Agenda E-19 (Summary)
Rules
September 2016

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. a. Approve the proposed amendments to Bankruptcy Rules 1001, 1006(b), and 1015(b), and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with law; and.....pp. 5–7

   b. Approve the proposed revisions to Official Forms 20A and 20B (renumbered as 420A and 420B) and Official Form 410S2 to take effect on December 1, 2016, and that they govern all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending. .....pp. 7–9

2. Approve the proposed (a) Mandatory Initial Discovery Pilot Project and (b) Expedited Procedures Pilot Project, each for a period of approximately three years, and delegate authority to the Committee on Rules of Practice and Procedure to develop guidelines to implement the pilot projects. .....pp. 18–21

3. Approve the proposed amendments to Evidence Rules 803(16) and 902, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.....pp. 31–33

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

- Federal Rules of Appellate Procedure .....pp. 2–5
- Federal Rules of Bankruptcy Procedure .....pp. 9–18
- Federal Rules of Civil Procedure.....pp. 21–25
- Federal Rules of Criminal Procedure.....pp. 26–30
- Federal Rules of Evidence .....p. 34
- Other Matters .....p. 35

Agenda E-19
Rules
September 2016

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee) met in Washington, D.C. on June 6, 2016. All members participated except Gregory G. Garre, Esq.

Representing the advisory rules committees were Judge Steven M. Colloton, Chair, and Professor Gregory E. Maggs, Reporter, of the Advisory Committee on Appellate Rules; Judge Sandra Segal Ikuta, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Michelle M. Harner, Associate Reporter, of the Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Donald W. Molloy, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, of the Advisory Committee on Criminal Rules; Judge William K. Sessions III, Chair, and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Daniel R. Coquillette, the Standing Committee's Reporter; Professor Joseph F. Spaniol, Jr., Professor R. Joseph Kimble, and Professor Bryan A. Garner, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Attorneys on the Rules Committee Support Staff; Derek Webb, Law Clerk to the Standing Committee; Amelia Yowell, Supreme Court Fellow; Judge Jeremy D. Fogel, Director, Dr. Tim Reagan, and Dr. Emery G. Lee, of the Federal Judicial Center (FJC); Sean Marlaire, Attorney Advisor, Judicial

Conference Committee on Court Administration and Case Management; Judge David G. Campbell, immediate-past Chair, Advisory Committee on Civil Rules; Judge Robert Michael Dow, Jr., Chair of the Rule 23 Subcommittee, Advisory Committee on Civil Rules; and Judge Paul W. Grimm, former member of the Advisory Committee on Civil Rules. Diana Erbsen, Joshua Gardner, Elizabeth J. Shapiro, and Natalia Sorgente attended on behalf of the Department of Justice.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments to Appellate Rules 8, 11(g), 25, 29(a), and 39(e)(3), and Form 4 with a request that they be published for comment in August 2016. The Standing Committee approved the Advisory Committee's recommendation.

Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3)

The Advisory Committee on Civil Rules has proposed amendments to Civil Rule 62, discussed *infra* pp. 24–25. Civil Rule 62(b) currently states: "If an appeal is taken, the appellant may obtain a stay by supersedeas bond . . . ." The proposed amendments would, in part, eliminate the antiquated term "supersedeas" and allow an appellant to provide "a bond or other security." The Appellate Rules use the term "supersedeas bond" in Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3). The proposed amendments to these rules are intended to conform the Appellate Rules to the proposed amended Civil Rule 62(b). No change in meaning is intended.

Most of the proposed amendments merely change the term "supersedeas bond" to "bond or other security," with slight variations depending on the context. The proposed amendments to Rule 8(b) are slightly more involved. Current Rule 8(b) provides jurisdiction to enforce a

supersedeas bond against the "surety" who issued the supersedeas bond. Because Civil Rule 62(b) now authorizes both bonds and other forms of security, the term "surety" would be too limiting. For example, the issuer of a letter of credit is not a surety. The proposed amendments to Rule 8(b) ensure that the rule encompasses sureties and other security providers.

Rule 25

The proposed amendments to Appellate Rule 25 (Filing and Service) are part of a larger inter-advisory committee project to develop rules for electronic filing, service, and notice. As part of that project, the Advisory Committee on Civil Rules determined to pursue a national rule mandating electronic filing and service in civil cases. That decision has required the Advisory Committees on Appellate, Bankruptcy, and Criminal Rules to reconsider their respective rules on filing and service.

The proposed amendments are intended to conform Appellate Rule 25 to Civil Rule 5. The proposal has four key components. First, proposed Rule 25(a)(2)(B) addresses filing. Those represented by counsel are required to file electronically, unless nonelectronic filing is allowed for good cause or is allowed or required by local rule. Unrepresented persons may file electronically only if allowed by court order or by local rule, and may only be required to file electronically by court order or by local rule that includes reasonable exceptions. Second, proposed Rule 25(a)(2)(B)(iii) addresses electronic signatures by specifying that when a paper is filed electronically, the "user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature." Third, proposed Rule 25(c)(2) addresses service and provides that "[e]lectronic service may be made by sending a paper to a registered user by filing it with the court's electronic-filing system or by using other electronic means that the person consented to in writing." Fourth, proposed Rule 25(d)(1) is

revised to make proof of service of process required only for papers that are not served electronically through the court's electronic filing system.

Rule 29(a)

Appellate Rule 29(a) (Brief of an Amicus Curiae–When Permitted) specifies that an amicus curiae may file a brief with leave of court or without leave of the court "if the brief states that all parties have consented to its filing." Several circuits have adopted local rules that forbid the filing of a brief by an amicus curiae when the filing could cause the recusal of one or more judges.[1] These local rules are in some tension with Rule 29(a) because they do not allow the filing of amicus briefs based solely on consent of the parties.

In considering how to address the issue, the Advisory Committee determined that the local rules forbidding the filing of an amicus brief in such situations should be authorized by Rule 29 because a court reasonably could conclude that its interest in avoiding disqualification of one or more judges on a hearing panel or in a rehearing vote outweighs the interest of a putative amicus curiae in filing a brief. Accordingly, the proposed amendment to Rule 29(a) authorizes courts to strike or prohibit the filing of amicus briefs in situations when they would disqualify a judge. The Advisory Committee declined to create a national rule; instead the matter is left to the discretion of the circuits to address by local rule or court order.

Form 4

Litigants seeking permission to proceed in forma pauperis must complete Appellate Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis). Question 12 of Appellate Form 4 asks litigants to provide the last four digits of their Social

[1] For example, Second Circuit Local Rule 29.1(a) states: "The court ordinarily will deny leave to file an amicus brief when, by reason of a relationship between a judge assigned to hear the proceeding and the amicus curiae or its counsel, the filing of the brief might cause the recusal of the judge." The D.C., Fifth, and Ninth Circuits have similar local rules.

Security numbers. Given the potential security and privacy concerns associated with Social Security numbers, and the consensus among clerks of court that the last four digits of Social Security numbers are not needed, the proposed amendment deletes this question.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Official Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 1001, 1006(b), and 1015(b), and Official Forms 20A, 20B, and 410S2, with a recommendation that they be approved and transmitted to the Judicial Conference.

The proposed amendments to Rules 1001 and 1006(b) were circulated to the bench, bar, and public for comment in August 2015. Because of the limited and conforming nature of the proposed amendments to Rule 1015(b) and Official Forms 20A, 20B, and 410S2, they are forwarded for approval without publication.

Rule 1001

Rule 1001 (Scope of Rules and Forms; Short Title) is the bankruptcy counterpart to Civil Rule 1, and it generally tracks the language of the civil rule. The last sentence of Rule 1001 currently states, "These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding." This language deviates from Civil Rule 1, which states (as of December 1, 2015): "[These rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." The proposed amendment to Rule 1001 changes the last sentence of the rule to conform to the language of Civil Rule 1.

The Advisory Committee received two comments to the proposed rule amendment. One comment supported the amendment and the other concerned general drafting issues. The

Advisory Committee determined that the comments did not warrant any changes and voted unanimously to approve the proposed amendment as published.

Rule 1006(b)

Rule 1006(b) (Filing Fee) governs the payment of the bankruptcy filing fee in installments, as authorized for individual debtors by 28 U.S.C. § 1930(a). In evaluating a suggested amendment to the rule, the Advisory Committee became aware that some courts refuse to accept a petition or summarily dismiss a case if an installment payment is not made at the time the case is filed. The Advisory Committee concluded that such a practice is inconsistent with Rules 1006(b)(1) and 1017(b)(1). The latter provision allows for dismissal of a case for the failure to pay any installment of the filing fee only "after a hearing on notice to the debtor and the trustee."

In order to clarify that courts may not refuse to accept petitions or summarily dismiss cases for failure to make initial installment payments at the time of filing, the proposed amendment to Rule 1006(b)(1) requires that an individual debtor's petition must be accepted for filing so long as the debtor submits a signed application to pay the filing fee in installments—even if a required initial installment payment is not made at the same time. The Committee Note explains that dismissal of the case for failure to pay any installment must proceed according to Rule 1017(b)(1).

The Advisory Committee received two comments to the proposed rule amendment. One comment supported the amendment and the other concerned general drafting issues. The Advisory Committee determined that the comments did not warrant any changes and voted unanimously to approve the proposed amendment as published.

Rule 1015(b)

Rule 1015(b) (Cases Involving Two or More Related Debtors) provides for the joint administration of bankruptcy cases in which the debtors are closely related. Among the debtors covered by the rule are "a husband and wife." The provision also implements a statutory requirement that a husband and wife with jointly administered cases choose the same exemption scheme—either federal bankruptcy exemptions, if permitted, or state exemptions.

After the decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), which held § 3 of the Defense of Marriage Act unconstitutional, the Advisory Committee received a suggestion that Rule 1015(b) be amended to substitute the word "spouses" for "husband and wife" in order to include joint bankruptcy cases of same-sex couples. Two years later, the Court decided *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which held that the right to marry is a fundamental right under the Fourteenth Amendment and that same-sex couples may not be deprived of that right. *Id.* at 2599. The Court further held in *Obergefell* that the Equal Protection Clause prevents states from denying same-sex couples the benefits of civil marriage on the same terms as opposite-sex couples. *Id.* at 2604.

In light of the holdings and reasoning in *Windsor* and *Obergefell*, the Advisory Committee recommended replacing both instances of "husband and wife" with "spouses" in Rule 1015(b). Because it viewed the proposed changes as conforming amendments, the Advisory Committee voted unanimously to recommend approval without publication for public comment.

Official Forms 20A and 20B

Official Forms 20A and 20B were not included with the large group of modernized and renumbered forms that went into effect on December 1, 2015. The Advisory Committee

reviewed the forms and recommended that they be renumbered and that a minor wording change be made to them.

Under the new numbering convention, the forms should be designated as Official Forms 420A and 420B. In addition, the Advisory Committee noted that both forms state that the recipient of the notice must "mail" a copy of any response to the movant's or objector's attorney. To encompass other permissible methods of service, the Advisory Committee recommended that "mail" be changed to "send." Because of the ministerial and conforming nature of the proposed changes, the Advisory Committee recommended approval and transmission to the Judicial Conference without publication.

Official Form 410S2

The Advisory Committee became aware of a possible inconsistency between Rule 3002.1(c) and Official Form 410S2. Rule 3002.1(c) requires a home mortgage creditor in a chapter 13 case to give notice of any fees, expenses, or charges that are assessed during the course of the case to the debtor, debtor's counsel, and the trustee. This information assists a debtor who wants to maintain mortgage payments while in bankruptcy to make payments in a sufficient amount to emerge from bankruptcy current on the mortgage. Official Form 410S2 implements the rule provision.

The instructions to Part 1 of the form state: "Do not include . . . any amounts previously . . . ruled on by the bankruptcy court." Subdivision (c) of the rule, however, requires the creditor to give notice of all postpetition fees, expenses, and charges without excepting ones already ruled on by the court.

The Advisory Committee concluded that the inconsistency between the form and the rule should be eliminated by deleting the instruction from the form. In order to prevent confusion or

the risk of double payments, the proposed amendment adds an instruction to Form 410S2 that requires the creditor to indicate if a fee has previously been approved by the court. Because this is a minor conforming amendment, the Advisory Committee recommended that the proposed change be approved without publication.

The Standing Committee voted unanimously to support the recommendations of the Advisory Committee on Bankruptcy Rules.

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 1001, 1006(b), and 1015(b), and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with law; and

b. Approve the proposed revisions to Official Forms 20A and 20B (renumbered as 420A and 420B) and Official Form 410S2 to take effect on December 1, 2016, and that they govern all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

The proposed amendments to the Federal Rules of Bankruptcy Procedure and revisions to the Official Bankruptcy Forms are set forth in Appendix A, with excerpts from the Advisory Committee's reports.

Rules and Official Forms Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to rules and forms for two separate public comment periods beginning in 2016. The first comment period—for a proposed amendment to Rule 3015 and a proposed new Rule 3015.1—opened on July 1, 2016 and will close on October 3, 2016. The second comment period will begin August 15, 2016 and end February 15, 2017. It will be for the following rules and forms: Rules 3002.1, 5005(a)(2), 8002, 8006, 8011, 8013, 8015, 8016, 8017, new Rule 8018.1, 8022, 8023, a new Part VIII appendix,

and Official Forms 25A, 25B, 25C, 26, 309F, 417A, and 417C. The reason for two comment periods is discussed below.

July 2016 Publication

Rule 3015 and new Rule 3015.1

The proposed amendment to Rule 3015 (Filing, Objection to Confirmation, Effect of Confirmation, and Modification of a Plan in a Chapter 12 or a Chapter 13 Case) would require the use of a national official form for chapter 13 plans unless a district requires the use of a local form for that purpose that meets the requirements set out in proposed new Rule 3015.1 (Requirements for a Local Form for Plans Filed in a Chapter 13 Case).

The Advisory Committee published a proposed chapter 13 plan form and amendments to nine related rules in 2013 and again in 2014. At the end of the second comment period, the Advisory Committee received a suggestion to allow districts to opt out of the proposed national chapter 13 plan form if the district adopts a local plan form that meets certain requirements. The proposed amendment to Rule 3015 and new Rule 3015.1 would implement the opt-out proposal.

The Advisory Committee unanimously recommended that the amendments to Rule 3015 and proposed new Rule 3015.1 be published for public comment. The opt-out concept was not included in the 2013 and 2014 publications, and, although it might be viewed as a lesser-included version of the proposal for a mandatory national form, it does represent a distinct change from the published proposals.

The Advisory Committee also unanimously agreed that the rules should be published on a truncated schedule. According to Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees, Vol. 1, Ch. 4, § 40.20.40(d) of the *Guide to Judiciary Policy*: "The Committee may shorten the public comment period or

eliminate public hearings if it determines that the administration of justice requires a proposed rule change to be expedited and that appropriate notice to the public can still be provided and public comment obtained." Given the two prior publications and the narrow focus of the revised rules, the Advisory Committee believes that three months is a sufficient period of time to obtain public comments. Moreover, the shortened time frame would allow the chapter 13 plan form and related rules (including the proposed opt-out procedure) to go into effect a year earlier than would be the case if the publication period were six months. The Standing Committee unanimously agreed with the recommendations.

August 2016 Publication

Rule 3002.1

The proposed amendment to Rule 3002.1 (Notice Related to Claims Secured by Security Interest in the Debtor's Principal Residence) was approved for publication by the Standing Committee at its January 2016 meeting, and described in its March 2016 report to the Judicial Conference. The amendment would authorize courts to modify the rule's requirements for claims arising from home equity lines of credit (HELOCs), and to acknowledge the right of the trustee, debtor, or other party in interest, such as the United States trustee, to object to a change in a home-mortgage payment amount after receiving notice of the change under this subdivision.

Rule 5005(a)(2)

Rule 5005(a)(2) governs the filing of documents electronically in federal bankruptcy cases. It generally tracks the language in Civil Rule 5(d)(3), which governs the electronic filing of documents in civil cases. The Advisory Committee has been working with the Advisory Committees on Appellate, Civil, and Criminal Rules to coordinate amendments to the electronic filing rules.

The Advisory Committee considered potential amendments to Rule 5005(a)(2) at its April 2015, October 2015, and March 2016 meetings. It reviewed the status of potential amendments to Civil Rule 5, and it examined the implications of those amendments for the bankruptcy rules. It also discussed in detail the variations in the electronic filing and service provisions being considered by the Criminal Rules Advisory Committee with respect to Criminal Rule 49. The Advisory Committee generally agreed that Rule 5005(a)(2) should be amended to the extent necessary to conform to Civil Rule 5.

In light of the foregoing, the Advisory Committee unanimously approved amendments to Rule 5005(a)(2) that would be consistent, to the greatest extent possible, with the proposed amendments to Civil Rule 5(d)(3). The variations between the proposed amendments to Rule 5005(a)(2) and Civil Rule 5(d)(3) relate primarily to different terminology used in bankruptcy and civil practice.[2] The two rules are otherwise consistent, and the Advisory Committee recommended publication in August 2016, at the same time as the proposed amendments to Civil Rule 5 are published.

Conforming Amendments to the Bankruptcy Appellate Rules and Forms

Part VIII of the Bankruptcy Rules (Appeals) was completely revised in 2014 to conform as closely as possible to the Federal Rules of Appellate Procedure. Rather than incorporate the Appellate Rules by reference, the Part VIII rules largely track the language of the Appellate Rules.

[2] For example, where Civil Rule 5 refers to "a person proceeding with an attorney," Bankruptcy Rule 5005 uses the term "entity," which under the Bankruptcy Code is a broader term than "person." And where Civil Rule 5 refers to "[a] person not represented by an attorney," Bankruptcy Rule 5005 uses the term "individual" because only human beings may proceed without an attorney in bankruptcy cases, and the Code definition of "person" includes corporations and partnerships in addition to individuals.

On April 28, 2016, the Supreme Court adopted and transmitted to Congress amendments to the Appellate Rules that will go into effect on December 1, 2016, unless Congress takes action to the contrary. The Advisory Committee on Appellate Rules has also proposed an amendment to Appellate Rule 29(a) for publication in August 2016. The following Part VIII amendments for publication are proposed to bring the Bankruptcy Rules into conformity with the pending amendments to the Appellate Rules.

Bankruptcy Rules 8002(c) (Time for Filing Notice of Appeal) and 8011(a)(2)(C) (Filing and Service; Signature) include inmate-filing provisions that are virtually identical to the existing provisions in Appellate Rules 4(c) and 25(a)(2)(C). The 2016 amendments to the Appellate Rules are intended to clarify certain issues that have produced conflicts in the case law.

To implement the amendments to the Appellate Rules, a new appellate form has been devised that can be used for an inmate declaration under Rules 4 and 25. For bankruptcy appeals, the Advisory Committee recommends that a similar form—Director's Form 4170 (Inmate Filer's Declaration)—be adopted for that purpose. In addition, the Advisory Committee proposes for publication an amendment to Official Form 417A (Notice of Appeal and Statement of Election), similar to the amendment to Appellate Forms 1 and 5, that will alert inmate filers to the existence of Director's Form 4170.

Rule 8002(b) and its counterpart, Appellate Rule 4(a)(4), set out a list of post-judgment motions that toll the time for filing an appeal. Under the current rules, the motion must be "timely file[d]" in order to have a tolling effect. The 2016 amendment to Appellate Rule 4(a)(4) resolves a circuit split on the question whether a tolling motion filed outside the time period specified by the relevant rule, but nevertheless ruled on by the district court, is timely filed for purposes of Rule 4(a)(4). Adopting the majority view on this issue, the pending amendment

adds an explicit requirement that the motion must be filed within the time period specified by the rule under which it is made in order to have a tolling effect for the purpose of determining the deadline for filing a notice of appeal. The Advisory Committee proposed that a similar amendment to Rule 8002(b) be published for comment.

The 2016 amendments to Appellate Rules 5, 21, 27, 35, and 40 convert the existing page limits to word limits for documents prepared using a computer and employ a conversion ratio of 260 words per page rather than the current ratio of 280 words per page. Accordingly, the amendments reduce the existing word limits in Appellate Rules 32 and 28.1 to reflect the 260 words-per-page ratio.

Appellate Rule 32(f) sets out a uniform list of the items that can be excluded when computing a document's length. The local variation provision of Rule 32(e) highlights a court's authority (by order or local rule) to set length limits that exceed those in the Appellate Rules. Appellate Form 6 (Certificate of Compliance with Rule 32(a)) is amended to reflect the changed length limits. Finally, a new appendix collects all of the length limits in the Appellate Rules.

The Advisory Committee proposed for publication parallel amendments to Rules 8013(f) (Motions), 8015(a)(7) and (f) (Form and Length of Briefs), 8016(d) (Cross-Appeals), and 8022(b) (Motion for Rehearing), along with Official Form 417C (Certificate of Compliance with Rule 8015(a)(7)(B), or 8016(d)(2)). In addition, it approved for publication a proposed appendix to Part VIII, which is similar to the appendix added to the Appellate Rules.

Rule 8017 is the bankruptcy counterpart to Appellate Rule 29. The 2016 amendment to Appellate Rule 29 provides a default rule concerning the timing and length of amicus briefs filed in connection with petitions for panel rehearing or rehearing en banc**.** The amendment does not require courts to accept amicus briefs regarding rehearing, but it does provide guidelines for such

briefs that are permitted. The Advisory Committee proposed for publication a parallel amendment to Rule 8017.

As discussed *supra* p. 4, the Advisory Committee on Appellate Rules has proposed for publication another amendment to Appellate Rule 29(a) that would authorize a court of appeals to prohibit or strike the filing of an amicus brief to which the parties consented if the filing would result in the disqualification of a judge. The Advisory Committee on Bankruptcy Rules proposed publication of a similar amendment to Bankruptcy Rule 8017 in order to maintain consistency between the two sets of rules.

Additional Amendments to the Bankruptcy Appellate Rules

In response to the August 2012 publication of the proposed revision of the Part VIII rules, a comment suggested that it would be useful for Rule 8002 to have a provision similar to that in Appellate Rule 4(a)(7), which addresses when a judgment or order is entered for purposes of Rule 4(a), in order to help clarify timing issues presented by the separate-document requirement. The Advisory Committee agreed and recommended for publication a new subdivision (a)(5) to Rule 8002(a) defining entry of judgment.

Under 28 U.S.C. § 158(d)(2)(A), which is implemented by revised Rule 8006(c), all appellants and all appellees, acting jointly, may certify a proceeding for direct appeal to the court of appeals without any action being taken by the bankruptcy court, district court, or bankruptcy appellate panel ("BAP"). The Advisory Committee received a suggestion that the bankruptcy court should have the opportunity to file a short supplemental statement regarding the merits of certification when the parties certify the appeal.

The Advisory Committee agreed that the court of appeals would likely benefit from the court's statement about whether the appeal satisfies one of the grounds for certification, but concluded that authorization should not be limited to the bankruptcy court. Because the matter

might be deemed to be pending in the district court or BAP at the time or shortly after the parties file the certification, those courts should also be authorized to file a statement with respect to appeals pending before them. Proposed new subdivision (c)(2) would authorize such supplemental statements by each court.

A proposed new Rule 8018.1 would address the situation in which an appeal is taken from a bankruptcy court judgment and the district court decides that the proceeding is one in which the bankruptcy court lacked constitutional authority to enter a final judgment. It would authorize the district court to treat the bankruptcy court's judgment as proposed findings of fact and conclusions of law, which the district court would review de novo.

Rule 8023 would be amended to add a cross-reference to Rule 9019 (Compromise and Arbitration). The amendment would provide a reminder that when dismissal of an appeal is sought as the result of a settlement by the parties, Rule 9019 may require approval of the settlement by the bankruptcy court. The amended rule would take into account that one of the parties to the appeal being voluntarily dismissed might be the bankruptcy trustee, who is required under Rule 9019 to obtain court approval of any compromise.

Most of the official forms that were part of the Advisory Committee's Forms Modernization Project, which began in 2008, went into effect on December 1, 2015. The Advisory Committee deferred at that time consideration of certain forms relating to chapter 11 cases—specifically, Forms 25A, B, and C, and Form 26. The Advisory Committee reviewed each of these forms extensively over the past year and has recommended that they be published for comment, as revised and renumbered as Official Forms 425A, 425B, 425C, and 426.

Official Form 309F is used for providing notice to creditors in a chapter 11 corporate or partnership case of the case's commencement and certain deadlines. Line 8 of the form, which

relates to the "Exception to discharge deadline," states: "You must start a judicial proceeding by filing a complaint if you want to have a debt excepted from discharge under 11 U.S.C. § 1141(d)(6)(A)."

The Advisory Committee concluded that there are ambiguities in § 1141(d)(6)(A) regarding its relationship to § 523 which may cause the instruction to be incorrect. It therefore proposed for publication an amendment to line 8 of the form that would read: "If § 523(c) applies to your claim and you seek to have it excepted from discharge, you must start a judicial proceeding by filing a complaint by the deadline stated below."

The Standing Committee unanimously approved all of the above amendments for publication in August 2016.

Information Items

At its March 15, 2016 meeting, the Judicial Conference approved the Standing Committee's recommendation to allow the Advisory Committee to make technical, non-substantive changes to official bankruptcy forms when the need for such changes is determined, subject to retroactive approval by the Standing Committee and reporting of the changes to the Judicial Conference. Operating under that authority, the Advisory Committee made, and the Standing Committee approved, the following technical changes:

- Official Form 106E/F - Line number references in the instruction at the top of Part 2 started at an incorrect number; they were changed from "4.3 followed by 4.4" to "4.4 followed by 4.5."

- Official Form 119 - Because there is no "Part 3" on the form, the reference to "Part 3" at the top of page 1 was changed to "Part 2."

- Official Form 201 - The hyperlink in Question 7 for NACIS codes was updated to match the new landing page maintained by the Administrative Office.

- Official Form 206 Summary - Cross-references to line numbers 6a and 6b of Official Form 206E/F were incorrect and were changed to 5a and 5b.

- Official Form 309A - Line 9 was reformatted to be consistent with the remainder of the lines in the form.

- Official Form 309I - The last two lines of instruction 13 on page 2 inaccurately indicated that the clerk's office must *receive* an objection to discharge by a certain deadline in order to be valid. The time period is marked by the filing (not the receipt) of a motion, so the instruction was rephrased as: "If you believe that the debtors are not entitled to a discharge of any of their debts under 11 U.S.C. § 1328(f), you must file a motion by the deadline."

- Official Form 423 - The reference near the top of the form to 11 U.S.C. §1141(d)(3) was changed from "does not apply" to "applies" to clarify the relationship between that statutory provision and the need for a chapter 11 debtor to complete an instructional course in personal financial management in order to obtain a discharge.

- Official Form 424 - The erroneous reference to Rule 8001 at the top of page 2 was changed to Rule 8006.

FEDERAL RULES OF CIVIL PROCEDURE

Items Recommended for Approval

As part of an ongoing project to develop ways to improve civil litigation, the Advisory Committee is engaged in several reform efforts, including the development and testing of pilot projects. As previously reported, a subcommittee was formed to investigate pilot projects undertaken across the country in state and federal courts and to recommend possible future pilot projects for federal courts. Over the past year, the subcommittee, comprised of members of both the Standing Committee and the Advisory Committee on Civil Rules, as well as a liaison from the Judicial Conference Committee on Court Administration and Case Management (CACM Committee), consulted with numerous organizations and courts, conducted reviews of pilot projects in ten states, held focus-group discussions with lawyers and judges from courts in Colorado, Arizona, and Canada, and collected and reviewed much additional information. With

this information and the involvement of both the CACM Committee and the FJC, the subcommittee has developed two pilot projects aimed at reducing the cost and delay of civil litigation—one focused on enhanced initial discovery and the other on expedited case management. Both pilots have been endorsed by the CACM Committee.

The proposed Mandatory Initial Discovery Pilot Project would involve all civil cases in participating courts other than cases exempted by Rule 26(a)(1)(B), patent cases governed by local rule, and cases transferred for consolidated administration by the Judicial Panel on Multidistrict Litigation. The pilot would be implemented through a standing order issued in each of the participating districts. The order would include detailed instructions to the parties, mandatory initial discovery requests, and specific requirements for the disclosure of hard-copy documents and electronically stored information. The pilot would also include a user's manual for the pilot judges. The current proposed Standing Order for this pilot is included as part of Appendix B.

The proposed Expedited Procedures Pilot Project has also been developed with the participation of the rules committees, the CACM Committee, and the FJC. This pilot focuses on strict judicial application of existing case management tools and judicial training. The pilot, which would involve all civil cases in participating courts in which discovery and trial are possible, has three parts. First, participating courts would be required to adopt the following practices: (1) prompt case management conferences; (2) firm caps on the amount of time allocated for discovery with very limited opportunity for extensions of time; (3) prompt resolution of discovery disputes by telephone conferences; (4) decisions on all dispositive motions within 60 days of the reply brief being filed; and (5) setting and holding firm trial dates.

Second, clear metrics would be employed. Third, there would be an extensive training and collaboration component, to include training sessions conducted by the FJC.

The authority for the proposed pilot projects is found in several places. First, 28 U.S.C. § 331 authorizes the Judicial Conference to "carry on a continuous study of the operation and effect of the general rules of practice and procedure" used in the federal courts, and to recommend "[s]uch changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay[.]" Second, Civil Rule 16(b)(3) authorizes a district court to enter a scheduling order that addresses several relevant subjects: deadlines for the litigation, the timing of disclosures and the extent of discovery, the disclosure of electronically stored information, procedures for prompt resolution of discovery disputes, and "other appropriate matters." Third, Rule 26(b)(2)(C) authorizes the court, on its own, to limit the frequency or extent of discovery, considering whether information can be obtained from other sources that are more convenient, less burdensome, or less expensive.

The subcommittee has recommended that at least three to five districts participate in each pilot project. Each participating district would have to agree to make the pilot's requirements mandatory.

The Advisory Committee on Civil Rules approved the pilot projects at its April 2016 meeting and submitted them to the Standing Committee with a recommendation that they be approved and transmitted to the Judicial Conference. The Standing Committee voted unanimously to approve the recommendations.

Recommendation: That the Judicial Conference approve the proposed (a) Mandatory Initial Discovery Pilot Project and (b) Expedited Procedures Pilot Project, each for a period of approximately three years, and delegate authority to the Committee on Rules of Practice and Procedure to develop guidelines to implement the pilot projects.

The proposed pilot projects are explained further in an excerpt from the Advisory Committee's report set out in Appendix B.

Rules Approved for Publication and Comment

The Advisory Committee on Civil Rules submitted proposed amendments to Civil Rules 5, 23, 62, and 65.1 with a request that they be published for comment in August 2016. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 5

Over the years, the Standing Committee and its Advisory Committees have worked together to identify rule changes made necessary by changes in technology, and have coordinated the development of rules proposals. One example is the recommendation by the inter-committee CM/ECF Subcommittee that the "3-day rule" in each set of national rules be amended to exclude electronic service.[3] Another example is a current inter-advisory committee project to develop rules for electronic filing, service, and notice. This coordinated work developed after the Advisory Committee on Civil Rules determined that the Civil Rules should be amended to mandate electronic filing and service. The resulting proposal would amend Civil Rule 5 (Serving and Filing Pleadings and Other Papers) to address electronic filing, signature, and service.

The proposed amendment to Rule 5(d)(3) would establish a uniform national rule that makes electronic filing mandatory for parties represented by counsel, with exceptions for good

[3] The "3-day rule" adds three days to a given period if that period is measured after service and service is accomplished by certain methods.

cause and for non-electronic filing permitted by local rule. The username and password of an attorney of record, along with the attorney's name in the signature block, serves as the attorney's signature. Under the proposal, courts would retain the discretion to permit electronic filing by pro se parties, either through local rule or order.

Proposed amendments to Rule 5(b)(2)(E) address service. The present rule allows electronic service only if the person to be served has consented in writing. The proposal deletes the requirement of consent when service is made on a registered user through the court's electronic filing system. A related proposed amendment abrogates subsection (b)(3), which currently permits electronic service through the court's facilities "[i]f a local rule so authorizes." The proposal to authorize electronic service through CM/ECF makes subsection (b)(3)'s reliance on local rules unnecessary. Written consent is still required for electronic service by other means, whether the person served is a registered user or not. An example is service of papers not filed with the court such as discovery materials. Pro se parties who are not registered users are also still protected by the consent requirement.

Proposed amendments to Rule 5(d) address proof of service. The current rule requires a certificate of service, but does not specify a particular form. The proposal provides that a notice of electronic filing (or "NEF") generated by the court's CM/ECF system constitutes a certificate of service.

Rule 23

Since 2011, the Advisory Committee on Civil Rules, through its Rule 23 Subcommittee, has been considering amendments to Rule 23 (Class Actions). The Advisory Committee determined to take up this effort in light of several developments that seemed to warrant reexamination of Rule 23, namely, (1) the passage of time since the 2003 amendments to Rule 23

went into effect; (2) the development of a body of case law on class-action practice; and (3) recurrent interest in the subject in Congress, including the 2005 adoption of the Class Action Fairness Act.

An initial list of possible rule amendments was presented by subcommittee members at nearly two dozen meetings and bar conferences with diverse memberships and attendees. In addition, the subcommittee held a mini-conference to gather additional input from a variety of stakeholders on potential rule amendments. Based on the feedback received, consensus emerged at the Advisory Committee's November 2015 meeting around a basic outline for proceeding. At its April 2016 meeting, the Advisory Committee considered and approved for publication a package of proposed amendments to address the following seven issues:

1. Requiring earlier provision of information to the court relating to its decision whether to send notice to the class of a proposed settlement (known as "frontloading");
2. Making clear that a decision to send notice to the class under Rule 23(e)(1) is not appealable under Rule 23(f);
3. Making clear in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice triggers the opt-out period in Rule 23(b)(3) class actions;
4. Updating Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions;
5. Addressing issues raised by "bad faith" class action objectors;
6. Refining standards for approval of proposed class action settlements under Rule 23(e)(2); and
7. A proposal by the Department of Justice to include in Rule 23(f) a 45-day period to seek permission for an interlocutory appeal when the United States is a party.

The proposed amendments to Rule 23 do not address all of the issues identified and considered by the subcommittee. The subcommittee decided not to proceed with several of them, and determined that two additional topics should remain under study: (1) instances where defendants in putative class actions have sought to "pick off" the named class representative by offering all of the individual relief he or she could obtain and moving to dismiss on grounds of mootness; and (2) whether the membership in a proposed class is sufficiently ascertainable to support class certification. The Advisory Committee concurred with this decision.

Rule 62

The proposed amendments to Rule 62 (Stay of Proceedings to Enforce a Judgment) are the product of a joint subcommittee with the Advisory Committee on Appellate Rules.

The Advisory Committee on Civil Rules initially reviewed Rule 62 to consider a complication in the relationship between automatic stays under subsection (a) and the authority to order a stay pending disposition of a post-judgment motion under subsection (b). Before the Time Computation Project, Civil Rules 50, 52, and 59 set the time for motions at 10 days after entry of judgment. Rule 62(b) recognized authority to issue a stay pending disposition of a motion under Rules 50, 52, 59, or 60. The Time Computation Project reset the time for motions under Rules 50, 52, or 59 at 28 days. It also reset the expiration of the automatic stay in Rule 62(a) at 14 days after entry of judgment. An unintentional result was that the automatic stay expired halfway through the time allowed to make a post-judgment motion. Rule 62(b), however, continued to authorize a stay "pending disposition of any of" these motions. The proposed amendment to Rule 62(a) addresses this gap in time periods by extending the time of an automatic stay to 30 days. The proposal further provides that the automatic stay takes effect "unless the court orders otherwise."

The remaining proposed amendments make clear that a judgment debtor can secure a stay by posting continuing security, whether as a bond or by other means, that will last from termination of the automatic stay through completion of all acts by the court of appeals. An attempt to post a single bond to cover a stay both during post-judgment proceedings and during an appeal might run afoul of the present Rule 62(d) language that provides "[i]f an appeal is taken, ... [t]he bond may be given upon or after filing the notice of appeal . . . ." Proposed Rule 62(b) allows a single bond or other security by enabling a party to obtain a stay by providing a bond "[a]t any time after judgment is entered." Proposed Rule 62(b) also explicitly recognizes "a bond or other security."

The proposal also reorganizes and moves to Rule 62(c) and (d) the provisions in present Rule 62(a) and (c) for stays of judgments in an action for an injunction or a receivership, or judgments directing an accounting in an action for patent infringement.

Rule 65.1

The proposed amendment to Rule 65.1 (Proceedings Against a Surety) is intended to conform that rule to the proposed amendments to Appellate Rule 8(b). As discussed *supra* pp. 2–3, the Advisory Committee on Appellate Rules has proposed amendments to the Appellate Rules to conform those rules with the amendments to Civil Rule 62, including amendments to Appellate Rule 8(b). Appellate Rule 8(b) and Civil Rule 65.1 parallel one another. The proposed amendments to Rule 65.1 imitate those to Appellate Rule 8(b), namely, incorporating the addition of the words "or other security."

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Criminal Rules submitted proposed amendments to Criminal Rules 12.4, 45(c), and 49 with a request that they be published for comment in August 2016. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 12.4

Criminal Rule 12.4 (Disclosure Statement) is the rule that governs the parties' disclosure statements and was a new rule added in 2002. The Committee Note states that "[t]he purpose of the rule is to assist judges in determining whether they must recuse themselves because of a 'financial interest in the subject matter in controversy.' Code of Judicial Conduct, Canon 3C(1)(c) (1972)."

When Rule 12.4 was promulgated, the Code of Judicial Conduct treated all victims entitled to restitution as parties. The Code of Judicial Conduct was amended in 2009 to no longer treat any victim who may be entitled to restitution as a party, and requires disclosure only when the judge has an interest "that could be substantially affected by the outcome of the proceedings." The proposed amendments to Rule 12.4(a) are therefore intended to make the scope of the required disclosures consistent with the 2009 amendments to the Code of Judicial Conduct by allowing the court to relieve the government of the burden of making the required disclosures upon a showing by the government of "good cause." The amendment will avoid the need for burdensome disclosures when there are numerous organizational victims, but the impact of the crime on each is relatively small. For example, nearly every organization in the United States could be affected by price fixing concerning a widely-used product, such as a computer

program. But each victim would suffer only minor harm from a price increase that might be no more than pennies for each product purchased. In such cases, it seems unnecessarily burdensome (even if possible) for the government to name every corporation, partnership, union, or other organizational victim. The proposed amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations' interests—and hence those of the judge—could not be "substantially affected by the outcome of the proceedings." "Good cause" is a flexible standard that allows the court to weigh all of the relevant factors and determine on a case-by-case basis whether to relieve the government of the obligation to make disclosures under Rule 12.4.

The proposed amendment to Rule 12.4(b) makes two changes. First, it specifies that the time for making the disclosures is within 28 days after the defendant's initial appearance. Second, the proposed amendment makes clear that a party must promptly file a statement any time it learns of additional required information or of a change in previously disclosed information.

Rules 49 and 45(c)

The proposed revision of Criminal Rule 49 (Serving and Filing Papers) and a corresponding conforming amendment to Criminal Rule 45(c) (Additional Time After Certain Kinds of Service) are part of the larger inter-advisory committee project to develop rules for electronic filing, service, and notice. The decision by the Advisory Committee on Civil Rules to pursue a national rule mandating electronic filing in civil cases required reconsideration of Criminal Rule 49(b) and (d), which provide that service and filing "must be made in the manner provided for a civil action," and Rule 49(e), which provides that a local rule may require electronic filing only if reasonable exceptions are allowed.

In its consideration of the issue, the Advisory Committee concluded that the default rule proposed by the Advisory Committee on Civil Rules could be problematic in criminal cases. Therefore, the Advisory Committee determined that the best course was to eliminate the incorporation of Civil Rule 5 in the Criminal Rules and create a "stand-alone" rule applicable to criminal cases. The proposed revision of Criminal Rule 49 does not diverge completely from Civil Rule 5 and, in fact, replicates it when possible. Any differences between the two rules are rooted in differences between civil and criminal cases, or a difference in the civil and criminal rules as a whole.

The organization and structure of proposed Rule 49 differ from Civil Rule 5 in several respects. For example, the two rules differ in the order in which they address electronic and non-electronic means of filing and service. Rule 49 addresses electronic filing and service first. There are also substantive differences. Under proposed Rule 49, an unrepresented party must file non-electronically, unless permitted to file electronically by court order or local rule. In contrast, under the proposed amendment to Civil Rule 5, an unrepresented party may be "required" to file electronically by a court order or local rule that allows reasonable exceptions.

Proposed Rule 49 also requires all nonparties, represented or not, to file and serve non-electronically in the absence of a court order or local rule to the contrary. Several factors supported this decision. First, the architecture of the current CM/ECF system allows only the prosecution and defendant(s) to file in a criminal case. Second, nonparties generally have a distinctive interest only in certain aspects of a criminal case, and it may not be desirable for them to be served with pleadings and filings that are unrelated to those aspects of the case. Some nonparties, particularly victims, provide information to the court that they may not wish to share with the parties. A default of non-electronic filing helps protect those interests. If a district

decides that it would prefer to adopt procedures that would allow all represented media, victims, or other filers to use its electronic filing system, that remains an option by local rule. This policy choice is reflected in subsection (c), Service and Filing By Nonparties, which has no counterpart in the Civil Rules. Subsection (c) also serves another important function. The introductory clause—"A nonparty may serve and file a paper only if doing so is required or permitted by law"—makes it clear that the provisions describing how nonparties must file or serve do not expand the right of nonparties to participate in criminal prosecutions.

In addition, proposed Rule 49 contains two provisions that do not appear in Civil Rule 5 but were imported from other Civil Rules. The Advisory Committee concluded that severing the link to the Civil Rules without adding the signature provision of Civil Rule 11(a) to Rule 49 would create or maintain an existing gap in the Criminal Rules. Nowhere in the Criminal Rules is there a requirement that the contact information specified in Civil Rule 11(a) be included as part of a filing. Proposed Rule 49(b)(4) fills this gap by replicating the language presently found in Civil Rule 11(a). That language has been restyled, and the word "party" changed to "person" in order to accommodate filings by nonparties.

Proposed Rule 49(c) also substitutes the language from Civil Rule 77(d)(1), governing the clerk's duty to serve notice of orders, for the direction in current Rule 49 that the clerk serve notice "in a manner provided for in a civil action."

A conforming amendment to Rule 45(c) revises cross references that would be made obsolete by the proposed revision of Rule 49. Criminal Rule 45(c) provides for additional time to take action after service by certain means authorized by Civil Rule 5. An amendment to Rule 45 that eliminates the "3-day rule" for electronic service is now pending before Congress. That

amendment also incorporates cross references to the sections of Civil Rule 5 listing certain authorized modes of service.

The proposed amendment to Rule 49 imports the service rules now referenced in Rule 45(c) into Rule 49(a), rendering the existing cross references to Civil Rule 5 obsolete. The conforming amendment would replace the obsolete references to Civil Rule 5 with references to the corresponding new subsections in Rule 49(a).

Information Item

At its January 2016 meeting, the Standing Committee referred to the Advisory Committee a request by the CACM Committee to consider its concerns regarding dangers to cooperating witnesses posed by access to information in case files. For years, the CACM Committee has been tracking district court practices regarding public access to criminal case files and the illicit use of cooperation information. Most recently, the CACM Committee worked with the FJC to develop a comprehensive multi-year survey to determine the frequency and nature of threats and harms suffered by cooperators (the FJC Study).

A task force was formed to bring together the key stakeholders: members of the rules committees as well as representatives from the CACM Committee, the Department of Justice, the Bureau of Prisons, and the Sentencing Commission. Thus far, the task force has identified additional legal research and data in addition to that contained in the FJC Study needed to consider the issues raised by the CACM Committee. The task force will consider appropriate responses to the problem, including whether amendments to the Criminal Rules are a useful solution.

FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules submitted proposed amendments to Rules 803(16) and 902, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and public for comment in August 2015.

Rule 803(16)

Evidence Rule 803(16) provides a hearsay exception for "ancient documents"; that is, if a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. Over the years, the rationale for the exception has been criticized because it assumes that just because the document itself is authentic, all of the statements in the document are reliable enough to be admissible despite the fact they are hearsay. The Advisory Committee has long concurred with this criticism, but has not felt the need to address it because the exception is used infrequently. However, because electronically stored information can be retained for more than 20 years, a strong likelihood exists that the ancient documents exception will be used much more frequently going forward. Accordingly, the Advisory Committee determined that the time had come to address the ancient documents exception.

The decision to address the exception was based on a concern that, with its increased use, the exception could become a receptacle for *unreliable* hearsay—that is, if the hearsay is in fact reliable it will probably be admissible under other reliability-based exceptions, such as the business records exception or the residual exception. Moreover, the need for an ancient documents exception is questionable as applied to electronically stored information, for the very

reason that there may well be a great deal of *reliable* electronic data available to prove any dispute of fact.

The proposed amendment that was issued for public comment would have abrogated the ancient documents exception. While some commentators supported elimination of the exception, most did not. Lawyers in several specific areas—*e.g.*, product liability litigation involving latent diseases, land-use disputes, environmental clean-up disputes—said they had come to rely on the exception. After considering several alternatives, the Advisory Committee decided to amend the rule to limit the ancient documents exception to documents prepared before 1998. The year was chosen for two reasons: (1) going backward, it addressed the reliance-interest concerns of many commentators; and (2) going forward, reliable electronically stored information is likely to be preserved that can be used to prove the facts that are currently proved by scarce hardcopy. If the electronically stored information is generated by a business, then it is likely to be easier to find a qualified witness who is familiar with the electronic recordkeeping than it is under current practice to find a records custodian familiar with hardcopy practices from the 1960's and earlier. Moreover, the Committee Note emphasizes that the residual exception remains available to qualify old documents that are reliable, and makes clear the expectation that the residual exception not only can, but *should*, be used by courts to admit reliable documents prepared after January 1, 1998, that would have previously been offered under the ancient documents exception. The Advisory Committee unanimously approved the modification.

Rule 902

The proposed amendments to Rule 902 (Evidence That Is Self-Authenticating) add two new subdivisions that would allow certain electronic evidence to be authenticated by a certification of a qualified person (in lieu of that person's testimony at trial). New Rule 902(13)

would allow self-authentication of machine-generated information (such as a web page) upon a submission of a certificate prepared by a qualified person. New Rule 902(14) would provide a similar certification procedure for a copy of data taken from an electronic device, media, or file. The proposed new subdivisions are analogous to Rule 902(11) and 902(12), which permit a foundation witness to establish the authenticity and admissibility of business records by way of certification, with the burden of challenging authenticity on the opponent of the evidence. The purpose of the two new subdivisions is to make authentication easier for certain kinds of electronic evidence that, under current law, would likely be authenticated under Rule 901 but only after calling a witness to testify to authenticity. The Advisory Committee has found that electronic evidence is rarely the subject of a legitimate authenticity dispute yet, under current law, a proponent must still go to the expense of producing authenticating witnesses for trial. The amendments would alleviate the unnecessary costs of this production by allowing the qualifying witness to establish authenticity by way of certification.

Commentators were generally supportive of the proposal. Following the public comment period, minor revisions to the Committee Notes were made in an effort to increase clarity and emphasize the importance of reasonable notice.

The Standing Committee voted unanimously to support both recommendations of the Advisory Committee on Evidence Rules.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Evidence Rules 803(16) and 902, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to the Federal Rules of Evidence are set forth in Appendix C, with an excerpt from the Advisory Committee's report.

Information Item

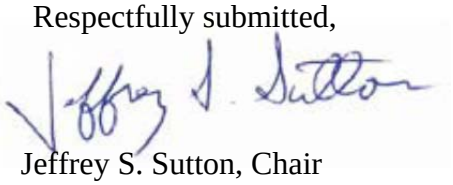
The volume of reported cases that set forth standards for authenticating electronic evidence led the Advisory Committee to consider whether to draft new rules to govern authentication of electronic evidence. The Advisory Committee concluded that any such amendments would be too detailed for the text of a rule, would not account for how a court can and should balance all of the factors relevant to authenticating electronic evidence, and would likely become outmoded by technological advances.

At the same time, the Advisory Committee supported the development of a practice manual on authenticating electronic evidence. Judge Paul W. Grimm, Gregory P. Joseph, Esq., and Professor Daniel J. Capra are currently engaged in developing the manual, which will be published by the FJC. The Advisory Committee appreciates the efforts of the authors and the FJC, and hopes that this resource guide will provide substantial assistance and guidance to courts and litigants.

OTHER MATTERS

Chief Judge William Jay Riley, the judiciary's planning coordinator, asked each Judicial Conference Committee for an update on strategic initiatives being implemented in support of the *Strategic Plan for the Federal Judiciary*. The Standing Committee reports that it continues to focus on educational efforts to implement the Civil Rules Package that became effective on December 1, 2015. Another initiative supportive of the *Strategic Plan* is the development and implementation of the pilot projects discussed *supra* pp. 18–21.

Respectfully submitted,



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Appendix A – Proposed Amendments to the Federal Rules of Bankruptcy Procedure
Appendix B – Excerpt from the Report of the Advisory Committee on Civil Rules
Appendix C – Proposed Amendments to the Federal Rules of Evidence

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 1001. Scope of Rules and Forms; Short Title

The Bankruptcy Rules and Forms govern procedure in cases under title 11 of the United States Code. The rules shall be cited as the Federal Rules of Bankruptcy Procedure and the forms as the Official Bankruptcy Forms. These rules shall be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every case and proceeding.

Committee Note

The last sentence of the rule is amended to incorporate the changes to Rule 1 F.R. Civ. P. made in 1993 and 2015.

The word "administered" is added to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that bankruptcy cases and the proceedings within them are resolved not only fairly, but also without undue cost or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned.

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

The addition of the phrase "employed by the court and the parties" emphasizes that parties share in the duty of using the rules to secure the just, speedy, and inexpensive determination of every case and proceeding. Achievement of this goal depends upon cooperative and proportional use of procedure by lawyers and parties.

This amendment does not create a new or independent source of sanctions. Nor does it abridge the scope of any other of these rules.

Changes Made After Publication and Comment

None.

Rule 1006. Filing Fee

* * * * *

(b) PAYMENT OF FILING FEE IN INSTALLMENTS.

(1) *Application to Pay Filing Fee in Installments*. A voluntary petition by an individual shall be accepted for filing, regardless of whether any portion of the filing fee is paid, if accompanied by the debtor's signed application, prepared as prescribed by the appropriate Official Form, stating that the debtor is unable to pay the filing fee except in installments.

* * * * *

Committee Note

Subdivision (b)(1) is amended to clarify that an individual debtor's voluntary petition, accompanied by an application to pay the filing fee in installments, must be accepted for filing, even if the court requires the initial installment to be paid at the time the petition is filed and the debtor fails to make that payment. Because the debtor's bankruptcy case is commenced upon the filing of the petition, dismissal of the case due to the debtor's failure to

make the initial or a subsequent installment payment is governed by Rule 1017(b)(1).

Changes Made After Publication and Comment

None.

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

* * * * *

(b) CASES INVOLVING TWO OR MORE RELATED DEBTORS. If a joint petition or two or more petitions are pending in the same court by or against (1) ~~a husband and wife~~spouses, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, the court may order a joint administration of the estates. Prior to entering an order the court shall give consideration to protecting creditors of different estates against potential conflicts of interest. An order directing joint administration of individual cases of ~~a husband and wife~~spouses shall, if one spouse has elected the exemptions under § 522(b)(2) of the Code and the other has elected the exemptions under § 522(b)(3), fix a reasonable time within which either may amend the election so that both shall have elected the same

exemptions. The order shall notify the debtors that unless they elect the same exemptions within the time fixed by the court, they will be deemed to have elected the exemptions provided by § 522(b)(2).

* * * * *

Committee Note

Subdivision (b) is amended to replace "a husband and wife" with "spouses" in light of the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Because this amendment is made to conform to the Supreme Court's decision in *Obergefell v. Hodges*, final approval is sought without publication.

United States Bankruptcy Court

_____ District of _____

In re *[Set forth here all names including married, maiden, and trade names used by debtor within last 8 years.]* Debtor Address _____ _____ Last four digits of Social Security or Individual Tax-payer Identification (ITIN) No(s).,(if any): _____ Employer's Tax Identification (EIN) No(s).(if any): _____ _____	Case No. _____ Chapter _____

NOTICE OF [MOTION TO] [OBJECTION TO]

_____has filed papers with the court to [relief sought in motion or objection].

Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. (If you do not have an attorney, you may wish to consult one.)

If you do not want the court to [relief sought in motion or objection], or if you want the court to consider your views on the [motion] [objection], then on or before (date), you or your attorney must:

[File with the court a written request for a hearing {*or, if the court requires a written response*, an answer, explaining your position} at:

{address of the bankruptcy clerk's office}

If you mail your {request}{response} to the court for filing, you must mail it early enough so the court will **receive** it on or before the date stated above.

You must also send a copy to:

{movant's attorney's name and address}

{names and addresses of others to be served}]

[Attend the hearing scheduled to be held on (date), (year) , at ____ a.m./p.m. in Courtroom____, United States Bankruptcy Court, {address}.]

[Other steps required to oppose a motion or objection under local rule or court order.]

If you or your attorney do not take these steps, the court may decide that you do not oppose the relief sought in the motion or objection and may enter an order granting that relief.

Date: _____

Signature: _____
Name: _____
Address: _____

United States Bankruptcy Court

_____ District of _____

In re *[Set forth here all names including married, maiden, and trade names used by debtor within last 8 years.]* Debtor Address _____ _____ Last four digits of Social Security or Individual Tax-payer Identification (ITIN) No(s).,(if any): _____ Employer's Tax Identification (EIN) No(s).(if any): _____	Case No. _____ Chapter _____

NOTICE OF OBJECTION TO CLAIM

_____ has filed an objection to your claim in this bankruptcy case.

Your claim may be reduced, modified, or eliminated. You should read these papers carefully and discuss them with your attorney, if you have one.

If you do not want the court to eliminate or change your claim, then on or before (date), you or your lawyer must:

{If required by local rule or court order.}

[File with the court a written response to the objection, explaining your position, at:

{address of the bankruptcy clerk's office}

If you mail your response to the court for filing, you must mail it early enough so that the court will **receive** it on or before the date stated above.

You must also send a copy to:

{objector's attorney's name and address}

{names and addresses of others to be served}]

Attend the hearing on the objection, scheduled to be held on (date), (year) , at ___ a.m./p.m. in Courtroom____, United States Bankruptcy Court, {address}.

If you or your attorney do not take these steps, the court may decide that you do not oppose the objection to your claim.

Date: _____

Signature: _____
Name: _____
Address: _____

COMMITTEE NOTE

The form numbers are updated to comport with the form numbering style developed as part of the Forms Modernization project. The forms are also amended to change the phrase "mail" to "send" to reflect the fact that there are various methods of providing documents to other parties.

Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 (Spouse, if filing) _____

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number _____

Official Form 410S2

Notice of Postpetition Mortgage Fees, Expenses, and Charges 12/16

If the debtor's plan provides for payment of postpetition contractual installments on your claim secured by a security interest in the debtor's principal residence, you must use this form to give notice of any fees, expenses, and charges incurred after the bankruptcy filing that you assert are recoverable against the debtor or against the debtor's principal residence.

File this form as a supplement to your proof of claim. See Bankruptcy Rule 3002.1.

Name of creditor: _____ **Court claim no**. (if known): _____

Last 4 digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Does this notice supplement a prior notice of postpetition fees, expenses, and charges?

q No

q Yes. Date of the last notice: ____/____/_____

Part 1: Itemize Postpetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges incurred on the debtor's mortgage account after the petition was filed. Do not include any escrow account disbursements or any amounts previously itemized in a notice filed in this case. If the court has previously approved an amount, indicate that approval in parentheses after the date the amount was incurred.

Description	Dates incurred		Amount
1. Late charges	_____	(1)	$ _____
2. Non-sufficient funds (NSF) fees	_____	(2)	$ _____
3. Attorney fees	_____	(3)	$ _____
4. Filing fees and court costs	_____	(4)	$ _____
5. Bankruptcy/Proof of claim fees	_____	(5)	$ _____
6. Appraisal/Broker's price opinion fees	_____	(6)	$ _____
7. Property inspection fees	_____	(7)	$ _____
8. Tax advances (non-escrow)	_____	(8)	$ _____
9. Insurance advances (non-escrow)	_____	(9)	$ _____
10. Property preservation expenses. Specify:_____	_____	(10)	$ _____
11. Other. Specify:_____	_____	(11)	$ _____
12. Other. Specify:_____	_____	(12)	$ _____
13. Other. Specify:_____	_____	(13)	$ _____
14. Other. Specify:_____	_____	(14)	$ _____

The debtor or trustee may challenge whether the fees, expenses, and charges you listed are required to be paid. See 11 U.S.C. § 1322(b)(5) and Bankruptcy Rule 3002.1.

Part 2: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number.

Check the appropriate box.

q I am the creditor.

q I am the creditor's authorized agent.

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

û _____ Date ____/_____/_____
Signature

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____– _____ Email _____

COMMITTEE NOTE

Form 410S2, *Notice of Postpetition Mortgage Fees, Expenses, and Charges*, is amended in the instructions in Part 1 to clarify how to report previously approved fees, expenses, or charges. The following language is added: "If the court has previously approved an amount, indicate that approval in parentheses after the date the amount was incurred." This amended language replaces the prior instruction not to report any amounts previously ruled on by the bankruptcy court.

Excerpt from the December 10, 2015 Report of the Advisory Committee on Bankruptcy Rules

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

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

FROM: Honorable Sandra Segal Ikuta, Chair
Advisory Committee on Bankruptcy Rules

DATE: December 10, 2015

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met in Washington, D.C., on October 1, 2015.

* * * * *

At the meeting the Committee approved conforming amendments to one rule and minor amendments to three official forms. It seeks the Standing Committee's approval of these amendments without publication.

* * * * *

II. Action Items

A. Items for Final Approval without Publication

The Committee requests that the Standing Committee approve the following rule and form amendments without publishing them for public comment due to their conforming or limited nature. The Committee recommends that the amended forms take effect on December 1, 2016. The rule and forms in this group appear in Appendix A.

Action Item 1. Rule 1015(b) (Cases Involving Two or More Related Debtors). Rule 1015(b) provides for the joint administration of bankruptcy cases in which the debtors are closely related. Among the debtors covered by the rule are "a husband and wife." The provision also implements a statutory requirement that a husband and wife with jointly administered cases choose the same exemption scheme—either federal bankruptcy exemptions, if permitted, or state exemptions.

After the decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), which held § 3 of the Defense of Marriage Act ("DOMA") unconstitutional, the Committee received a suggestion that Rule 1015(b) be amended to substitute the word "spouses" for "husband and wife" in order to include joint bankruptcy cases of same-sex couples. The Committee considered the suggestion at its spring 2014 meeting. It concluded that the first reference to "husband and wife" in Rule 1015(b) falls squarely within the holding of *Windsor*. Section 302 of the Bankruptcy Code, unlike the language of Rule 1015(b), authorizes the filing of a joint petition under a chapter by "an individual that may be a debtor under such chapter and such individual's spouse." The rule's use of the more restrictive term "husband and wife" could be justified only by reliance on § 3 of DOMA, which amended the Dictionary Act to provide that "the word 'spouse' refers only to a person of the opposite sex who is a husband or wife." 1 U.S.C. § 7. *Windsor*'s invalidation of the DOMA provision removed support for the rule's deviation from the statutory language.

The other reference to "husband and wife" in Rule 1015(b), however, is consistent with the statutory language. The rule implements § 522(b)(1) of the Code, which imposes a restriction on the choice of exemptions in cases in which the debtors are a "husband and wife." While some of the Court's reasoning in *Windsor* could be read to suggest that same-sex married couples in bankruptcy should not have a greater choice of exemptions than husbands and wives have, the decision is not directly on point. The Committee voted at the spring 2014 meeting to propose the substitution of "spouses" for both references to "husband and wife" in Rule 1015(b), but to await further clarification of the law on same-sex marriages before presenting the amendment to the Standing Committee.

At this fall's meeting, the Committee revisited the issue in light of the decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which held that the right to marry is a fundamental right under the Fourteenth Amendment and that same-sex couples may not be deprived of that right. *Id.* at 2599. The Court further held that the Equal Protection Clause prevents states from denying same-sex couples the benefits of civil marriage on the same terms as opposite-sex couples. *Id.* at 2604. The Committee concluded that the decision supported the proposed amendments to Rule 1015(b) to eliminate language suggesting that only opposite-sex married couples may file a joint bankruptcy petition under § 303 and that same-sex married couples are subject to different rules regarding their choice of exemptions. Because the Committee viewed

the proposed changes as conforming amendments, it voted unanimously to seek approval of them without publication for public comment.

Action Item 2. Official Forms 20A (Notice of Motion or Objection) and 20B (Notice of Objection to Claim). These official forms were overlooked by the Forms Modernization Project, and thus they were not included with the large group of modernized and renumbered forms that went into effect on December 1, 2015. The Committee recommends that these forms be renumbered and that a minor wording change be made to them.

Under the new numbering convention, the forms should be designated as Official Forms 420A and 420B. In addition, the Committee noted that both forms state that the recipient of the notice must "mail" a copy of any response to the movant's or objector's attorney. To encompass other permissible methods of service, the Committee recommends that "mail" be changed to "send," as indicated on the proposed forms in Appendix A.

Action Item 3. Official Form 410S2 (Notice of Postpetition Fees, Expenses, and Charges). Rule 3002.1(c) requires a home mortgage creditor in a chapter 13 case to give notice of any fees, expenses, or charges that are assessed during the course of the case to the debtor, debtor's counsel, and the trustee. This information assists a debtor who wants to maintain mortgage payments while in bankruptcy to make payments in a sufficient amount to emerge from bankruptcy current on the mortgage. Official Form 410S2 implements the rule provision. The Committee became aware of a possible inconsistency between the rule and the form. The instructions to Part 1 of the form state, "Do not include . . . any amounts previously . . . ruled on by the bankruptcy court." Rule 3002.1(c), however, requires the creditor to give notice of all postpetition fees, expenses, and charges without excepting ones already ruled on. This issue was discussed in *In re Sheppard*, 2012 WL 1344112 (Bankr. E.D. Va. Apr. 18, 2012). Noting the difference between the rule and the form's instruction, the court held that the form's instruction "best effectuates the ultimate goal of Rule 3002.1 to provide debtors with accurate information regarding postpetition obligations that await them at the conclusion of their bankruptcy case." *Id.* at *4. The court explained that requiring creditors to file a notice for amounts already approved by the court would result in duplication and uncertainty. Accordingly, it concluded that there was no need for the creditor to file notice of fees that had been included in a consent order resolving the creditor's motion for relief from the stay. *Id.*

Participants at a mini-conference the Committee held in 2012 came out the other way on the issue. They suggested that the instruction regarding amounts previously ruled on be deleted from Official Form 410S2 because giving notice of previously authorized fees would allow the trustee to determine if they had been paid.

The Committee concluded that the inconsistency between the form and the rule should be eliminated by deleting the instruction from the form. In order to prevent confusion or the risk of double payments, the proposed amendment adds an instruction to Form 410S2 that requires the creditor to indicate if a fee has previously been approved by the court. Because this is a minor conforming amendment, the Committee recommends that the proposed change be approved without publication.

* * * * *

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

MEMORANDUM

TO: Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Sandra Segal Ikuta
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: May 10, 2016

I. Introduction

The Advisory Committee on Bankruptcy Rules met on March 31, 2016, in Denver, Colorado.

* * * * *

The Committee now seeks the Standing Committee's final approval of two rule amendments that were published in August 2015, as well as retroactive approval of technical amendments that have been made to several official forms.

* * * * *

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Part II of this report discusses the action items, grouped as follows:

A. Items for Final Approval

(A1) Rules published for comment in August 2015—
- Rules 1001;
- Rule 1006(b); and

(A2) Technical changes previously made to Official Forms 106E/F, 119, 201, 206 Summary, 309A, 309I, 423, and 424.

* * * * *

II. Action Items

A. Items for Final Approval

(A1) *Rules published for comment in August 2015.*

The Committee recommends that the Standing Committee approve and transmit to the Judicial Conference the proposed rule amendments that were published for public comment in August 2015 and are discussed below. Bankruptcy Appendix A includes the rules that are in this group.

Action Item 1. Rule 1001 (Scope of Rules and Forms; Short Title). Rule 1001 is the bankruptcy counterpart to Civil Rule 1. Rather than incorporating Civil Rule 1 by reference, Rule 1001 generally tracks the language of the civil rule. The last sentence of Rule 1001 currently states, "These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding." This language deviates from Civil Rule 1, which states (as of December 1, 2015), "[These rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." The proposed amendment to Rule 1001 changes the last sentence of the rule to conform to the language of Civil Rule 1.

The Committee received two comments to the proposed rule amendment and, after due deliberation, determined that the comments did not warrant any action. Accordingly, the Committee voted unanimously to approve the proposed amendment as published.

Action Item 2. Rule 1006(b) (Filing Fee). Rule 1006(b) governs the payment of the bankruptcy filing fee in installments, as authorized for individual debtors by 28 U.S.C. § 1930(a). The Committee received and over the course of several years considered a potential amendment to the rule with respect to courts requiring a debtor who applies to pay the filing fee in installments to make an initial installment payment with the petition and the application. The Committee requested the Federal Judicial Center ("FJC") to conduct an empirical study on court practices regarding initial installment payments at the time of filing and whether there is an association between such a requirement and the rate of fee waiver applications. Although based on the FJC study and other factors, the Committee ultimately concluded that there was no need to clarify that courts may require an initial installment payment with the petition and application, the FJC study raised a different issue. Because Rule 1006(b)(1) requires the bankruptcy clerk to accept the petition, resulting in the commencement of a bankruptcy case, the practice of some courts of refusing to accept a petition or summarily dismissing a case because of the failure to

make an installment payment at the time of filing is inconsistent with Rules 1006(b)(1) and 1017(b)(1). The latter provision allows the court, only "after a hearing on notice to the debtor and the trustee," to dismiss a case for the failure to pay any installment of the filing fee.

In order to clarify that courts may not refuse to accept petitions or summarily dismiss cases for failure to make initial installment payments at the time of filing, the Committee proposed, and the Standing Committee approved, publication of an amendment to Rule 1006(b)(1) clarifying that an individual debtor's petition must be accepted for filing so long as the debtor submits a signed application to pay the filing fee in installments and even if a required initial installment payment is not made at the same time. The Committee Note explains that dismissal of the case for failure to pay any installment must proceed according to Rule 1017(b)(1).

The Committee received two comments to the proposed rule amendment and, after due deliberation, determined that the comments did not warrant any action. Accordingly, the Committee voted unanimously approve the proposed amendment as published.

(A2) *Technical changes to official forms.*

Action Item 3. Official Forms 106E/F, 119, 201, 206 Summary, 309A, 309I, 423, and 424. The Committee recommends that the Standing Committee give retroactive approval to the technical changes described below that have been made to official bankruptcy forms since the last Standing Committee meeting and that it give notice of these changes to the Judicial Conference.

At its March 15, 2016, meeting, the Judicial Conference approved the Standing Committee's recommendation to allow the Advisory Committee to make technical, non-substantive changes to official bankruptcy forms when the need for such changes is determined, subject to retroactive approval by the Standing Committee and reporting of the changes to the Judicial Conference. Operating under that authority, the Committee has made the technical changes listed below.

- Official Form 106E/F - Line number references in the instruction at the top of Part 2 started at an incorrect number; they were changed from "4.3 followed by 4.4" to "4.4 followed by 4.5."

- Official Form 119 - Because there is no "Part 3" on the form, the reference to "Part 3" at the top of page 1 was changed to "Part 2."

- Official Form 201 - The hyperlink in Question 7 for NACIS codes was updated to match the new landing page maintained by the Administrative Office.

- Official Form 206 Summary - Cross-references to line numbers 6a and 6b of Official Form 206E/F were incorrect and were changed to 5a and 5b.

- Official Form 309A - Line 9 was reformatted to be consistent with the remainder of the lines in the form.

- Official Form 309I - The last line of instruction 13 on page 2 was deleted, and the penultimate sentence was changed to: "If you believe that the debtors are not entitled to a discharge of any of their debts under 11 U.S.C. § 1328(f), you must file a motion by the deadline."

- Official Form 423 - The reference near the top of the form to 11 U.S.C. §1141(d)(3) was changed from "does not apply" to "applies" because it had previously misstated the relationship between that statutory provision and the necessity of a chapter 11 to complete an instructional course in personal financial management in order to obtain a discharge.

- Official Form 424 - The top of page 2 was changed from Rule 8001 to Rule 8006.

* * * * *

MEMORANDUM

TO: Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure

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

RE: Report of the Advisory Committee on Civil Rules

DATE: May 12, 2016 (revised July 1, 2016)

Introduction

The Civil Rules Advisory Committee met in Palm Beach, Florida, on April 14, 2016.

* * * * *

Part II presents a recommendation to approve submission to the Judicial Conference of the United States two proposed pilot projects. One project would test a system of mandatory initial discovery requests to be adopted in each participating court. The second would test the effectiveness of court-wide adoption of practices that, under the current rules, have proved effective in reducing cost and delay. The Committee on Court Administration and Case Management has participated in the work that shaped these projects. It is understood on all sides that the projects will evolve as they move along the path to implementation, both in the interlude before presentation to the Judicial Conference and, if approved, in the actual implementation period thereafter.

* * * * *

II. RECOMMENDATION FOR APPROVAL: PILOT PROJECTS

One of the conclusions reached in the process of developing the rule amendments that became effective on December 1, 2015, was that additional innovations in civil litigation may be more likely if they are tested first in a series of pilot projects. To pursue the possible development of such pilot projects, a subcommittee was formed consisting of Jeff Sutton, John Bates, Paul Grimm, Neil Gorsuch, Amy St. Eve, John Barkett, Parker Folse, Virginia Seitz, Ed Cooper, and Dave Campbell. Judge Phil Martinez from the Judicial Conference Committee on Court

Administration and Case Management (CACM) was added as a liaison to the subcommittee. The subcommittee's charge is to investigate pilot projects already completed in other locations and recommend possible pilot projects for federal courts.

The subcommittee reported on its work at the January 2016 Standing Committee meeting. At that time, the subcommittee had made contact with the National Center for State Courts, the Institute for Advancement of the American Legal System (IAALS), the Conference of State Court Chief Justices, and various innovative federal courts, and had conducted reviews of pilot projects in ten states. Summaries of the subcommittee's findings were included in the January materials.

Since the January meeting, the subcommittee has held focus-group discussions with lawyers and judges from courts in Colorado, Arizona, and Canada, which all use enhanced initial disclosures. Summaries of the Colorado and Arizona discussions are included as Exhibits 1 and 2 to this report. The subcommittee has also collected and reviewed much additional information, including a recently-proposed revision to Arizona's longstanding enhanced disclosure rule, a recently-revised portion of a joint project by IAALS and the American College of Trial Lawyers recommending more robust initial disclosures, reactions to and comments on the 1993 amendment of the Federal Rules of Civil Procedure that required enhanced initial disclosures, articles from a 1997 symposium concerning the initial disclosure efforts of the early 1990s, the robust initial disclosure rules used in various states (Ex. 3), and a recent FJC report titled "A Study of Civil Case Disposition Time in U.S. District Courts" (Ex. 4).

The subcommittee has concluded that two specific pilot projects should be implemented in federal district courts, one focused on enhanced initial discovery and the other on expedited case management. Descriptions of these proposed pilot programs are provided below. The Civil Rules committee concurred in the pursuit of these pilot projects at its April 2016 meeting.

The subcommittee believes that more robust initial discovery requirements could help reduce the cost and delay of civil litigation. This belief is based on several sources: (a) the employment protocol test project currently underway, which requires more substantial initial disclosures in employment cases and, according to a study completed by the FJC and described at the January meeting, appears to be reducing discovery disputes; (b) the Colorado Civil Access Pilot Project, which included more robust initial disclosures and was found, in a study by IAALS, to have reduced time to disposition of civil cases (the Colorado courts have now adopted the initial disclosures as part of their civil rules); (c) the Arizona enhanced disclosure rule, which has been in place for more than twenty years and generally is preferred by Arizona lawyers over the federal rules; and (d) the rather obvious conclusion that civil litigation will be resolved more quickly and less expensively if relevant information is disclosed earlier and with less discovery practice.

The subcommittee also believes that expedited case management practices could help reduce the cost and delay of civil litigation. Many studies have found that cases are resolved more quickly and with less cost when judges intervene early, actively manage cases, set reasonable but efficient discovery schedules, set firm trial dates, and resolve disputes quickly. The purpose of the second pilot is to implement these practices in the pilot districts, with specific time goals and focused training for judges, measuring case disposition times and other relevant milestones as the pilot progresses. The pilot would test how effectively these proven case management practices can be implemented in various districts through specific time goals and focused training.

Authority to engage in these pilot projects is found in several places. Civil Rule 16(b)(3) authorizes a district court to enter a scheduling order that addresses several relevant subjects: deadlines for the litigation, the timing of disclosures and the extent of discovery, the disclosure of

ESI, procedures for prompt resolution of discovery disputes, and "other appropriate matters." Rule 26(b)(2)(C) authorizes the court, on its own, to limit the frequency or extent of discovery, considering whether information can be obtained from other sources that are more convenient, less burdensome, or less expensive. And 28 U.S.C. § 331 authorizes the Judicial Conference to "carry on a continuous study of the operation and effect of the general rules of practice and procedure" used in the federal courts, and to recommend "[s]uch changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay[.]"

A. MANDATORY INITIAL DISCOVERY PILOT PROJECT

1. Standing Order. This pilot project would be implemented through a standing order issued in each of the pilot districts. Our current draft of the order is as follows:

Standing Order

The Court is participating in a pilot project that requires mandatory initial discovery in all civil cases other than cases exempted by Rule 26(a)(1)(B), patent cases governed by a local rule, and cases transferred for consolidated administration in the District by the Judicial Panel on Multidistrict Litigation. The discovery obligations addressed in this Standing Order supersede the disclosures required by Rule 26(a)(1) and are framed as court-ordered mandatory initial discovery pursuant to the Court's inherent authority to manage cases, Rule 16(b)(3)(B)(ii), (iii), and (vi), and Rule 26(b)(2)(C). Unlike initial disclosures required by current Rule 26(a)(1)(A) & (C), this Standing Order does not allow the parties to opt out.

A. Instructions to Parties.

1. The parties are ordered to respond to the following mandatory initial discovery requests before initiating any further discovery in this case. Further discovery will be as ordered by the Court. Each party's response must be based on the information then reasonably available to it. A party is not excused from providing its response because it has not fully investigated the case or because it challenges the sufficiency of another party's response or because another party has not provided a response. Responses must be signed under oath by the party certifying that it is complete and correct as of the time it was made, based on the party's knowledge, information, and belief formed after a reasonable inquiry, and signed under Rule 26(g) by the attorney.

2. The parties must provide the requested information as to facts that are relevant to the parties' claims and defenses, whether favorable or unfavorable, and regardless of whether they intend to use the information in presenting their claims or defenses. The parties also must provide relevant legal theories in response to paragraph B.4 below. If a party limits the scope of its response on the basis of any claim of privilege or work product, the party must produce a privilege log as required by Rule 26(b)(5) unless the parties agree or the Court orders otherwise. If a party limits its response on the basis of any other objection, including an objection that providing the required information would involve disproportionate expense or burden, considering the needs of the case, it must explain with particularity the nature of the objection and its legal basis, and provide a fair description of the information being withheld.

3. All parties must file answers, counterclaims, crossclaims, and replies within the time set forth in Rule 12(a)(1)(A), (B), and (C) even if they have filed or intend to file a motion to dismiss or other preliminary motion. Fed. R. Civ. P. 12(a)(4). But the Court may for good cause defer the time to answer, counterclaim, crossclaim, or reply while it considers a motion to dismiss based on: lack of subject-matter jurisdiction; lack of personal jurisdiction; sovereign immunity; or absolute immunity. In that event, the time to answer, counterclaim, crossclaim, or reply shall be set by the Court based upon entry of an order deciding the motion, and the time to serve responses to the mandatory initial discovery under paragraph 4 shall be measured from that date.

4. A party seeking affirmative relief must serve its responses to the mandatory initial discovery no later than 30 days after the filing of the first pleading made in response to its complaint, counterclaim, crossclaim, or third-party complaint. A party filing a responsive pleading, whether or not it also seeks affirmative relief, must serve its initial discovery responses no later than 30 days after it files its responsive pleading. However, (a) no initial discovery responses need be served if the Court approves a written stipulation by the parties that no discovery will be conducted in the case; and (b) initial discovery responses may be deferred, one time, for 30 days if the parties jointly certify to the Court that they are seeking to settle the case and have a good faith belief that it will be resolved within 30 days of the due date for their responses.

5. Initial responses to these mandatory discovery requests shall be filed with the Court on the date when they are served; provided, that voluminous attachments need not be filed, nor are parties required to file documents that are produced in lieu of identification pursuant to paragraphs (B) (3), (5), or (6) below. Supplemental responses shall be filed with the Court if they are served prior to the scheduling conference held under Rule 16(b), but any later supplemental responses need not be filed, although the party serving the supplemental response shall file a notice with the Court that a supplemental response has been served.

6. The duty of mandatory initial discovery set forth in this Order is a continuing duty, and each party must serve supplemental responses when new or additional information is discovered or revealed. A party must serve such supplemental responses in a timely manner, but in any event no later than 30 days after the information is discovered by or revealed to the party. If new information is revealed in a written discovery response or a deposition in a manner that reasonably informs all parties of the information, the information need not be presented in a supplemental response.

7. The Court normally will set a deadline in its Rule 16(b) case management order for final supplementation of responses, and full and complete supplementation must occur by the deadline. In the absence of such a deadline, full and complete supplementation must occur no later than 90 days before the final pretrial conference.

8. During their Rule 26(f) conference, the parties must discuss the mandatory initial discovery responses and seek to resolve any limitations they have made or intend to make in their responses. The parties should include in the Rule 26(f) report to the Court a description of their discussions. The report should describe

the resolution of any limitations invoked by either party in its response, as well as any unresolved limitations or other discovery issues.

9. Production of information under this Standing Order does not constitute an admission that information is relevant, authentic, or admissible.

10. Rule 37(c)(1) shall apply to mandatory discovery responses required by this Order.

B. Mandatory Initial Discovery Requests.

1. State the names and, if known, the addresses and telephone numbers of all persons who you believe are likely to have discoverable information relevant to any party's claims or defenses, and provide a fair description of the nature of the information each such person is believed to possess.

2. State the names and, if known, the addresses and telephone numbers of all persons who you believe have given written or recorded statements relevant to any party's claims or defenses. Unless you assert a privilege or work product protection against disclosure under applicable law, attach a copy of each such statement if it is in your possession, custody, or control. If not in your possession, custody, or control, state the name and, if known, the address and telephone number of each person who you believe has custody of a copy.

3. List the documents, electronically stored information ("ESI"), tangible things, land, or other property known by you to exist, whether or not in your possession, custody or control, that you believe may be relevant to any party's claims or defenses. To the extent the volume of any such materials makes listing them individually impracticable, you may group similar documents or ESI into categories and describe the specific categories with particularity. Include in your response the names and, if known, the addresses and telephone numbers of the custodians of the documents, ESI, or tangible things, land, or other property that are not in your possession, custody, or control. For documents and tangible things in your possession, custody, or control, you may produce them with your response, or make them available for inspection on the date of the response, instead of listing them. Production of ESI will occur in accordance with paragraph (C)(2) below.

4. For each of your claims or defenses, state the facts relevant to it and the legal theories upon which it is based.

5. Provide a computation of each category of damages claimed by you, and a description of the documents or other evidentiary material on which it is based, including materials bearing on the nature and extent of the injuries suffered. You may produce the documents or other evidentiary materials with your response instead of describing them.

6. Specifically identify and describe any insurance or other agreement under which an insurance business or other person or entity may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse a party for payments made by the party to satisfy the judgment. You may produce a copy of the agreement with your response instead of describing it.

7. A party receiving the list described in Paragraph 3, the description of materials identified in Paragraph 5, or a description of agreements referred to in Paragraph 6 may request more detailed or thorough responses to these mandatory discovery requests if it believes the responses are deficient. When the court has authorized further discovery, a party may also serve requests pursuant to Rule 34 to inspect, copy, test, or sample any or all of the listed or described items to the extent not already produced in response to these mandatory discovery requests, or to enter onto designated land or other property identified or described.

C. Disclosure of Hard-Copy Documents and ESI.

1. *Hard-Copy Documents.* Hard-copy documents must be produced as they are kept in the usual course of business.

2. *ESI.*

a. *Duty to Confer.* When the existence of ESI is disclosed or discovered, the parties must promptly confer and attempt to agree on matters relating to its disclosure and production, including:

i. requirements and limits on the preservation, disclosure, and production of ESI;

ii. appropriate ESI searches, including custodians and search terms, or other use of technology assisted review;

iii. the form in which the ESI will be produced.

b. *Resolution of Disputes.* If the parties are unable to resolve any dispute regarding ESI and seek resolution from the Court, they must present the dispute in a single joint motion or, if the Court directs, in a conference call with the Court. Any joint motion must include the parties' positions and the separate certification of counsel required under Rule 26(g).

c. *Production of ESI.* Unless the Court orders otherwise, a party must produce the ESI identified under paragraph (B)(3) within 40 days after serving its initial response. Absent good cause, no party need produce ESI in more than one form.

d. *Presumptive Form of Production.* Unless the parties agree or the Court orders otherwise, a party must produce ESI in the form requested by the receiving party. If the receiving party does not specify a form, the producing party may produce the ESI in any reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the ESI as the producing party.

Instructions for Pilot Courts

Pilot judges should hold initial case management conferences under Rule 16(b) within the time specified in Rule 16(b)(2). Judges should discuss with the parties their compliance with the mandatory discovery obligations set forth in the

> Standing Order, resolve any disputes, and set a date for full and complete supplementation of responses.
>
> Judges may alter the time for mandatory initial discovery responses upon a showing of good cause, but this should not be a frequent event. Early discovery responses are critical to the purposes of this pilot program.
>
> Judges should make themselves available for prompt resolution of discovery disputes. It is recommended that judges require parties to contact the Court for a pre-motion conference, as identified in Rule 16(b)(3)(B)(v), before filing discovery motions. If discovery motions are necessary, they should be resolved promptly.
>
> Courts should vigorously enforce mandatory discovery obligations. Experience in states with robust initial disclosure requirements has shown that diligent enforcement by judges is the key to an effective disclosure regime. Rule 37 governs sanctions.

2. User's Manual. The pilot project will require something of a "user's manual" for the pilot judges, The precise form of that manual has not been developed, but it would include the following kinds of instructions:

Pilot judges should hold initial case management conferences under Rule 16(b) within the time specified in Rule 16(b)(2). Judges should discuss with the parties their compliance with the mandatory discovery obligations set forth in the Standing Order, resolve any disputes, and set a date for full and complete supplementation of responses.

Judges may alter the time for mandatory initial discovery responses upon a showing of good cause, but this should not be a frequent event. Early discovery responses are critical to the purposes of this pilot program.

Judges should make themselves available for prompt resolution of discovery disputes. It is recommended that judges require parties to contact the Court for a pre-motion conference, as identified in Rule 16(b)(3)(B)(v), before filing discovery motions. If discovery motions are necessary, they should be resolved promptly.

Courts should vigorously enforce mandatory discovery obligations. Experience in states with robust initial disclosure requirements has shown that diligent enforcement by judges is the key to an effective disclosure regime. Rule 37 governs sanctions.

3. Timing, Participation, and Other Issues.

We propose that the initial discovery pilot project be approved by the Standing Committee at its June meeting. Additional details will need to be worked out, but our hope is that this pilot can be launched in 2017. The pilot would last three years. We will seek the agreement of CACM and the FJC, and approval by the Judicial Conference in September.

We think that at least three to five districts should participate. One small district has already volunteered.

To participate in this pilot, district courts must be willing to make the pilot's requirements mandatory. We have debated whether to require that all judges in the pilot districts be willing to

participate. On one hand, complete participation would avoid skewing the results of the pilot through self-selection by judges, and would present a better prospect of culture change – one of the goals of the pilot. On the other hand, requiring participation by all judges might mean that larger districts do not participate.

One other issue was discussed at the civil rules committee meeting. The subcommittee's original draft required that answers be filed and mandatory discovery responses be made in every case, even when motions to dismiss have been filed. Some expressed the view that exceptions should be allowed for motions raising jurisdictional or immunity issues, and language has been added to paragraph 1(A)(3) of the standing order to reflect this possibility. The counter-argument is that permitting any exceptions for motions to dismiss will only encourage such motions and delay the responses required by the pilot, defeating in part the purpose of prompt and complete responses early in every case.

B. EXPEDITED PROCEDURES PILOT

1. Description of Pilot Project

The goal of the Civil Rules is to further the "just, speedy, and inexpensive determination of every action." Case resolution that is not speedy and inexpensive often will not be just. This pilot will involve all civil cases where discovery and trial are possible (it will not include cases decided on an administrative record with no trial). The pilot will include three parts:

(1) Each participating court will adopt the following practices: (a) prompt case management conferences in every case (within the time allowed by amended Rule 16(b)(2)); (b) firm caps on the amount of time allocated for discovery, to be set by the judge after conferring with the parties at the case management conference, and to be extended no more than once and only for good cause based on a showing of diligence by the parties; (c) prompt resolution of discovery disputes by telephone conferences; (d) decisions on all dispositive motions within 60 days of the reply brief being filed; and (e) setting and holding firm trial dates.

(2) Metrics will be as follows: (a) if we could measure it, the level of the pilot judges' compliance with the goals in (1) above; (b) trial dates in 90% of civil cases set within 14 months of case filing, trial dates in the remaining 10% set within 18 months, and all trial dates held firm; (c) 25% reduction in the number of categories of cases in the district "dashboard" that are decided slower than the national average (or some comparable measure that could use the new CACM dashboard tool).

(3) Training and collaboration: (a) the FJC will do an initial one-day training session for pilot judges and staff, followed by additional FJC training every six months or year; (b) judges in the district will meet quarterly to discuss best practices and what is working and not working, and to refine their case management methods to meet the pilot goals; (c) one or two judges from outside the district will be available as resources during these quarterly conferences, with the same resource judges serving throughout the duration of the pilot; (d) the judges in the pilot district would have at least one bench-bar meeting per year to talk with lawyers in the district about how the pilot is working and to make appropriate adjustments; (e) the pilot would last three years.

Building on the work of several federal and state courts, this project seizes on the increased reasonableness associated with discovery that must be finished within a discrete time period. A similar dynamic is at play when trial judges allocate a set amount of time for each party to make its case at trial; redundancy is lessened and efficiency increases.

There are several premises of the pilot: (1) the longer a case takes to resolve, the more expensive it is for the parties; (2) the combination of tight timetables for discovery, prompt resolution of discovery and dispositive motions, and firm trial dates is more likely to prompt lawyers to be reasonable in their discovery requests and litigation behavior than any rule; (3) lawyer cooperation should increase when both parties must conduct discovery within a set period of time; and (4) prompt feedback about the impact of these practices will demonstrate their utility to the judges who use them.

2. Participants

A. Civil Rules and Standing Committees
B. CACM
C. FJC

3. Timetable

A. April 2016—approval by Civil Rules Committee
B. June 2016—approval by Standing Committee, CACM, and FJC
C. September 2016—approval by the Judicial Conference
D. Early 2017—initial implementation
E. End of 2020—completion

4. Criteria for district courts to participate

A. Court must be willing to make the pilot's requirements mandatory.
B. All judges on the district court must be willing to participate.
C. At least three to five district courts need to participate.

This pilot project is less refined that the mandatory disclosures pilot and will require significant work over the next several months.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * * * *

(16) ***Statements in Ancient Documents***. A statement in a document ~~that is at least 20 years old~~that was prepared before January 1, 1998, and whose authenticity is established.

* * * * *

Committee Note

The ancient documents exception to the rule against hearsay has been limited to statements in documents prepared before January 1, 1998. The Committee has

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

determined that the ancient documents exception should be limited due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). Given the exponential development and growth of electronic information since 1998, the hearsay exception for ancient documents has now become a possible open door for large amounts of unreliable ESI, as no showing of reliability needs to be made to qualify under the exception.

The Committee is aware that in certain cases—such as cases involving latent diseases and environmental damage—parties must rely on hardcopy documents from the past. The ancient documents exception remains available for such cases for documents prepared before 1998. Going forward, it is anticipated that any need to admit old hardcopy documents produced after January 1, 1998 will decrease, because reliable ESI is likely to be available and can be offered under a reliability-based hearsay exception. Rule 803(6) may be used for many of these ESI documents, especially given its flexible standards on which witnesses might be qualified to provide an adequate foundation. And Rule 807 can be used to admit old documents upon a showing of reliability—which will often (though not always) be found by circumstances such as that the document was prepared with no litigation motive in mind, close in time to the relevant events. The limitation of the ancient documents exception is not intended to raise an inference that 20 year-old documents are, as a class, unreliable, or that they should somehow not qualify for admissibility under Rule 807. Finally, many old documents can be admitted for the non-hearsay purpose of proving notice, or as party-opponent statements.

The limitation of the ancient documents hearsay exception is not intended to have any effect on authentication of ancient documents. The possibility of authenticating an old document under Rule 901(b)(8)—or under any ground available for any other document—remains unchanged.

The Committee carefully considered, but ultimately rejected, an amendment that would preserve the ancient documents exception for hardcopy evidence only. A party will often offer hardcopy that is derived from ESI. Moreover, a good deal of old information in hardcopy has been digitized or will be so in the future. Thus, the line between ESI and hardcopy was determined to be one that could not be drawn usefully.

The Committee understands that the choice of a cut-off date has a degree of arbitrariness. But January 1, 1998 is a rational date for treating concerns about old and unreliable ESI. And the date is no more arbitrary than the 20-year cutoff date in the original rule. See Committee Note to Rule 901(b)(8) ("Any time period selected is bound to be arbitrary.").

Under the amendment, a document is "prepared" when the statement proffered was recorded in that document. For example, if a hardcopy document is prepared in 1995, and a party seeks to admit a scanned copy of that document, the date of preparation is 1995 even though the scan was made long after that—the subsequent scan does not alter the document. The relevant point is the date on which the information is recorded, not when the information is prepared for trial. However, if the content of

the document is *itself* altered after the cut-off date, then the hearsay exception will not apply to statements that were added in the alteration.

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * * * *

(13) ***Certified Records Generated by an Electronic Process or System.*** A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

Committee Note

The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and

inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule. The Rule specifically allows the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

The reference to the "certification requirements of Rule 902(11) or (12)" is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(13) is solely

limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation. For example, assume that a plaintiff in a defamation case offers what purports to be a printout of a webpage on which a defamatory statement was made. Plaintiff offers a certification under this Rule in which a qualified person describes the process by which the webpage was retrieved. Even if that certification sufficiently establishes that the webpage is authentic, defendant remains free to object that the statement on the webpage was not placed there by defendant. Similarly, a certification authenticating a computer output, such as a spreadsheet, does not preclude an objection that the information produced is unreliable—the authentication establishes only that the output came from the computer.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * * * *

(14) ***Certified Data Copied from an Electronic Device, Storage Medium, or File.*** Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

Committee Note

The amendment sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or an electronic file, other than

through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing an authenticating witness for this evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by "hash value." A hash value is a number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule.

The reference to the "certification requirements of Rule 902(11) or (12)" is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(14) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation. For example, in a criminal case in which data copied from a hard drive is proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

A challenge to the authenticity of electronic evidence may require technical information about the system or

process at issue, including possibly retaining a forensic technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

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

MEMORANDUM

TO: Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. William K. Sessions, III, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: May 7, 2016

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 29, 2016 in Alexandria, Virginia.

The Committee seeks final approval of two proposed amendments for submission to the Judicial Conference:

1. Amendment to Rule 803(16), the ancient documents exception to the hearsay rule, to limit its application to documents prepared before 1998; and

2. Amendment to Rule 902 to add two subdivisions that would allow authentication of certain electronic evidence by way of certification by a qualified person.

* * * * *

II. Action Items

A. Amendment Limiting the Coverage of Rule 803(16)

Rule 803(16) provides a hearsay exception for "ancient documents." If a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. The Committee has considered whether Rule 803(16) should be eliminated or amended because of the development of electronically stored information. The rationale for the exception has always been questionable, because a document does not magically become reliable enough to escape the rule against hearsay on the day it turns 20. The Committee concluded that the exception has been tolerated because it has been used relatively infrequently, and usually because there is no other evidence on point. But because electronically stored information can be retained for more than 20 years, there is a strong likelihood that the ancient documents exception will be used much more frequently in the coming years. And it could be used as a receptacle for unreliable hearsay, because if the hearsay is in fact reliable it will probably be admissible under other reliability-based exceptions, such as the business records exception or the residual exception. Moreover, the need for an ancient documents exception is questionable as applied to ESI, for the very reason that there may well be a great deal of *reliable* electronic data available to prove any dispute of fact.

The proposed amendment that was issued for public comment would have eliminated the ancient documents exception. The public comment on that proposed elimination was largely negative, however. Most of the comments asserted that without the ancient documents exception, important documents in certain specific types of litigation would no longer be admissible—or would be admissible only through expending resources that are currently not necessary under Rule 803(16). Examples of litigation cited by the public comment include cases involving latent diseases; disputes over the existence of insurance; suits against churches alleged to condone sexual abuse by their clergy; cases involving environmental cleanups; and title disputes. Many of the comments concluded that the business records exception and the residual exception are not workable alternatives for ancient documents. The comments contended that the business records exception requires a foundation witness that may be hard to find, and that the residual exception is supposed to be narrowly construed. Moreover, both these exceptions would require a statement-by-statement analysis, which is not necessary under Rule 803(16), thus leading to more costs for proponents. Much of the comment was about the amendment's leading to extra costs of qualifying old documents.

In light of the public comment, the Committee abandoned the proposal to eliminate the ancient documents exception. But it also rejected the option of doing nothing. The Committee strongly believes that the ESI problem as related to Rule 803(16) is real. Because ESI can be easily and permanently stored, there is a substantial risk that the terabytes of emails, web pages, and texts generated in the last 20 or so years could inundate the courts by way of the ancient documents exception. Computer storage costs have dropped dramatically—that greatly expands the universe of information that could be potentially offered under the ancient documents exception. Moreover, the presumption of the ancient documents exception was that a hardcopy document kept around for 20 years must have been thought to have some importance; but that presumption is no longer the case with easily stored ESI. The Committee remains convinced that

it is appropriate and necessary to get out ahead of this problem—especially because the use of the ancient documents exception is so difficult to monitor. There are few reported cases about Rule 803(16) because no objection can be made to admitting the content of the document once it has been authenticated—essentially there is nothing to report. So tracking reported cases would not be a good way to determine whether ESI is being offered under the exception. Finally, the Committee adheres to its position that Rule 803(16) is simply a flawed rule; it is based on the fallacy that because a document is old and authentic, its contents are reliable. Therefore something must be done, at least, to limit the exception as to ESI.

The Committee considered a number of alternatives for amending Rule 803(16) to limit its impact. The alternatives of adding reliability requirements, or necessity requirements, were rejected. These alternatives were likely to lead to the increased costs of qualification of old documents, and extensive motion practice, that were opposed in the public comment. Ultimately, the Committee returned to where it started—the ESI problem. The Committee determined that the best result was to limit the ancient documents exception to documents prepared before 1998. That amendment will have no effect on any of the cases raised in the public comments, because the concerns were about cases involving records prepared well before 1998. And 1998 was found to be a fair date for addressing the rise of ESI. The Committee recognizes, of course, that any cutoff date will have a degree of arbitrariness, but it also notes that the ancient documents exception itself set an arbitrary time period for its applicability.

The Committee has considered the possibility that in the future, cases involving latent diseases, CERCLA, etc. will arise. But the Committee has concluded that in such future cases, the ancient documents exception is unlikely to be necessary because, going forward from 1998, there is likely to be preserved, reliable ESI that can be used to prove the facts that are currently proved by scarce hardcopy. If the ESI is generated by a business, then it is likely to be easier to find a qualified witness who is familiar with the electronic recordkeeping than it is under current practice to find a records custodian familiar with hardcopy practices from the 1960's and earlier. Moreover, the Committee has emphasized in the Committee Note that the residual exception remains available to qualify old documents that are reliable; the Note states the Committee's expectation that the residual exception not only can, but *should* be used by courts to admit reliable documents prepared after January 1, 1998 that would have previously been offered under the ancient documents exception.

The Committee unanimously recommends that the Standing Committee approve the * * * * * amendment to Rule 803(16), and the Committee Note, for submission to the Judicial Conference[.]

* * * * *

B. Proposed Amendment to Evidence Rule 902

At its Spring 2015 meeting, the Committee unanimously approved a proposal to add two new subdivisions to Rule 902, the rule on self-authentication. The first provision would allow self-authentication of machine-generated information, upon a submission of a certification prepared by a qualified person. The second proposal would provide a similar certification

procedure for a copy of data taken from an electronic device, medium or file. These proposals are analogous to Rules 902(11) and (12) of the Federal Rules of Evidence, which permit a foundation witness to establish the authenticity of business records by way of certification.

The proposals have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901 but only by calling a witness to testify to authenticity. The Committee has concluded that the types of electronic evidence covered by the two proposed rules are rarely the subject of a legitimate authenticity dispute, but it is often the case that the proponent is nonetheless forced to produce an authentication witness, incurring expense and inconvenience—and often, at the last minute, opposing counsel ends up stipulating to authenticity in any event.

The self-authentication proposals, by following the approach taken in Rule 902(11) and (12) regarding business records, essentially leave the burden of going forward on authenticity questions to the opponent of the evidence. Under those rules a business record is authenticated by a certificate, but the opponent is given "a fair opportunity" to challenge both the certificate and the underlying record. The proposals for new Rules 902(13) and 902(14) would have the same effect of shifting to the opponent the burden of going forward (not the burden of proof) on authenticity disputes regarding the described electronic evidence.

Applications of Rules 902(13) and (14)

At the Standing Committee meeting in Spring 2015, Committee members inquired as to what kind of information might be authenticated under these new provisions. The Committee (with the substantial assistance of John Haried, who initially proposed these amendments) has prepared the following examples to illustrate how Rules 902(13) and (14) may be used:

Examples of how Rule 902(13) can be used:

1. Proving that a USB device was connected to (i.e., plugged into) a computer: In a hypothetical civil or criminal case in Chicago, a disputed issue is whether Devera Hall used her computer to access files stored on a USB thumb drive owned by a co-worker. Ms. Hall's computer uses the Windows operating system, which automatically records information about every USB device connected to her computer in a database known as the "Windows registry." The Windows registry database is maintained on the computer by the Windows operating system in order to facilitate the computer's operations. A forensic technician, located in Dallas, Texas, has provided a printout from the Windows registry that indicates that a USB thumb drive, identified by manufacturer, model, and serial number, was last connected to Ms. Hall's computer at a specific date and time.

> **Without Rule 902(13):** Without Rule 902(13), the proponent of the evidence would need to call the forensic technician who obtained the printout as a witness, in order to establish the authenticity of the evidence. During his or her testimony, the forensic technician would typically be asked to testify about his or her background and qualifications; the process by which digital forensic examinations are conducted in general; the steps taken by the forensic technician during the examination of Ms. Hall's

computer in particular; the process by which the Windows operating system maintains information in the Windows registry, including information about USB devices connected to the computer; and the steps taken by the forensic examiner to examine the Windows registry and to produce the printout identifying the USB device.

Impact of Rule 902(13): With Rule 902(13), the proponent of the evidence could obtain a written certification from the forensic technician, stating that the Windows operating system regularly records information in the Windows registry about USB devices connected to a computer; that the process by which such information is recorded produces an accurate result; and that the printout accurately reflected information stored in the Windows registry of Ms. Hall's computer. The proponent would be required to provide reasonable written notice of its intent to offer the printout as an exhibit and to make the written certification and proposed exhibit available for inspection. If the opposing party did not dispute the accuracy or reliability of the process that produced the exhibit, the proponent would not need to call the forensic technician as a witness to establish the authenticity of the exhibit. (There are many other examples of the same types of machine-generated information on computers, for example, internet browser histories and wifi access logs.)

2. Proving that a server was used to connect to a particular webpage: Hypothetically, a malicious hacker executed a denial-of-service attack against Acme's website. Acme's server maintained an Internet Information Services (IIS) log that automatically records information about every internet connection routed to the web server to view a web page, including the IP address, webpage, user agent string and what was requested from the website. The IIS logs reflected repeated access to Acme's website from an IP address known to be used by the hacker. The proponent wants to introduce the IIS log to prove that the hacker's IP address was an instrument of the attack.

Without Rule 902(13): The proponent would have to call a website expert to testify about the mechanics of the server's operating system; his search of the IIS log; how the IIS log works; and that the exhibit is an accurate record of the IIS log.

With Rule 902(13): The proponent would obtain the website expert's certification of the facts establishing authenticity of the exhibit and provide the certification and exhibit to the opposing party with reasonable notice that it intends to offer the exhibit at trial. If the opposing party does not timely dispute the reliability of the process that produced the registry key, then the proponent would not need to call the website expert to establish authenticity.

3. Proving that a person was or was not near the scene of an event: Hypothetically, Robert Jackson is a defendant in a civil (or criminal) action alleging that he was the driver in a hit-and-run collision with a U.S. Postal Service mail carrier in Atlanta at 2:15 p.m. on March 6, 2015. Mr. Jackson owns an iPhone, which has software that records machine-generated dates, times, and GPS coordinates of each picture he takes with his iPhone. Mr. Jackson's iPhone contains two pictures of his home in an Atlanta suburb at about 1 p.m. on March 6. He wants to introduce into evidence the photos together with the metadata, including

the date, time, and GPS coordinates, recovered forensically from his iPhone to corroborate his alibi that he was at home several miles from the scene at the time of the collision.

Without Rule 902(13): The proponent would have to call the forensic technician to testify about Mr. Jackson's iPhone's operating system; his search of the phone; how the metadata was created and stored with each photograph; and that the exhibit is an accurate record of the photographs.

With Rule 902(13): The proponent would obtain the forensic technician's certification of the facts establishing authenticity of the exhibits and provide the certification and exhibit to the opposing party with reasonable notice that it intends to offer the exhibit at trial. If the opposing party does not timely dispute the reliability of the process that produced the iPhone's logs, then the proponent would not have to call the technician to establish authenticity.

4. Proving association and activity between alleged co-conspirators: Hypothetically, Ian Nichols is charged with conspiracy to commit the robbery of First National Bank that occurred in San Diego on January 30, 2015. Two robbers drove away in a silver Ford Taurus. The alleged co-conspirator was Dain Miller. Dain was arrested on an outstanding warrant on February 1, 2015, and in his pocket was his Samsung Galaxy phone. The Samsung phone's software automatically maintains a log of text messages that includes the text content, date, time, and number of the other phone involved. Pursuant to a warrant, forensic technicians examined Dain's phone and located four text messages to Ian's phone from January 29: "Meet my house @9"; "Is Taurus the Bull out of shop?"; "Sheri says you have some blow"; and "see ya tomorrow." In the separate trial of Ian, the government wants to offer the four text messages to prove the conspiracy.

Without Rule 902(13): The proponent would have to call the forensic technician to testify about Dain's phone's operating system; his search of the phone's text message log; how logs are created; and that the exhibit is an accurate record of the iPhone's logs.

With Rule 902(13): The proponent would obtain the forensic technician's certification of the facts establishing authenticity of the exhibit and provide the certification and exhibit to the opposing party with reasonable notice that it intends to offer the exhibit at trial. If the opposing party does not timely dispute the reliability of the process that produced the iPhone's logs, then the court would make the Rule 104 threshold authenticity finding and admit the exhibits, absent other proper objection.

Hearsay Objection Retained: Under Rule 902(13), the opponent – here, criminal defendant Ian—would retain his hearsay objections to the text messages found on Dain's phone. For example, the judge would evaluate the text "Sheri says you have some blow" under F.R.E. 801(d)(2)(E) to determine whether it was a coconspirator's statement during and in furtherance of a conspiracy, and under F.R.E. 805, to assess the hearsay within hearsay. The court might exclude the text "Sheri says you have some blow" under either rule or both.

Example of how Rule 902(14) can be used

In the armed robbery hypothetical, above, forensic technician Smith made a forensic copy of Dain's Samsung Galaxy phone in the field. Smith verified that the forensic copy was identical to the original phone's text logs using an industry standard methodology (*e.g.*, hash value or other means). Smith gave the copy to forensic technician Jones, who performed his examination at his lab. Jones used the copy to conduct his entire forensic examination so that he would not inadvertently alter the data on the phone. Jones found the text messages. The government wants to offer the copy into evidence as part of the basis of Jones's testimony about the text messages he found.

> **Without Rule 902(14):** The government would have to call two witnesses. First, forensic technician Smith would need to testify about making the forensic copy of information from Dain's phone, and about the methodology that he used to verify that the copy was an exact copy of information inside the phone. Second, the government would have to call Jones to testify about his examination.
>
> **With Rule 902(14):** The proponent would obtain Smith's certification of the facts establishing how he copied the phone's information and then verified the copy was true and accurate. Before trial the government would provide the certification and exhibit to the opposing party—here defendant Ian—with reasonable notice that it intends to offer the exhibit at trial. If Ian's attorney does not timely dispute the reliability of the process that produced the Samsung Galaxy's text message logs, then the proponent would only call Jones.

The Committee has carefully considered whether the self-authentication proposals would raise a Confrontation Clause concern when the certificate of authenticity is offered against a criminal defendant. The Committee is satisfied that no constitutional issue is presented, because the Supreme Court has stated in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 322 (2009), that even when a certificate is prepared for litigation, the admission of that certificate is consistent with the right to confrontation if it does nothing more than authenticate another document or item of evidence. That is all that these certificates would be doing under the Rule 902(13) and (14) proposals. The Committee also relied on the fact that the lower courts have uniformly held that certificates prepared under Rule 902(11) do not violate the right to confrontation; those courts have relied on the Supreme Court's statement in *Melendez-Diaz.* The Committee determined that the problem with the affidavit found testimonial in *Melendez-Diaz* was that it certified the accuracy of a drug test that was itself prepared for purposes of litigation—a certification cannot render constitutional an underlying report that itself violates the Confrontation Clause. There is of course no intention or implication from the amendment that a certification could somehow be a means of bringing otherwise testimonial reports into court. But the Committee concluded that if the underlying report is not testimonial, the certification of authenticity will not raise a constitutional issue under the current state of the law.

In this regard, the Note approved by the Committee emphasizes that the goal of the amendment is a narrow one: to allow authentication of electronic information that would

otherwise be established by a witness, instead to be established through a certification by that same witness. The Note makes clear that these are authentication-only rules and that the opponent retains all objections to the item other than authenticity --- most importantly that the item is hearsay or that admitting the item would violate a criminal defendant's right to confrontation.

The Committee unanimously recommends that the proposed amendment to Rule 902, adding new subdivisions (13) and (14), and their Committee Notes, be approved by the Standing Committee and submitted to the Judicial Conference.

* * * * *