criterion for appointment of Reporters. It might

also be prudent for the Reporters to recruit colleagues in other disciplines whose expertise complements their own, as a kind of informal group of advisors. Additionally, the Administrative Office and the Federal Judicial Center may be called on to gather, digest, and synthesize empirical work of other institutions. The Advisory Committees should notify these institutions about what data ought to be collected. The Federal Judicial Center, in particular, should engage in original rules-related empirical research to determine how procedures are working. Likewise, the Center is adept at field studies and pilot programs—although, as we have observed, data from such projects is problematic, if only because of selection effects in litigation. (Litigants settle when they agree on a probable outcome; samples of litigated cases then may reflect the degree of uncertainty rather than the anticipated operation of the system. Moreover, the amounts paid in settlement, which may be the best indicators of anticipated performance, are rarely available to researchers.) Advisory Committees must take advantage of available data. Finally, a program might be developed for commissioning independent studies to be performed by outside experts under contract with the Advisory Committee.

In sum: the Standing Committee ought to be able to expect that the Advisory Committees will rely to the maximum possible extent on empirical data as a basis for proposing rules changes.

[6] Recommendation to all the Advisory Committees: Each Advisory Committee should ground its proposals on available data and develop mechanisms for gathering and evaluating data that are not otherwise available, and should use these data to decide whether changes in existing rules should be proposed.]

***700** An empirical research project of national scope is taking place under the auspices of the Civil Justice Reform Act of 1990. [57] Indeed, some have suggested that the program of district-by-district plans for case management has effectively created a second track of federal rulemaking that threatens the policy goals of national uniformity and political neutrality behind the Rules Enabling Act process. The pilot programs and district plans present an unparalleled opportunity for empirical research into the effectiveness of reforms, within districts and comparing districts with other districts. The Judicial Conference delegated primary responsibility for oversight and evaluation under the Act to the Committee on Court Administration and Case Management. But, as members of the Standing Committee will recall, the Standing Committee has established a liaison with that Committee. Congress has extended the deadline for reporting to December 31, 1996. [58]

The Advisory Committee on the Civil Rules has the most direct interest in the evaluation of the delay and cost reduction plans. That Advisory Committee will be obliged to conduct its own assessment of the final report to Congress with the expectation that some local innovations in practice and procedure will deserve to be incorporated into the Federal Rules of Civil Procedure—and that less successful innovations will be abandoned, if necessary by being forbidden in the national rules. (We return below to the subject of uniformity.) The final report of the RAND study will provide the Advisory Committee with data for assessing future proposals for rules changes. In the long run, the Advisory Committees and the Standing Committee ought to be expected to learn to better utilize empirical research during the evaluation and reporting cycle. To this end, the Standing Committee should request that the Advisory Committee on Civil Rules provide a written report generalizing from the experience with the 1990 Act.

[7] Recommendation to the Advisory Committee on the Civil Rules: The Advisory Committee should report on and make suggestions about how data gathered from the experience under the Civil Justice Reform Act of 1990 might effectively be used in rulemaking.

Finally, the Standing Committee ought to go about gathering information about the experiences with the phenomenon of local options in the national rules. As part of the 1993 amendments to the Federal Rules of Civil Procedure, districts were afforded the discretion to opt-in or opt-out of various discovery rules changes. The resulting patchwork provides the equivalent of field experiments in the effectiveness of the optioned rules changes. The Federal Judicial Center has begun to collect data on the experience with opting in and out. The Standing Committee should recommend that the Advisory Committee on Civil Rules, in conjunction with the Federal Judicial Center and scholars, seek to evaluate and compare the experiences between districts that opted-in and those that opted-out. This study ought to assess the particular measures involved and offer guidance to the

Standing Committee on the future appropriateness of writing local options into the national rules. There should be no bias in this inquiry: ***701** although it has long been a belief of the Standing Committee that uniform rules would facilitate a national practice, this belief should be investigated rather than treated as a shibboleth.

[8] Recommendation to the Advisory Committee on the Civil Rules: The Advisory Committee should assess the effects of creating local options in the national rules.

B. Standing Committee

Membership: The discussion about the composition of membership on the Advisory Committees will not be rehearsed here. Much of it applies to the Standing Committee.

It has been suggested that the Standing Committee should be reconstituted to consist only of an independent chair plus the chairs of the various Advisory Committees—or perhaps to have overlapping membership with the Advisory Committees, comprising the Chair plus one or two members of each Advisory Committee. Such a change would reduce the effectiveness of the Standing Committee as an independent voice (and a check), but it would increase continuity and ensure that each member is more thoroughly versed in the subject. The Chief Justice should consider each side of this balance in selecting the composition of the Standing Committee. One middle position between constituting the Standing Committee wholly from members of the Advisory Committees would be to make the Chairs full members of the Standing Committee, giving them *de jure* the roles that many have assumed *de facto* in recent years. We make no concrete suggestion here but again commend this possibility to the consideration of the Chief Justice.

The criticism that the committees do not "represent" the bar resonates more for the Advisory Committees, which have principal drafting responsibility, than for the Standing Committee. Therefore, we do not suggest enlarging the membership of the Standing Committee to include more attorneys. Nevertheless, it is proper to take into account goals of diversity in membership.

[9] Recommendation to the Chief Justice: Appointments to the Standing Committees should reflect the personal and professional diversity in the federal bench and bar.

Assuring uniformity. The Rules Enabling Act process is supposed to achieve and maintain a uniform national system of federal practice and procedure. National uniformity has been undermined by three factors. First, the ADR movement has created a menu of "nouveaux procedures" [59] that present choices of different resolution procedures for different kinds of disputes. Second, the Civil Justice Reform Act of 1990 balkanized rulemaking authority. Third, the Standing Committee has followed something of a reverse King James Version of rulemaking that "taketh away" and then "giveth": the Standing Committee's Local Rules Project has harmonized local rules with the national rules, but in recent rules amendments, e.g., Fed.R.Civ.P. 26(a), the Standing Committee has authorized district courts to strike off on their own paths, even to reject the national rule. But the new Fed.R.Civ.P. 83, effective on December 1, 1995, insists that local rules be ***702** consistent with, and not duplicate, national rules. To promote uniformity in other areas, the Standing Committee has circulated to all district courts a report of the Local Rules Project on criminal rules, and the Reporter has prepared a careful study that will serve as the basis of initiatives looking toward more uniform rules of ethics.

To identify these three developments is not to pass judgment on them, although the worry often heard is that the federal courts are reverting to the pre-1938 era of local procedure. It would not be appropriate for our Subcommittee to recommend a once-and-for-all solution—though we have already suggested taking a good hard look at the consequences. The Judicial Conference's own Long Range Planning Committee was unable to suggest a concrete solution. [60] Our exercise in taking the long-range view would not be complete if we did not at least draw attention to a worry expressed by many on the bench and in the bar. The worry is that the national rules and rulemaking are well on their way to becoming merely the lounge act and not the main room attraction in federal practice and procedure.

[10] Recommendation to the Standing Committee: The Standing Committee ought to keep the goal of national uniformity prominent in its expectations and decisionmaking. The Local Rules Project initiatives should be understood as a part of the continuing duty of the Standing Committee. There ought to be a strong but rebuttable presumption against local options in the national rules.% B

Redrafting proposals. The main task of drafting proposed rules belongs to the Advisory Committees. The Advisory Committees possess the requisite expertise and serve as the focal point for suggestions and public commentary on the present and proposed rules. Rulemaking procedures and tradition, however, recognize that the Standing Committee may revise drafts of proposed rules submitted by the Advisory Committees, before or after the public comment period. Those procedures and traditions likewise anticipate that the Standing Committee will exercise self-restraint. Members of the Standing Committee should communicate concerns about style and grammar to the Chairs and Reporters of the Advisory Committees before the meeting of the Standing Committee begins, to permit these matters to be rectified off the floor (it is easier to draft in small, peaceful groups) and presented to the Standing Committee in writing to facilitate careful reflection. Meetings of the Standing Committee then can focus on substance. We recognize, of course, that style and substance may be inseparable. If in the judgment of the Standing Committee a proposal requires substantial changes for either style or substance, the draft ought to be returned to the Advisory Committee. This division of the rulemaking labor obliges the Standing Committee to be aware of its function and respectful of the role of the Advisory Committees.

[11] Recommendation to the Standing Committee: The Standing Committee and its members must be mindful that the primary *703 responsibility for drafting rules changes is assigned to the Advisory Committees. Members of the Standing Committee should facilitate careful changes in language. If in the judgment of the Standing Committee a proposal requires substantial changes, the Standing Committee should return the measure to the Advisory Committee for further consideration.

Reporter. The Reporter to the Standing Committee has duties different from the those of the Reporters to the Advisory Committees. The former serves as a drafter, but the limited drafting function of the Standing Committee likewise limits this responsibility of its Reporter. The Reporter facilitates communication between the Advisory Committees and the Standing Committee, especially between regular meetings of the Standing Committee, by attending the meetings of the Advisory Committees and by communicating with their Reporters. The Reporter advises the Chair, assists the Administrative Office rules committee staff, and cooperates with the Federal Judicial Center. The Reporter monitors Congressional activities that are related to rulemaking and rules proposals. The Reporter keeps the Standing Committee abreast of commentary and literature related to the rules and rulemaking. The Reporter performs out-reach efforts such as appearing before bar groups to familiarize the profession and the public with the rulemaking process and particular proposals. The Reporter serves as a director for special projects, such as the Local Rules Project. The Reporter serves as an advisor to the Standing Committee, as for example with the pending challenge to the Ninth Circuit Rules jointly filed by several states' attorneys general. The Reporter, as the “scholar-in-residence” of the Standing Committee, pursues long range proposals for rulemaking.

If these duties continue to increase and become more time-consuming, the Standing Committee may eventually decide to appoint an Associate Reporter to assist the Reporter. The sense of the Subcommittee is that things have not yet reached that point. If the Standing Committee accepts the recommendation below to allow the Subcommittee on Long Range Planning to lapse as well as other recommendations made here that would add to the duties of the Reporter, then an Associate Reporter might be needed sooner rather than later. Therefore, our recommendation is open-ended.

[12] Recommendation to the Standing Committee: The Standing Committee should take cognizance of the growing demands being placed on its Reporter and eventually should consider whether to appoint an Associate Reporter.

Liaison members. Liaison members from the Standing Committee attend and have the privilege of the floor at meetings of the Advisory Committees. This innovation ought to be continued with some attention to developing a more definite role for the liaison members.

[13] Recommendation to the Chair: The practice of appointing liaison members from the Standing Committee to the various Advisory Committees should be continued.]

Subcommittee on Style. Judge Robert E. Keeton, the immediate past Chair of the Standing Committee, established a Subcommittee on Style and charged it with undertaking a restyling of the various sets of federal rules. ***704** That Subcommittee appointed a Consultant who has written a manual on rules drafting. The Subcommittee regularly has contributed to the efforts of the Advisory Committees and the Standing Committee to achieve greater consistency and clarity in the language of the federal rules.

The objective of this effort—uniform, readable, rules consistent with modern legal usage—is important not only to users of the rules but also to drafters, for clarity promotes understanding. The work of the Subcommittee, and particularly the Consultant's drafting manual, will be advantageous to the Standing Committee (and other legal drafters) in the years to come. But it remains an open question whether the plan to rewrite the body of existing rules will succeed. The principal question is whether it is possible to revise the rules without too many accidental change in meaning. A stated goal of preserving meaning invites readers to use the old rules to interpret the new ones, which may complicate interpretation for some time. (This has occurred with the 1948 amendments to Title 28 of the United States Code.) Discovery of ambiguities also leads to discovery of unwelcome substance; yet definitions of “unwelcome” differ, and the ensuing debate about substance may frustrate agreement on style changes.

The Supreme Court also has shown some unease with this process, which until the completion of the project produces differences in style across rules; the “restyled” rules use terminology in a different way from the older rules. When sending a package to Congress on April 27, 1995, the Supreme Court changed “must” to “shall” to preserve consistent usage. The Court may prefer an all-at-once project, of the kind now under way, but thoroughgoing restyling will be a long time coming for several sets of rules. The Advisory Committee on Appellate Rules has completed its initial review of a complete rewrite; the other advisory committees are mid-way in the process or have not yet begun it.

The Long Range Planning Subcommittee believes that the objects of the project are desirable, and that it should be continued. Better drafting for rules newly proposed, or revised for other reasons, should be pursued assiduously. Costs and benefits of revising whole sets of rules at once are more closely balanced: the gains are greater, but so too the costs. Experience with the Appellate Rules will permit the Standing Committee to decide how to proceed with the other sets of rules.

[14] Recommendation to the Standing Committee: The Standing Committee should continue to improve the style of new and amended rules, and should use its experience to decide whether to revise each set of federal rules fully.

Subcommittee on Long Range Planning. The immediate past Chair of the Standing Committee established a Subcommittee for Long Range Planning. Since then, the Subcommittee has planned to find a role, without substantial long range success. The rulemaking process *is* a form of long-range planning, which suggests that there is no need for a separate long-range planning organ. The Subcommittee has filed reports with the Standing Committee about long range proposals already in the rulemaking pipeline and recommended the introduction of other such proposals. It has recommended that Advisory Committees study comprehensive packages of procedural reforms proposed by scholars, committees, and bar groups. (In ***705** the three years since the Standing Committee adopted this recommendation, no Advisory Committee has reported back to the Standing Committee on any of these proposals.) The Subcommittee has attempted to monitor the work of the Judicial Conference's Committee on Long Range Planning. It performed this self-study of rulemaking procedures.

The term of one member of the Subcommittee as a member of the Standing Committee expired before the preparation of this Report; his vacancy on the Subcommittee has not been filled. The term of Professor Baker, the original chair of the Subcommittee, expired at the end of September 1995. He too has not been replaced, but he has continued to participate in the preparation of this final version of the Report. The Subcommittee enthusiastically recommends that with the completion of this Report the Standing Committee disband the Subcommittee on Long Range Planning. (Similarly, in June 1995 the Chief Justice discharged the Judicial Conference's own Committee on Long Range Planning.) Another option is to assign long range planning in rulemaking to the reportorial function, perhaps on the occasion of creating the position of Associate Reporter, as is anticipated in a previous recommendation.

[15] Recommendation to the Chair of the Standing Committee: The Subcommittee on Long Range Planning should be abolished. Issues regarding long range planning in the rules process should be reassigned to the Reporter.

C. Judicial Conference

The Judicial Conference performs a function somewhere between the Standing Committee's and the Supreme Court's. For the most part, the Judicial Conference evaluates proposals on the basis of the paper record compiled by the Advisory Committees and the Standing Committee, and it gives thumbs up or thumbs down (the latter rarely) without making changes. We do not make any recommendations concerning the way the Judicial Conference deals with proposals from the Standing Committee —except for the obvious implication that a change in the role of the Supreme Court (discussed below) would alter the role of the Judicial Conference, and vice versa. The Judicial Conference is the largest body that participates in the process and hence is the least suited to technical drafting. It also has the least time for rulemaking; its agendas are crowded with other subjects, and rules are discussed briefly when they are discussed at all. This increases the chance of misunderstanding, which leads to error. As we mention below, therefore, if the Supreme Court retains its current role, it may be appropriate to remove the Judicial Conference as a separate step in the process.

D. Supreme Court

The main issue regarding the Supreme Court's participation in judicial rulemaking is whether the High Court should continue its role in the statutory scheme. Congress has designated the Supreme Court as the entity with power to promulgate rules for the federal courts, subject to the possibility of legislation during the seven months between proposal and effective date.

***706** Historically, the Court's role has been justified on two levels. First, the Supreme Court, as the highest federal court, exercises supervisory powers over the lower federal courts. Second, the prestige of the Court lends authority to the rules.

Commentators and individual Justices have questioned these justifications and argued that the Court's role is, in the pejorative, to serve as a “rubber stamp.” Others on and off the Court have answered that the historic rationales still apply. They draw attention to the occasions when the Supreme Court has disapproved or altered draft rules and to the dissenting statements from some of the Justices regarding particular rules. There is the further, but inevitable, complication that the Supreme Court frequently is called on to interpret the rules and to decide whether they are valid under the Rules Enabling Act and the Constitution.

Justice White's statement regarding the 1993 package of amendments summed up his 31 years of experience in judicial rulemaking. [61] He concluded that the Supreme Court's “promulgation” of rules functionally amounts to a certification to the Congress that the Rules Enabling Act procedures are operating properly and that the particular proposals before the Court are the products of a careful rulemaking process. The transmittal letters from the Chief Justice since then have made the same point.

Given the considerations on both sides, we leave to the Justices themselves the question whether there should be any change in their role—and, correspondingly, whether, if it is best to maintain the Court's current role, it would be appropriate to reduce

the role of the Judicial Conference. Having *both* of these bodies pass on rules that have already been fully ventilated consumes much time for little purpose.

There is one other possible change worth mentioning. A few years ago, the British Embassy sent a diplomatic note to the Court concerning the implications of a proposal for service in foreign countries. The measure was returned to the Judicial Conference for further consideration. After the concerns of the foreign governments were addressed, the proposal went forward. In the aftermath of that round of rulemaking, the Justices informed the Standing Committee that they wanted to be alerted to any controversy or objections to particular proposals, as part of the written record forwarded with the rules packages. The Supreme Court may appropriately conclude that return of rules packages—rather than the revision of the proposals and promulgation of rules that the Advisory Committees and Standing Committee have not reviewed—is the best approach when the proposals it receives seem problematic to the Justices.

E. Congress

The separation of powers that is part of the structure of the Constitution is not designed for efficiency. By creating federal courts and defining their jurisdiction, Congress keeps the promise of the Preamble to "establish justice." Rulemaking is a power that is legislative in nature to the extent that rules affect the interests of litigants and regulate the conduct of officers of the Third Branch (including attorneys), but is nevertheless ***707** delegated partly to the Third Branch. The line drawn in the statutory authorization allows rules dealing with "practice and procedure" but prohibits rules that "abridge, enlarge or modify any substantive rights." [62] On the judicial side, this distinction requires careful discernment.

Congress has the power to adopt rules and procedures for the federal courts. [63] "May" does not imply "should." The wisdom behind the Rules Enabling Act procedures is deep. The Third Branch has the expertise to write rules of practice and procedure. Respect for the independence of the coordinate judicial branch, and the overarching values that independence protects, also counsels moderation in legislative promulgation or amendment of rules. Similarly with respect to legislation regulating the rulemaking process. In his year-end report for 1994, the Chief Justice wrote: "I believe that this [Rules Enabling Act] system has worked well, and that Congress should not seek to regulate the composition of the Rules Committees any more than it already has." The Judicial Conference has reached the same conclusion. See also Recommendation 1 above. And the Judicial Conference's Committee on Long Range Planning shares this understanding. See *Proposed Long Range Plan for the Federal Courts* (Mar.1995) Recommendation 30, Implementation Strategy 30a ("Rules should be developed exclusively in accordance with the time-tested and orderly process established by the Rules Enabling Act.").

The Judicial Conference has the responsibility to represent before Congress the interests of the federal courts and the citizens they serve. The Standing Committee has the responsibility to aid the Judicial Conference in performing this role. The Standing Committee should continue to monitor legislative activity and serve as a resource to the Judicial Conference to remind Congress of the values behind the Rules Enabling Act. Existing links between the Advisory Committees (and the AO) and Members of Congress and committee staffs should be maintained and, if possible, reinforced. It may be necessary to remind Congress, too, that the 1988 legislation increasing the time needed to amend a rule affects the relation between legislative and judicial branches in the way we discussed above.

F. The Rulemaking Calendar

The rulemaking cycle: Three changes in the rulemaking environment have occurred at roughly the same time. (1) The period between initial proposal and ultimate rule was extended in 1988 by increased opportunities for comment and an increased length of report-and-wait periods, so that it is now difficult to see a proposal through in fewer than three years. (2) The national rulemaking process had become more frenetic, with multiple packages pending simultaneously. Instead of five or more years between amendment cycles (the old norm), it is now common to see multiple amendments to the same rule in different phases: one pending before Congress, another pending before the Judicial Conference, a third out for public comment, and a fourth

under consideration by an Advisory Committee. ***708** (3) Meanwhile local rulemaking has burgeoned, in part, but only in part, at the instance of Congress (the Civil Justice Reform Act of 1990).

On one thing most people agree: *all* of these developments are unfortunate. It takes too long to amend a rule or create a new one, and delay not only perpetuates whatever problem occasioned the call for amendment but also invites Congress and local courts to step in. The former undermines the Rules Enabling Act process (and discards the benefits of expertise); the latter undermines national uniformity. If the Supreme Court cannot respond quickly to a problem, legislation or local rules must be the answer. That amendments to the Rules Enabling Act are themselves responsible for the extended rulemaking cycle—so that Congress is the source of the delay it bemoans—offers no succor to those who seek swift changes. At the same time, few people can be found to support the existence of multiple changes to the same rule. Professor Wright, an observer and long-time participant in the rulemaking process, has condemned the process of overlapping amendments in no uncertain terms.[64] His *cri de coeur* is one among many strong and fundamentally correct indictments. It also illustrates the intractable nature of the problem—for it is precisely the change in the length of the cycle that has made overlaps inevitable!

When rules could be amended after a year or so of effort, and when the Chairs of the Advisory Committees and Standing Committee had indefinite terms, it was easy to have discrete and well-separated packages of rules. The heads of the committees could plan a coherent program, confident that they could see it through, and that if new information called for prompt change, they could accomplish it by adding it to an existing package. No more. The increased length and formality of the rulemaking process makes it difficult for a bright idea or alteration required by legislation to "catch up" with an existing package. Meanwhile the members of the committees serve shorter terms, so that fresh blood brings fresh suggestions every year and the Chairs, to have any effect before their three-year terms expire, must act with dispatch. No wonder we see a drawn-out process in which amending cycles overlap while local rules sprout like weeds. And it is almost impossible to imagine a cure while the duration from proposal to effectiveness is longer than the terms of Chairs.

What is worse, a cure that entailed enforced separation of rules packages—say, a maximum of one package per three-year term of a Chair—would have large costs of its own. Would the package have to start life at the outset of the Chair's time? Too soon; the Chair needs time to settle in, do some deep thinking, review the data, collect the thoughts of the committee, and so on. Then would the package start late in the Chair's term? Too late; its architect would leave before shepherding the package through and accommodating the many demands for amendments that occur in the process. Meanwhile new things come up—new statutes, decisions that interpret a rule to create a trap for the unwary (the source of the overlapping proposals concerning Fed.R.App.P. 3 and 4 that Professor Wright bemoaned)—and the cost of tidiness may be that litigants forfeit their rights. Put to a choice between simplifying the life of judges and authors, and preserving the rights of litigants, the rules committees sensibly ***709** choose the latter. That seals the fate of proposals to simplify and separate amendment packages without any escape hatch. Once we allow the escape hatch, however, messiness is inevitable.

Several recommendations above aim at relieving the stresses that have led to the current problems. We have suggested longer terms for Chairs and slower turnover of committees. We have ruminated about the possibility of abbreviating the rulemaking process by skipping one or another of the participants (either the Judicial Conference or the Supreme Court). What we now take up is the possibility of setting norms for our own work—norms rather than rules, for the reasons we have explained, but norms that if implemented will relieve some points of stress.

Let us establish biennial cycles as the norm. Rules would be issued for comment every other year—not every year, or every six months, as is possible now. Advisory Committees could be encouraged to make recommendations to the Standing Committee every year (to ease the problem of congestion for both the Advisory Committees and the Standing Committee), but proposals would be consolidated for biennial publication. All Advisory Committees could be on the same schedule, so unless some emergency intervened the bar could anticipate that, say, proposals would be sent out for public comment only in even-numbered years. Chairs with longer tenure could plan for these cycles, and it would be easier for late-occurring ideas to "catch up" without the need for separate publication.

A change in the publication cycle could be accompanied, to advantage, by a change in the Standing Committee's schedule. The summer meeting of the Standing Committee has been set by working backward from the May 1 deadline for promulgating rules and transmitting them to Congress (with a December 1 effective date). The Supreme Court can promulgate the rules by May 1 only if it receives a recommendation of the Judicial Conference the preceding fall (a recommendation at the Conference's spring meeting would leave the Court too little time). The Conference can make the necessary recommendation only if the Standing Committee acts by July, which leaves time to write and circulate the final recommendations. The summer meeting is therefore an enduring feature of the rulemaking landscape, so long as the Judicial Conference and the Court play their current roles and the statutory schedule is unchanged.

Not so the winter meeting—and not so the content of meetings. If all recommendations to the Judicial Conference are consolidated for action at the summer meeting, the second meeting of the year can be reserved for the discussion of drafts the Advisory Committees want to publish for comment. A meeting of the Standing Committee in the fall, rather than the winter, would create sufficient time to have a full comment period, a meeting of the Advisory Committee the next spring, and consideration of the final proposals at the ensuing summer meeting of the Standing Committee. This change could shave six months to a year off the rulemaking schedule, making a biennial cycle more attractive. [65]

***710** As we have stressed, it will be essential to allow exceptions for true exigencies, as well as for off-year republication of proposals that deserve further comment. These should be few, however, as a longer cycle will permit more concentrated thought.

[16] Recommendation to the Standing Committee: The Standing Committee should establish a biennial cycle as the norm in rulemaking, should limit its summer meeting to the consideration of proposals to the Judicial Conference, and should hold a fall meeting for the consideration of recommendations that drafts by sent out for public comment.

Conclusion

The Subcommittee believes that the current rulemaking process is fundamentally sound, but improvement is both possible and desirable. Practices and procedures of the federal courts are admired and emulated by the state court systems and by the court systems of other countries. The procedure that has evolved for maintaining that system of rules deserves substantial credit for this. Nevertheless, we offer these constructive criticisms and recommendations.

Our hope for this Self-Study Report is that it will assist the Standing Committee to consider and then recommend adjustments in the federal judicial rulemaking mechanism.

Respectfully submitted,

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***711 APPENDIX A**

Summary of Comments Received for the Self-Study of Judicial Rulemaking by Thomas E. Baker Chair, Subcommittee on Long Range Planning May 2, 1994

Notice: The following notice of the self-study was mailed to several thousand individuals and organizations on the mailing list the Administrative Office uses to announce proposed rules amendments. It also appeared in several legal newspapers and in some of the advance sheets of the West Publishing Company's federal courts reporters. It was signed by the Chairs of the

Standing Committee and the Subcommittee. Interested persons were asked to send in comments and suggestions to the Chair of the Subcommittee. Also enclosed was a copy of the Administrative Office's brochure entitled, "The Federal Rules of Practice and Procedure—A Summary for Bench and Bar."

SELF-STUDY

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, through its Subcommittee on Long Range Planning, is conducting a self-study of judicial rulemaking procedures.

The self-study will consider:
What are the appropriate goals of federal judicial rulemaking?

How well do the existing rulemaking procedures accomplish those goals?

What are the criticisms of the way rules are made?

How might rulemaking procedures be improved?

What follows are summaries of the comments and suggestions received. The complete responses have been distributed to members of the Subcommittee and the Chair, Reporter, and Secretary of the Standing Committee. These summaries are in rough chronological order.

(1) Laurens Walker, Boyd Professor of Law, University of Virginia, Feb. 17, 1994: sends two articles, *A Comprehensive Reform of Federal Civil Rulemaking,* 61 Geo. L.J. 455 (1993) and *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments,* 51 Law & Contemp.Prob. 67 (1988); proposes a synopic model from administrative law known as "comprehensive rationality"; advocates an empirical approach to rulemaking; suggests that the Supreme Court require that the Advisory Committees engage in social scientific cost/benefit analysis preliminary to any rules changes; as the title indicates, the earlier article advocates thinking of the present rules as a baseline for conducting restricted field experiments in order to gather empirical information on the likely impact of changes before implementing them in the national rules.

***712** (2) Jonathan F. Lewis, Editor-in-Chief, George Washington Law Review, undated: forwards a copy of the 1993 article by Professor Walker, described in (1).

(3) Stephen B. Burbank, Robert G. Fuller, Jr., Professor of Law, University of Pennsylvania, Feb. 17, 1994: sends a forthcoming article from the Brooklyn Law Review; concludes there is a compelling need for a clearer, shared conception of the proper spheres respectively for judicial rulemaking and legislative initiatives; urges that more time and energy be devoted to collecting and analyzing empirical data before changes are made in the national rules; recommends a moratorium on further civil rules changes until such a study has been undertaken, with the cooperation of the bench and bar and Congress.

(4) Frank J. Remington, Professor of Law, University of Wisconsin-Madison Law School, Feb. 17, 1994: suggests that the reporters to the Advisory Committees ought to respond on the merits to public comments and suggestions, beyond a form acknowledgment, to achieve more substantive give-and-take that might benefit and inform rulemaking and would encourage more public participation; was sent a form letter of acknowledgement(!).

(5) John P. Frank, Esq., Lewis & Roca, Phoenix, AZ, Feb. 25, 1994: endorses the goals in FRCP 1; criticizes the civil rules for what they have become, unduly long and unnecessarily complex, compounded by turgid committee notes, chaotic when contemplated against the Civil Justice Reform Act, disuniform for all the local options; advocates the restoration of the balance of lawyer-members on the Advisory Committees; urges that reconstituted committees, each with a majority of lawyer-members,

should reconsider the rules from beginning to end with the fundamental goal in mind to restore simplicity and to end the present insiders' game that federal procedure has become.

(6) Susan P. Graber, Associate Justice, Supreme Court of Oregon, Feb. 28, 1994: suggests a topic for possible rules changes in both the Civil and the Appellate Rules; recommends consideration of rules establishing standards and procedures for certifying questions of state law to state courts.

(7) Jeffrey A. Parness, Professor, Northern Illinois University College of Law, Mar. 1, 1994: recommends better record keeping and indexing of the public comments received by the Advisory Committees for researchers and scholars; the Rules Committees should hire outside consultants to conduct literature surveys and specified research to supplement the research support from the Administrative Office and the Federal Judicial Center; suggests that formal relations be established with relevant state governmental entities that may be impacted by rules changes, *e.g.*, the 1993 amendments to Civil Rule 11 likely will increase the number of state bar disciplinary referrals made by federal judges.

(8) Alan B. Morrison, Public Citizen Litigation Group, Washington, DC, Mar. 11, 1994: complains that the memberships of the various Advisory Committees include too many (appellate) judges and too few practitioners; practitioner-members too often are prominent lawyers or high level government officials who do not work day-in and day-out with the rules; there are too many law professors without real-world, in-court experience; while ***713** geographic diversity is useful, more important representativeness is lacking for the variety of firms and lawyers that appear in federal court, such as civil rights attorneys or plaintiffs' attorneys; Advisory Committees almost never offer explanations for rejecting individual suggestions and comments on proposed changes; the current format for public hearings is unsatisfactory and ineffective, because so many persons want to be heard time is limited, thus it is hardly worth it for many groups to send representatives (closed circuit television might be an improvement); access to the public records of the committees should be improved, perhaps through more readily accessible print and electronic sources like *Law Week* or the Internet; recently, there has been a significant increase in the number and the complexity of rules changes, exacerbated by locally-optional provisions that greatly reduce uniformity; recommends more frequent meetings by reconstituted Advisory Committees, with larger, professional, full-time staff.

(9) Thomas Earl Patton, Schnader, Harrison, Segal & Lewis, Washington, DC, Mar. 11, 1994: suggests that the system is reverting to the pre-1938 stage of local procedures, with the loss of the two basic principles of uniformity and simplicity; criticizes the latest rules changes for including opt-out provisions; draws attention to the wide opposition from all portions of the bar to the 1993 discovery reforms; argues that the “case-management” philosophy of judging has taken over rulemaking and is being taken to the extreme; the views of the experienced trial bar are not being given adequate weight in rulemaking; urges that the Advisory Committees be more representative of the practicing bar and be protected from reformers on a mission; urges that Congress somehow be taken out of rulemaking.

(10) Marc Galanter, Institute for Legal Studies, University of Wisconsin-Madison Law School, Mar. 13, 1994: urges greater use and reliance on systematic, empirical research for rulemaking; identifies a system need for better data collection and the development of “civil justice indicators” to aid in the assessment of current and proposed rules; recommends that procedures be adopted to draw upon social science expertise, such as adding a social scientist to the membership or commissioning experts to conduct reviews of the relevant social science literature.

(11) A. Leo Levin, Professor, University of Pennsylvania Law School, Mar. 14, 1994: the rulemaking process is too long; the rules have become too long and too complex; the trend is away from national uniformity in procedures; differentiated procedures, common in case processing, should be developed for rulemaking, so that less controversial amendments might proceed more expeditiously; endorses a rules amendments moratorium and the creation of a commission to study rulemaking procedures and make legislative recommendations to Congress.

(12) James F. Roman, Duxbury, MA, Mar. 15, 1994: an ex-convict and former pro se litigant accuses the federal court system of wrongdoing and fraud; argues that present rulemaking procedures are unduly cumbersome and duplicitous; at all levels, federal courts are not performing adequately; maintains that the Administrative Office and the courts are self-aggrandizing institutions.

(13) Ed Hendricks, Chairman, American Judicature Society Justice System Reform Committee, Mar. 15, 1994: concludes that judicial rulemaking ***714** has improved over the years through greater representativeness in the memberships of the committees and broader access and participation; advocates more systematic, affirmative efforts to gather information as a basis for rules changes; recommends expansion of list of organizations and individuals from whom comments are solicited; prior to consideration of rules changes, there should be a careful canvassing of the available literature, including relevant empirical data each time a proposal is considered; the committees should communicate with the research community and fund particular studies for possible rules changes; there is a need for systematically and longitudinally gathering and recording civil justice indicators (akin to criminal justice indicators) and data about caseloads and existing court procedures; the memberships of the committees should be more representative of the bar and other groups; questions whether the Supreme Court should continue to play a role in rulemaking.

(14) James A. Parker, U.S. District Judge, Dist. NM, member of the Standing Committee, Mar. 15, 1994: consider reducing the number of members of the Standing Committee to improve efficiency; the criminal defense bar may not be adequately represented on the Standing Committee; the self-study should evaluate the 6-month publication period, whether it is too long or too short, how often the Standing Committee has adjusted the period for particular rules changes, and whether the "substantial change" standard for republication needs better definition; the experience under the procedures for closed committee meetings and redacted public minutes should be examined.

(15) John C. Smith, Publisher, West Publishing Company, Mar. 16, 1994: publishes several "products" with multiple sets of federal rules and statutes; suggests that better coordination of publications could be achieved by making the amendments to the Bankruptcy Rules effective on the same date as the other federal rules; suggests that annual supplements and pocket parts could be published more timely if Congress were to approve or disapprove amendments by December 1 of the session to which the proposals are made, but the amendments would become effective on March 1 of the following calendar year.

(16) Robert D. Evans, Director, Governmental Affairs Office, American Bar Association, Mar. 23, 1994: statement from the ABA; urges that appointments to the rules committees reflect the demographic diversity of the legal community and that membership also more substantially represent the practicing bar, especially trial lawyers and criminal defense lawyers, and the academy; the membership of the Evidence Rules Advisory Committee needs this sort of attention; records should be kept and made public giving some accounting of the diversity of memberships and appointments; if the Supreme Court does not and cannot participate actively in rulemaking, the rules enabling legislation should be amended to eliminate the Court's formal role that adds approximately six months to the already lengthy process; deadlines for public comments—illustrated by the deadline for responses in the present self-study—do not afford ample time for meaningful participation by institutions like the ABA; calendaring meetings twice a year results in a two or three year cycle for rules changes; a priority should be given to providing interested individuals and organizations timely notification of public meetings and hearings; publishing an agenda in advance of ***715** meetings, including proposals being considered for publication and approval, would encourage greater outside participation; any publication for comment of a rule that would delegate to the Judicial Conference the authority to issue guidelines or standards should include a draft of the actual guideline or standard for comment; the current provisions for republication of "substantial changes" in proposals after public comment are not adequate, as the recent changes in Civil Rule 26 illustrate; the Criminal Rules Advisory Committee is criticized for being unwilling to overturn case law and statutes and for not following the ABA standards in areas like defense discovery; the Civil Rules Advisory Committee is criticized for being too willing to take the initiative for reform and for not deferring to the Civil Justice Reform Act of 1990; provisions in the national rules that allow for local opting out compromise the goal of uniformity; there is a need for greater reliance on empirical data in rule making, including controlled experiments; coordination is needed among the various rules committees, especially among the committees dealing with the rules of evidence and the civil and criminal rules; the national rules ought to better address the development and implementation of ADR procedures; some thought ought to be given to making future rules

changes substance-specific, so that different types of lawsuits would proceed on different procedural tracks; the rulemaking process needs to determine appropriate responses to the CJRA; overall, the self-study should attend to ways to improve and maintain the fairness and openness of the rulemaking process.

(17) Judith Resnik, Orrin B. Evans Professor, University of Southern California Law Center, Mar. 19 & 24, 1994: concludes that rulemaking goals vary over time; endorses the Rule 26 model of a national rule with local options, to accommodate the CJRA; the rulemaking committees should seek to structure and lead the conversation among local rulemakers; the CJRA is an opportunity for gathering empirical information; suggests specific ways the rules committees might develop background information for evaluating proposals; notes the untapped resource of procedure professors at the law schools; raises practical problems with the archives materials on rulemaking, how they are accessed and how they are maintained; *From "Cases" to "Litigation"*, 54 Law & Contemp.Prob. 5 (1991); sent her Letter to Judge Becker of the Long Range Planning Committee of the Judicial Conference; advocates structural mechanisms to increase and improve understanding of federal courts; adequate and useful data still is lacking on such commonplace federal court practices as complex litigation, class actions, the pretrial process, and settlement practices; little is known about the demographics of litigants and their perceptions; decisionmaking personnel, such as magistrate judges and bankruptcy judges, have not been studied; the appellate process likewise is relatively unstudied; recommends a national meeting of researchers, academics, lawyers, and judges to consider the kind of information that is available and to contemplate what other information might be gathered; concludes some permanent structure, perhaps similar to the lawyers advisory committees under the CJRA, is needed to provide systemic information from those "outside" the judiciary.

(18) Larry A. Hammond, Chair, Criminal Justice Reform Committee of the American Judicature Society, Phoenix, AZ, Mar. 25, 1994: urges that rulemakers evaluating civil rule changes take into account the impact of ***716** those changes on the criminal justice system; so long as there are more cases than there are enough judges to handle them, any change on the civil side will affect the criminal docket; the system is a whole.

(19) Myrna Raeder, Professor of Law, Southwestern University, Mar. 28, 1994: serves as Vice Chairperson of the A.B.A. Criminal Justice Section's Committee on Rules of Criminal Procedure and Evidence; urges that the Judicial Conference attempt to achieve committee memberships that reflect the diversity of the federal bar, rather than the current level of diversity of the federal bench; greater diversity can be fostered by better record keeping and by obtaining wider input, from relevant groups, to identify potential members; expresses concern for the recent trend of proliferating rules changes effected outside the Rules Enabling Act process; suggests that short of a formal amendment to the authorizing legislation, there ought to be some informal understanding that Congressional initiatives will be referred to the appropriate Advisory Committee; comments on the uncertainty surrounding the Civil Justice Reform Act of 1990 and its implications for judicial rulemaking; recommends that the rules committees gather and evaluate data from the CJRA plans to seek to harmonize local experiments and to identify proposals worthy of national implementation; requests advanced notification and publication of proposed rules changes, agendas, and minutes of committee meetings.

(20) Alfred W. Cortese, Jr., Kirkland & Ellis, Washington, DC, Apr. 4, 1994: goals of rulemaking ought to include external neutrality from external politics, internal neutrality so far as litigants are concerned, responsiveness to those who use the federal courts, maintenance of the distinction between procedure and substantive or jurisdictional changes, efficiency measured against fairness; preserving the integrity of judicial rulemaking obliges both the Congress and rulemakers to be sensitive to the tensions in the Rules Enabling Act procedures and recent incidents suggest both sides have not always succeeded; the rules presently favor the initiation and maintenance of a lawsuit; responsiveness would be enhanced by greater public participation in rulemaking and by more bar participation as committee members; rulemaking procedures are working reasonably well and no significant changes are indicated; how to balance independence and responsiveness, insularity and participation, is rightly left to the professionalism of the members and staffs of the rules committees.

(21) William R. Slomanson, Professor, Western State University College of Law, San Diego, CA, Apr. 4, 1994: supports the self-study; proposes the appointment of one local subcommittee member in each district to be responsible for communication

between the bar in that district and the Standing Committee; such a decentralized system would take more time, but would provide far greater participation than the present comment period and public hearings.

(22) Daniel R. Coquillette, Reporter, Committee on Rules of Practice and Procedure, Boston, MA, Apr. 5, 1994: describes the current duties of the Reporter to the Standing Committee, which have been greatly expanded over the years; concludes that the Rules Enabling Act process is the only mechanism capable of restoring and maintaining procedural uniformity to the federal courts.

***717** (23) Joseph F. Weis, Jr., U.S. Circuit Judge, Third Circuit, Pittsburgh, PA, Apr. 14, 1994: former Chair, Standing Committee; expresses twin concerns over delay in rulemaking and insufficient uniformity among the different sets of rules; suggests that two members from each Advisory Committee be selected to reconstitute the Standing Committee and the Chair of the Standing Committee be an ex officio member of each Advisory Committee; further efficiency would be obtained by scheduling all the meetings of all the advisory committees at the same time and place, to be followed immediately by a meeting of the Standing Committee; continued emphasis must be placed on the partnership between the judiciary and the Congress under the Rules Enabling Act process; renewed efforts should be made to keep Congressional staff informed about rulemaking initiatives.

*718 APPENDIX B

FEDERAL JUDICIAL RULEMAKING: AN ANNOTATED BIBLIOGRAPHY

Prepared under the supervision of Thomas E. Baker by Gregory A. Cardenas, Gregory J. Fouratt and Eric Gifford Candidates for J.D., Texas Tech University School of Law

September 1995

James E. Bailey III, *Legislating Procedure in the Bankruptcy System: A Level Playing Field or a Slippery Slope?*, 24 Mem.St.U.L.Rev. (1994): questions whether responsibility for amending and promulgating general rules of practice and procedure in federal bankruptcy courts should rest with Congress or with some other independent body; stresses the importance of a neutral and detached rulemaking process and expresses concern about legislation introduced by the 103d Congress proposing bankruptcy rules amendments.

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Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 Tex.Tech.L.Rev. 323 (1991): provides a brief history of rulemaking; summarizes present procedures.

Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum.L.Rev. 1433 (1984): details the history of Congress' active role in procedural rulemaking; emphasizes the supervisory power doctrine.

Margaret A. Berger, Discussion Leader, *Civil Litigation in the Twenty-First Century: A Panel Discussion*, 59 Brook.L.Rev. 1199 (1993): participants discuss the future of procedure by tracing its history and attempting to predict its development in light of current trends; members include Judith Resnik, Kenneth R. Feinberg, Ralph K. Winter, Deborah R. Hensler, Stephen N. Subrin, Elizabeth M. Schneider and Jeffrey W. Stempel.

Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 Colum.L.Rev. 1 (1989): explores the normative framework underlying the rhetoric of procedural reform from the Field Code to the Federal Rules of Civil Procedure; concludes with some thoughts on current procedure “crisis.”

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***719** Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 Duke L.J. 1012: criticizes Professor Carrington for misreading federal rules and misinterpreting their purpose(s).

Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium,* 59 Brook.L.Rev. 841 (1994): argues for the need for a clearer conception of the proper spheres of rulemaking responsibility; urges greater reliance on empirical data; recommends a moratorium on civil rules changes; advocates greater cooperation among bench and bar and Congress.

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rules in Congress and to provide a base constituency for the Supreme Court in the exercise of its authority under the Rules Enabling Act.

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system, emphasizing the experiences of the various Task Forces on gender discrimination; other symposium articles focus on various other gender issues.

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***725** Roscoe Pound, *A Practical Program of Procedural Reform,* 22 Green Bag 438 (1910): provides a summary of Deab Pound's ideas for procedural reform.

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Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 Stan.L.Rev. 1447 (1994): discusses the Civil Justice Reform Act and how it attempted to change and improve the rulemaking process; recognizes Congress' constitutional power over judicial rulemaking, but argues for caution and restraint; emphasizes the value of transubstantive and nationally-uniform rules of civil procedure; expresses some concern for the effects of local rulemaking.

David M. Roberts, *The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers*, 8 U.Puget Sound L.Rev. 537 (1985): demonstrates how the proliferation of local rules threatens the integrity and uniformity of federal procedure.

Maurice Rosenberg, *The Federal Civil Rules After Half a Century*, 36 Me.L.Rev. 243 (1984): asserts that the stated goal of speedy and inexpensive achievement of justice is being impeded by the rules themselves; argues for diversified rules of procedure tailored to the varied needs of individual cases.

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Linda J. Rusch, *Separation of Powers Analysis as a Method for Determining the Validity of Federal District Court's Exercise of Local Rulemaking Power: Application to Local Rules Mandating Alternative Dispute Resolution*, 23 Conn.L.Rev. 483 (1991): suggests a separation of powers test based on functionalism to determine the proper scope of judicial rulemaking authority.

***726** Lawrence G. Sager, *Foreward: Constitutional Limitations on Congress Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv.L.Rev. 17 (1981): asserts that the Constitution confers this rule-making authority not on Congress, but on the courts themselves, in the context of jurisdiction-stripping proposals.

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Jeffrey W. Stempel, *Halting Devolution or Bleak to the Future: Subrin's New-Old Procedure as a Possible Antidote to Dreyfuss's "Tolstoy Problem"*, 46 Fla.L.Rev. 57 (1994): considers ideas of Professors Dreyfuss and Subrin on 1993 Amendments to the Fed.R.Civ.P. and their general misgivings about the rulemaking process; argues that for effective reform the system needs a "renewed institutional focus" on the part of the litigation community of lawyers, judges and academics.

Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform,* 59 Brook.L.Rev. 659 (1993): assesses litigation reform initiatives by evaluating recent activities and debates over direction of reform; proposes a more integrated and deliberate reform methodology; approves generally of the Rules Enabling Act process, but suggests refinements borrowing from legislative and administrative paradigms.

Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns,* 137 U.Pa.L.Rev. 1999 (1989): examines the goal of uniformity and the proliferation of local rules.

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Edson R. Sunderland, *The Regulation of Procedure by Rules Originating in the Judicial Council,* 10 Ind.L.J. 202 (1935): concludes that an independent body like the judicial council would be an appropriate body for development of rules of procedure.

Griffen Terry, Comment, *A Critical Analysis of the Formulation and Content of the 1993 Amendments to the Federal Rules of Civil Procedure,* 63 U.Cin.L.Rev. 869: discusses the 1993 amendments to the Fed.R.Civ.P. ***727** and provides a general description of the federal rulemaking process commenting on its changing dynamics; argues generally that involvement by Congress adversely impacts the rulemaking process.

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Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure,* 74 Cornell L.Rev. 270 (1989): criticizes the traditional rulemaking process and its underlying trans-substantive philosophy of the Fed.R.Civ.P.

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Janice Toran, *Tis A Gift to be Simple: Aesthetics and Procedural Reform,* 89 Mich.L.Rev. 352 (1990): hypothesizes that aesthetic considerations, simplicity, elegance, coherence, and the like, should and do play a role in the formulation of legal procedures and the procedural reform process.

George G. Tyler, *The Origin of the Rule-Making Power and its Exercise by Legislatures*, 22 A.B.A.J. 772 (1936): chronicles the history of the migrating locus of rulemaking power, from the legislature to the courts.

Laurens Walker, *Avoiding Surprise from Federal Civil Rule Making: The Role of Economic Analysis,* 23 J.Legal Studies 569 (1994): considers the ***728** feasibility of applying economic analysis to the civil rules as a basis for policy making; proposes new criteria designed to make empirical predictions about rule changes.

Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 60 Geo.Wash.L.Rev. 455 (1993): focusing on the changes to Rules 11 and 26, criticizes the whole rulemaking process; suggests that the controversy over recent amendments threatens judicial control of rulemaking and worries that the expertise of federal judges may be lost or unduly discounted.

Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments,* 51 Law & Contemp.Probs. 67 (1988): theorizes that the process that guided the development of the Fed.R.Civ.P. through the first 50 years is not appropriate for the work that lies ahead; identifies as the chief deficiency the lack of a systematic official plan to collect valid information about the likely impact of changes to the rules before they are amended; proposes a series of field experiments as a solution.

Sam B. Warner, *The Role of Courts and Judicial Councils in Procedural Reform,* 85 U.Pa.L.Rev. 441 (1937): explores the extent of courts' rulemaking powers and who should exercise those powers.

Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?,* 137 U.Pa.L.Rev. 1901 (1989): discusses the first 50 years of the Fed.R.Civ.P. and poses and answers a series of rhetorical questions about the possibility that the rules in effect deny justice to certain classes of litigants.

Jack B. Weinstein, Reform of Court Rulemaking Procedures 90 (1977): condensed version of book published as: Weinstein, Reform of Federal Court Rulemaking Procedures, 76 Colum.L.Rev. 905 (1976); recommends changes; also published as: Jack B. Weinstein, Reform of the Federal Rule-Making Process, 63 A.B.A.J. 47 (1977).

Jack B. Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power,* 14 Vand.L.Rev. 831 (1961): uses the bifurcation rule to demonstrate some problems that can arise when rules with substantive weight are appraised merely on their procedural characteristics.

Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie,* 54 Brook.L.Rev. 1 (1988): describes the adoption of Fed.R.Civ.P. and the Erie decision; focuses on the relative indifference that surrounded these two events when they occurred in 1938 and the huge impact they have had in the 50 years since.

Russell R. Wheeler, *Broadening Participation in the Courts Through Rule-Making and Administration,* 62 Judicature 281, 282-83 (1979): describes the federal rulemaking process; characterizes it as “relatively simple”; examines the tension between

the judiciary working to govern itself by making its own rules and the "democratic" method of allowing substantial public involvement in the rulemaking process.

Ralph U. Whitten, *Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4*, 40 Me.L.Rev. 41 (1988): examines the permissible scope of supervisory rulemaking by the Supreme Court under the separation of powers doctrine.

***729** Joseph A. Wickes, *The New Rulemaking Power of the United States Supreme Court*, 13 Tex.L.Rev. 1 (1934): examines the historical background of the Rules Enabling Act.

John H. Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally*, 23 Ill.L.Rev. 276 (1928): editorial asserts that any time a legislature attempts to impose upon the judiciary any rules for the discharge of the judiciary's duties, the rules are constitutionally invalid.

Charles A. Wright, *Amendments to the Federal Rules: The Functioning of a Continuing Rules Committee*, 7 Vand.L.Rev. 521 (1954): describes 1954 set of amendments to the Fed.R.Civ.P. and the rulemaking process used to make them.

Charles Alan Wright, *Foreword: The Malaise of Federal Rulemaking*, 14 Rev.Litig. 1 (1994): characterizes the rulemaking process as being in great disorder and in need of revision; notes the tradition and prestige of the rulemaking process, but criticizes the senseless complexity that has developed due to the proliferation of local rulemaking; suggests that Congressional interference in the process merely adds to the existing disorder; other contributions to the Symposium deal with particular amendments in the 1993 package and larger issues of procedural reform.

Charles A. Wright, *Book Review*, 9 St. Mary's L.J. 652, 653-58 (1978): endorses many of Judge Weinstein's suggested improvements of the rulemaking process.

Charles A. Wright, *Procedural Reform: Its Limitations and Its Future*, 1 Ga.L.Rev. 563 (1967): describes the apparently smooth operation of "procedural reform" within the federal system.

21 Charles A. Wright and K. Graham, Federal Practice and Procedure § 5006 (1977): chronicles the history of the drafting process for the Fed.R.Evid.

4 Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure §§ 1001-1008 (1969 and Supp.1993): chronicles the history of procedure in federal courts; discusses the drive for procedural reform which culminated in the Rules Enabling Act; examines the formation of the federal rules and the contributions of the advisory committees.

12 Charles A. Wright & Arthur Miller, Federal Practice and Procedure § 3152 (1973): discusses the abuses of local rulemaking power.

Footnotes

1 This portion of this Report is adapted from Thomas E. Baker, An Introduction to Federal Court Rulemaking Procedure, 22 Tex.Tech L.Rev. 323, 324-28 (1991). For a more detailed history, see Stephen B. Burbank, The Rules Enabling Act of 1934, 130 U.Pa.L.Rev. 1015, 1035-95 (1982). See also Peter G. McCabe, Renewal of the Federal Rulemaking Process, 44 Am.U.L.Rev. 1655 (1995), which provides a comprehensive statement of current practices and a summary of their history.

2 Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 73, 83.

3 Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93.

4 Act of May 19, 1828, ch. 68, 4 Stat. 278.

5 Charles E. Clark, The Challenge of a New Federal Judicial Procedure, 20 Cornell L.Q. 443, 499-50 (1935).

6 Act of June 1, 1872, ch. 255, 17 Stat. 197.

7 "[T]he procedural law continued to operate in an atmosphere of uncertainty and confusion, aggravated by the growing tendency of federal courts to develop their own rules of procedure under the licensing words of the 1872 Act that conformity was to be 'as near as may be.' " Charles Alan Wright & Arthur R. Miller, 4 Federal Practice and Procedure § 1002 at 14 (2d ed. 1987).

8 Id. § 1004 at 21.

9 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

10 41 U.S. (16 Pet.) 1, 10 L.Ed. 865 (1842).

11 Act of June 19, 1934, ch. 651, §§ 1-2, 48 Stat. 1064; Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1935).

12 Wright & Miller, supra note 7, § 1005.

13 Ibid.

14 Order Requesting Amendments from the Advisory Committee, 308 U.S. 642 (1939).

15 Continuance of Advisory Committee, 314 U.S. 720 (1941); Charles E. Clark, "Clarifying" Amendments to the Federal Rules?, 14 Ohio St.L.J. 241 (1953).

16 E.g., Order Amending the Rules of Civil Procedure, 329 U.S. 843 (1946) (noting Justice Frankfurter's reliance on the judgment of the Advisory Committee); Order Amending the Rules of Civil Procedure, 308 U.S. 643 (1939) (noting Justice Black's disapproval); Order Adopting the Rules of Procedure for the District Courts of the United States, 302 U.S. 783 (1937) (noting Justice Brandeis' disapproval).

17 Order Discharging the Advisory Committee, 352 U.S. 803 (1956).

18 The Rule-Making Function and the Judicial Conference of the United States, 44 A.B.A.J. 42 (1958) (panel discussion).

19 Tom C. Clark, Foreword to Wright & Miller, supra note 7, at ix.

20 Act of July 11, 1958, Pub.L. No. 93-12, 72 Stat. 356; Panel Discussion, The Rule-Making Function of the Judicial Conference of the United States, 44 A.B.A.J. 42 (1958).

21 The Justices continue to express their individual concerns about the Supreme Court's appropriate role in judicial rulemaking. Statement of Justice White, 113 S.Ct. 575 [preliminary pages] (Apr. 22, 1993); Dissenting Statement of Justice Scalia, joined by Justices Thomas and Souter, 113 S.Ct. 581 [preliminary pages] (Apr. 22, 1993); Order Amending the Rules of Civil Procedure, 374 U.S. 861 (1963) (opposing statements of Justices Black and Douglas).

22 Act of January 2, 1975, Pub.L. No. 93-595, 88 Stat.1926; Edward W. Cleary, Preliminary Notes on Reading the Rules of Evidence, 57 Neb.L.Rev. 908 (1978).

23 28 U.S.C. § 2074(b).

24 Judicial Improvements and Access to Justice Act, Pub.L. No. 100-702, 102 Stat. 4642 (codified at 28 U.S.C. § 2073(c)).

25 This portion of this Report is adapted from Baker, supra note 1, at 328-31, and Administrative Office of the U.S. Courts, The Federal Rules of Practice and Procedure—A Summary for Bench and Bar (Oct. 1993) (hereinafter A Summary for Bench and Bar).

26 28 U.S.C. §§ 2071-2077.

27 Announcement, 54 Fed.Reg. 13,752 (Apr. 5, 1989) (publishing Procedures adopted by the Judicial Conference of the United States on Mar. 14, 1989).

28 28 U.S.C. § 331.

29 Ibid.

30 Ibid.

31 28 U.S.C. § 2073(b). The convention has been to refer to this Committee as the "Standing Committee on Rules of Practice and Procedure" or simply the "Standing Committee."

32 8 U.S.C. § 2073(b).

33 "Meetings of the rules committees are open to the public and are widely announced. All records of the committees, including minutes of committee meetings, suggestions and comments submitted by the public, statements of witnesses, transcripts of public hearings, and memoranda prepared by the reporters, are public and are maintained by the secretary. Copies of the rules and proposed amendments are available from the Rules Committee Support Office." A Summary for Bench and Bar, supra note 25.

34 See 28 U.S.C. § 620(b)(1), (4). See also Experimentation in the Law: Report of the Federal Judicial Center Advisory Committee on Experimentation in the Law (1981).

35 A Summary for Bench and Bar, supra note 25.

36 See 28 U.S.C. § 2073(b).

37 A Summary for Bench and Bar, supra note 25.

38 Notice of Public Meeting, 59 Fed.Reg. 59,793 (Nov. 18, 1994).

39 A Summary for Bench and Bar, supra note 25.

40 A Summary for Bench and Bar, supra note 25.

41 E.g., 115 S.Ct. No. 1, at cxvi (Nov. 1, 1994).

42 Notice of Meeting, 55 Fed.Reg. 25,384 (1990).

43 Order Amending the Federal Rules of Civil Procedure (Apr. 22, 1993), H.R.Doc. 103-74, 103d Cong., 1st Sess., reprinted at 113 S.Ct. 478 [preliminary pages] (1993).

44 The Supreme Court actually made changes in the original adoption of the civil and criminal rules. Wright & Miller, supra note 7, §§ 2 n. 8 & 1004 n. 18. Charles E. Clark, The Role of the Supreme Court in Federal Rulemaking, 46 J.Am.Jud.Soc. 250 (1963). And the Court continues to do so. Order, 129 F.R.D. 559 (May 1, 1990); Order of April 27, 1995 (not yet reported).

45 28 U.S.C. §§ 2071-77.

46 But see Act of March 30, 1973, Pub.L. 93-12, 87 Stat. 9 (providing that the proposed Rules of Evidence should have no effect until expressly approved by Act of Congress).

47 Order Amending the Rules of Civil Procedure, 480 U.S. 955 (1987); Order Amending the Rules of Civil Procedure, 471 U.S. 1155 (1985); Order Amending the Rules of Civil Procedure, 461 U.S. 1097 (1983).

48 Pub.L. No. 103-322, 108 Stat. 1796; H.R.Rep. No. 103-711, 103d Cong., 2nd Sess. (1994). On unanimous recommendation of the Advisory Committee on Evidence and of the Standing Committee, the Judicial Conference informed Congress that in its view this exercise was imprudent and had produced seriously flawed language. The Judicial Conference proposed an alternative text more in accord with the norms and drafting style of the other rules. See *Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases* (Feb. 1995). Congress took no action, and the new rules went into force on July 9, 1995, as originally enacted.

49 This part of this Report is adapted, with permission, from a letter from Professor Oakley to the Chair of the Subcommittee. John B. Oakley, An Open Letter on Reforming the Process of Revising the Federal Rules, 55 Mont.L.Rev. 435 (1994).

50 Professor Carl Tobias assisted in the compilation of issues for consideration in this part of this Report.

51 28 U.S.C. § 478(b).

52 See also Long Range Plan for the Federal Courts (May 1995) Recommendation 30, Implementation Strategy 30c: "In developing rules, the Judicial Conference and the individual courts should seek significant participation by the interested public and representatives of the bar, including members of the federal and state benches."

53 The full mailing list contains more than 10,000 names. Most addressees receive them ex officio, but there is also a revolving list that eventually will number 2,500 scholars and members of the bar. Any recipient on the revolving list who does not respond over the course of three years will be replaced with a new name.

54 At http://www.uscourts.gov. The Federal Judicial Center also has a home page, at http://www.fjc.gov, with its own publications and links to other legal sites on the Internet. The Cornell Legal Information Institute has made the rules themselves, and many other legal texts, available at http:// www.law.cornell.edu. Other sites are blooming. For example, Villanova maintains what it calls "The Home Page for the Federal Courts on the Internet" at http:// www.law.vill.edu/Fed-Ct/fedcourt.html.

55 Baker, supra note 1, at 334-35. See particularly Stephen B. Burbank, Ignorance and Procedural Law Reform: A Call for a Moratorium, 59 Brooklyn L.Rev. 841 (1993).

56 Baker, supra note 1, at 335.

57 Pub.L. No. 101-650, 104 Stat. 5089 (1990).

58 Pub.L. No. 103-420, 103rd Cong., 2nd Sess. (Oct. 25, 1994).

59 Baker, supra note 1, at 334.

60 Proposed Long Range Plan for the Federal Courts (Mar. 1995) Recommendation 30, Implementation Strategy 30b: "The national rules should strive for greater uniformity of practice and procedure, but individual courts should be permitted limited flexibility to account for differing local circumstances and to experiment with innovative procedures."

61 Statement of Justice White, 113 S.Ct. at 575 [preliminary pages] (Apr. 22, 1993).

62 28 U.S.C. § 2072(a) & (b).

63 U.S. Const. art. III, § 1.

64 Charles Alan Wright, Foreword: The Malaise of Federal Rulemaking, 14 Rev.Litigation 1 (1994).

65 The following schedule would work. In spring or summer of Year One, the Advisory Committee makes a recommendation for publication. The Standing Committee would consider the recommendation at a meeting between September 15 and 30. Publication at the beginning of November (giving the AO a month for preparation) would produce a comment period closing at the end of April in Year Two. Advisory Committees would meet toward the end of April, in conjunction with any oral hearings, to consider comments and make recommendations for a meeting of the Standing Committee to be held at the end of June of beginning of July. The Standing Committee would transmit any approved drafts to the Judicial Conference for consideration in the fall of Year Two. If the Conference and Supreme Court approved, the rule would take effect on December 1 of Year Three, a total time of approximately 2 1/2 years from initial proposal to effectiveness.

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