PRELIMINARY DRAFT OF

Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure

Request for Comment

Comments are sought on Amendments to:

Appellate Rules	8, 11, 25, 28.1, 29, 31, 39, and 41, and Form 4
Bankruptcy Rules	3002.1, 5005, 8002, 8006, 8011, 8013, 8015, 8016, 8017, new Rule 8018.1, 8022, 8023, and new Part VIII Appendix; and Official Forms 309F, 417A, 417C, 425A, 425B, 425C, and 426
Civil Rules	5, 23, 62, and 65.1
Criminal Rules	12.4, 45, and 49

All Written Comments are Due by February 15, 2017

THE UNITED STATES COURTS

Prepared by the
Committee on Rules of Practice and Procedure of the
Judicial Conference of the United States

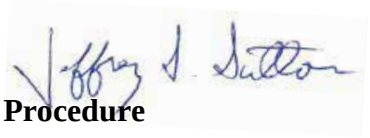
AUGUST 2016

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

M E M O R A N D U M

TO: **THE BENCH, BAR, AND PUBLIC**

FROM: **Honorable Jeffrey S. Sutton, Chair**
Committee on Rules of Practice and Procedure



DATE: **August 12, 2016**

RE: **Request for Comments on Proposed Rules Amendments**

The Judicial Conference Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules have proposed amendments to their respective rules and forms, and requested that the proposals be circulated to the bench, bar, and public for comment. The proposed amendments, advisory committee reports, and other information are attached and posted on the Judiciary's website at:

http://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment

Opportunity for Public Comment

All comments on these proposed amendments will be carefully considered by the advisory committees, which are composed of experienced trial and appellate lawyers, judges, and scholars. Please provide any comments on the proposed amendments, whether favorable, adverse, or otherwise, as soon as possible, but **no later than Wednesday, February 15, 2017**. All comments are made part of the official record and are available to the public.

Comments concerning the proposed amendments must be submitted electronically by following the instructions at:

http://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment

Members of the public who wish to present testimony may appear at public hearings on these proposals. The advisory committees will hold hearings on the proposed amendments on the following dates:

- Appellate Rules in Washington, D.C., on October 17, 2016, and in Denver, Colorado, on January 20, 2017;
- Bankruptcy Rules in Pasadena, California, on January 24, 2017;
- Civil Rules in Washington, D.C., on November 3, 2016, in Phoenix, Arizona, on January 4, 2017, and in Dallas/Fort Worth, Texas, on February 16, 2017;
- Criminal Rules in Phoenix, Arizona, on January 4, 2017, and in Washington, D.C., on February 24, 2017.

If you wish to testify, you must notify the Committee **at least 30 days before the scheduled hearing**. Requests to testify should be e-mailed to: Rules_Support@ao.uscourts.gov, with a copy mailed to: Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Suite 7-240, Washington, D.C. 20544.

After the public comment period, the advisory committees will decide whether to submit the proposed amendments to the Committee on Rules of Practice and Procedure. At this time, the Committee on Rules of Practice and Procedure has not approved these proposed amendments, except to authorize their publication for comment. The proposed amendments have neither been submitted to nor considered by the Judicial Conference or the Supreme Court.

If approved, the proposed amendments would become effective on December 1, 2018, with or without revision, by the relevant advisory committee, the Committee on Rules of Practice and Procedure, the Judicial Conference, and the Supreme Court, and if Congress does not act to defer, modify, or reject them.

If you have questions about the rulemaking process or pending rules amendments, please contact the Rules Committee Support Office at 202-502-1820 or visit:

http://www.uscourts.gov/rules-policies

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PART III: FEDERAL RULES OF CIVIL PROCEDURE

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MEMORANDUM

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

FROM: **Hon. Steven M. Colloton, Chair**
Advisory Committee on Appellate Rules

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

DATE: **December 14, 2015**

I. Introduction

The Advisory Committee on Appellate Rules met on October 29, 2015 in Chicago, Illinois.

* * * * *

Part II of this report discusses the proposals for which the Committee seeks approval for publication.

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II. Action Items – for Publication

* * * * *

A. Stays of the Issuance of the Mandate: Rule 41

Appellate Rule 41(b) provides that "[t]he court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later," but also provides that "[t]he court may shorten or extend the time." Under Rule 41(d)(1), a timely rehearing petition or stay motion presumptively "stays the mandate until disposition of the petition or motion." A party can seek a stay pending the filing of a certiorari petition; if the court grants such a stay and the party who sought the stay files the certiorari petition, then Rule 41(d)(2)(B) provides that "the stay continues until the Supreme Court's final disposition." Rule 41(d)(2)(D) directs that "[t]he court of appeals must issue the mandate immediately when a copy of the Supreme Court order denying the petition for writ of certiorari is filed."

In light of issues raised in *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005), the Committee has studied whether Rule 41 should be amended (1) to clarify that a court must enter an order if it wishes to stay the issuance of the mandate; (2) to address the standard for stays of the mandate; and (3) to restructure the Rule to eliminate redundancy. The Committee now seeks approval to publish proposed amendments to accomplish these changes. The proposed amendments are set out in an enclosure to this report.

Before 1998, Rule 41 referred to a court's ability to shorten or enlarge the time for the mandate's issuance "by order." The phrase "by order" was deleted as part of the 1998 restyling of the Rule. Though the change appears to have been intended as merely stylistic, it has caused uncertainty concerning whether a court of appeals can stay its mandate through mere inaction or whether such a stay requires an order. The proposed amendments to Rule 41(b) would specify that the mandate is stayed only "by order." Requiring stays of the mandate to be accomplished by court order will provide notice to litigants and facilitate review of the stay.

The amendments to Rule 41(d) simplify and clarify the current rules pertaining to issuance of a stay pending a petition for a writ of certiorari to the Supreme Court. The deletion of subdivision (d)(1) is intended to streamline the Rule by removing redundant language; no substantive change is intended. Subdivision (d)(4) – i.e., former subdivision (d)(2)(D) – is amended to specify that a mandate stayed pending a petition for certiorari must issue immediately once the court of appeals receives a copy of the Supreme Court's order denying certiorari, unless the court of appeals finds that extraordinary circumstances justify a further stay. In *Schad* and *Bell*, without deciding whether the current version of Rule 41 provides authority for a further stay of the mandate after denial of certiorari, the Supreme Court ruled that any such authority could be exercised only in "extraordinary circumstances." *Schad*, 133 S. Ct. at 2551. Because a court of appeals has inherent authority to *recall* a mandate in extraordinary circumstances, *Calderon v. Thompson*, 523 U.S. 538, 550 (1998), the Committee thought there was little point in considering whether to forbid extensions of time altogether. The amendment to subdivision (d)(4) makes explicit that the court may stay the mandate after the denial of certiorari, and also makes explicit that such a stay is permissible only in extraordinary circumstances.

Some have suggested that under the current rule, a court may extend the time after a denial of certiorari *without* extraordinary circumstances under Rule 41(b). The proposed amendment to Rule 41(b) would establish that a court may extend the time only "in extraordinary circumstances" or pending a petition for certiorari under the conditions set forth in Rule 41(d). The "extraordinary circumstances" requirement is based on the strong interest of litigants and the judicial system in achieving finality. The proposed amendment would apply the "extraordinary circumstances" requirement both after a denial of certiorari and when no party petitions for a writ of certiorari, because the strong interests in finality counsel against extensions unless a heightened standard is met.

* * * * *

C. Extension of Time for Filing Reply Briefs: Rules 31(a)(1) and 28.1(f)(4)

Federal Rules of Appellate Procedure 31(a)(1) and 28.1(f)(4) give parties 14 days after service of the appellee's brief to file a reply brief in appeals and cross-appeals. In addition, Rule 26(c) provides that "[w]hen a party may or must act within a specified time after service, 3 days are added after the period would otherwise expire." Accordingly, parties effectively have 17 days to file a reply brief. Pending amendments, however, soon will eliminate the "three-day rule" in Rule 26(c), thus reducing the effective time for filing a reply brief from 17 days to 14 days.

The Committee considered whether Rules 31(a)(1) and 28.1(f)(4) should be amended to extend the period for filing reply briefs in light of the elimination of the three-day rule. The Committee concluded that effectively shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods are best measured in increments of 7 days, the Committee concluded the period should be extended to 21 days. The Committee now seeks approval to publish amendments to Rules 31(a)(1) and 28.1(f)(4) that would accomplish this result.

The Committee did not believe that extending the period for filing a reply brief would delay the completion of appellate litigation. For the 12-month period ending September 30, 2014, the median time from the filing of the appellee's "last brief" to oral argument or submission on the briefs was 3.6 months nationally. The Administrative Office does not specifically measure the time from filing of the "reply brief" to oral argument, perhaps because the reply brief is optional. Given this 3.6-month median time period, however, a four-day increase over the 17 days allowed under the current rules is not likely to have a discernible impact on the scheduling or submission of cases. *See* Administrative Office of the U.S. Courts, Table B-4A ("U.S. Courts of Appeals—Median Time Intervals in Months for Civil and Criminal Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2014"). The Committee's clerk representative reported his understanding that the circuits typically set cases for oral argument after receipt of the appellee's brief, and that a modest change in the deadline for a reply brief should not affect this scheduling.

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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. Steven M. Colloton, Chair**
Advisory Committee on Appellate Rules

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

DATE: **May 18, 2016**

I. Introduction

The Advisory Committee on Appellate Rules met on April 5, 2016 in Denver, Colorado. At this meeting and in subsequent email votes, the Committee decided to propose four sets of amendments for publication. As discussed in Part II below, these amendments would:

(1) conform Appellate Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3) to the proposed revision of Civil Rule 62 by altering clauses that use the term "supersedeas bond";

(2) allow a court to prohibit or strike the filing of an amicus brief based on party consent under Appellate Rule 29(a) when filing the brief might cause a judge's disqualification;

(3) delete a question in Appellate Form 4 that asks a movant seeking to proceed in forma pauperis to provide the last four digits of his or her social security number; and

(4) revise Appellate Rule 25 to address electronic filing, signatures, service, and proof of service in a manner conforming to the proposed revision of Civil Rule 5.

* * * * *

II. Action Items – for Publication

The Appellate Rules Committee presents the following four action items for publication.

A. Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), 39(e)(3): Revising clauses that use the term "supersedeas bond" to conform with the proposed revision of Civil Rule 62(b) [Item 12-AP-D]

The Advisory Committee on Civil Rules is proposing amendments to Civil Rule 62, which concerns stays of judgments and proceedings to enforce judgments. Rule 62(b) currently says: "If an appeal is taken, the appellant may obtain a stay by supersedeas bond . . . ." The proposed amendments will eliminate the antiquated term "supersedeas" and allow an appellant to provide "a bond or other security." A letter of credit is one possible example of security other than a bond.

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). These rules must be amended to conform to the revision of Civil Rule 62(b). Most of the required 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 a little more complicated. Rule 8(b) provides jurisdiction to enforce a supersedeas bond against the "surety" who issued the supersedeas bond. Because Rule 62(b) now authorizes both bonds and other forms of security, the term "surety" is now too limiting. For example, the issuer of a letter of credit is not a surety. The Committee proposes amending Rule 8(b) so that the terms encompass sureties and other security providers.

The Committee intends to conform the Appellate Rules to proposed Civil Rule 62 and does not intend any other change in meaning. The Committee has spelled out this objective in the Advisory Committee Notes.

* * * * *

B. Rule 29(a): Limitations on the Filing of Amicus Briefs by Party Consent [Item 14-AP-D]

Appellate Rule 29(a) specifies that an amicus curiae may file a brief with leave of the 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. For example, Second Circuit Local Rule 29.1(a) says: "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. These rules are inconsistent with Rule 29(a) because they do not allow the filing of amicus briefs based solely on consent of the parties.

The Advisory Committee presented a proposed amendment to Rule 29(a) in January 2016. Members of the Standing Committee made suggestions concerning the text and raised some policy questions that warranted further discussion. The Advisory Committee considered these matters at its April 2016 meeting and now submits a revised proposal for publication.

1. *Revised Proposal for Publication*

The Advisory Committee submits the following revised proposal for publication. The proposal differs from the January 2016 proposal in three ways. First, the proposed amendment no longer specifies that courts must act "by local rule." Courts may act by local rule, order, or any other means. Second, the revision modifies the text to clarify that local courts may both prohibit the filing of a brief that would cause recusal and also strike a brief after it has been filed if the potential for disqualification is discovered later in a screening process. Third, the rule contains two minor stylistic changes: deletion of a hyphen between "amicus curiae" and changing of the phrase "disqualification of a judge" to "a judge's disqualification."

* * * * *

2. *Four Additional Issues Raised at the January 2016 Standing Committee*

The Advisory Committee also considered four additional issues raised at the January 2016 Standing Committee meeting. First, a member of the Standing Committee asked whether Rule 29(a) should announce a national rule instead of leaving the matter to local rules or court orders. The Committee decided that this is a matter appropriately left to the discretion of local circuits.

Second, a member of the Standing Committee also asked whether Rule 29(a) should be simplified so that it allows filing of an amicus brief only by leave of court. The Committee believes that the United States or a State should be permitted to file without leave of court and thus does not favor adding a universal requirement to obtain leave of court.

Third, a consultant to the Standing Committee raised a policy objection to allowing a court to prohibit the filing of an amicus brief that would cause a judge's disqualification. The objection was that a court might block an amicus brief that raises an awkward but important issue about disqualification that the parties themselves do not wish to raise. In such situations, the parties may consent to having an amicus curiae raise the issue. The Advisory Committee considered this potential objection but concluded that local circuits should be permitted to conclude that the benefits of avoiding recusals in a three-judge panel or an en banc court outweigh the potential benefits of an amicus brief.

Fourth, the Style Consultants suggested a revision to the clause beginning with the word "except" in line 5. They proposed ending the second sentence with the word "filing" and creating a new sentence beginning with the word "But." At its April 2016 meeting, the Committee discussed the matter at length and rejected the proposed revision. The Committee believed that the proposed third sentence (beginning with "But") contradicted the categorical grant of permission in the proposed second sentence. *See Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 398-99 (2010) ("The Federal Rules regularly use 'may' to confer categorical permission, as do federal statutes that establish procedural entitlements.") (citations omitted). Another proposed alternative of breaking the section into subdivisions would add unnecessary complexity. The Committee thus decided to approve the original a version with the "except" clause. This formulation is consistent with existing Appellate Rules, e.g., Fed. R. App. P. 25(a)(5), 28(b), 28.1(a), (c)(2), (c)(3), (d), and other respected texts, e.g., U.S. Const. Art. I, § 6, cl.1, Art. III, § 3, cl. 2.

C. Form 4: Removal of Question Asking Petitioners Seeking to Proceed in forma Pauperis to Provide the Last Four Digits of their Social Security Numbers [Item 15-AP-E]

Litigants seeking permission to proceed in forma pauperis must complete Appellate Form 4. Question 12 of Appellate Form 4 currently asks litigants to provide the last four digits of their social security numbers. The clerk representative to the Advisory Committee has investigated the matter and reports that the general consensus of the clerks of court is that the last four digits of a social security number are not needed for any purpose and that the question could be eliminated. Given the potential security and privacy concerns associated with social security numbers, and the lack of need for obtaining the last four-digits of social security numbers, the Committee proposes to amend Form 4 by deleting this question.

* * * * *

D. Revision of Appellate Rule 25 to address Electronic Filing, Signatures, Service, and Proof of Service [Items 08-AP-A, 11-AP-C, 11-AP-D, 15-AP-A, 15-AP-D, 15-AP-H]

At its April 2016 meeting, the Appellate Rules Committee reviewed the Civil Rules Committee's progress on revising Civil Rule 5 to address electronic filing, signatures, service, and proof of service. The Committee then decided to propose revisions of Appellate Rule 25 that would follow the proposed revisions of Civil Rule 5 as closely as possible while maintaining the current structure of Appellate Rule 25.

The proposed revision of Appellate Rule 25 has four key features. First, proposed Rule 25(a)(2)(B)(i) addresses electronic filing by generally requiring a person represented by counsel to file papers electronically. This provision, however, allows everyone else to file papers nonelectronically and also provides for exceptions for good cause and by local rule. 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 electronic service by saying that such service "may be made by sending it 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.

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 8. Stay or Injunction Pending Appeal

(a) Motion for Stay.

(1) **Initial Motion in the District Court.** A party must ordinarily move first in the district court for the following relief:

* * * * *

(B) approval of a ~~supersedeas~~bond or other security provided to obtain a stay of judgment; or

* * * * *

(2) **Motion in the Court of Appeals; Conditions on Relief.** A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges.

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

(E) The court may condition relief on a party's filing a bond or other ~~appropriate~~security in the district court.

(b) Proceeding Against a Surety or Other Security Provider. If a party gives security in the form of a bond, other security, ~~or~~ a stipulation, or other undertaking with one or more sureties or other security providers, each ~~surety~~provider submits to the jurisdiction of the district court and irrevocably appoints the district clerk as ~~the surety's~~its agent on whom any papers affecting ~~the surety's~~its liability on the bond or undertaking may be served. On motion, a ~~surety's~~security provider's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the

district clerk, who must promptly mail a copy to each ~~surety~~security provider whose address is known.

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Committee Note

The amendments to subdivisions (a)(1)(B) and (b) conform this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

Rule 11. Forwarding the Record

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(g) Record for a Preliminary Motion in the Court of Appeals. If, before the record is forwarded, a party makes any of the following motions in the court of appeals:

- for dismissal;
- for release;
- for a stay pending appeal;
- for additional security on the bond on appeal or on a ~~supersedeas~~bond or other security provided to obtain a stay of judgment; or
- for any other intermediate order—

the district clerk must send the court of appeals any parts of the record designated by any party.

Committee Note

The amendment of subdivision (g) conforms this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

Rule 25. Filing and Service

(a) Filing.

(1) **Filing with the Clerk.** A paper required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) **Filing: Method and Timeliness**.

(A) **Nonelectronic Filing**

~~(A)~~(i) **In general.** ~~Filing~~For a paper not filed electronically, filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing.

~~(B)~~(ii) **A brief or appendix.** A brief or appendix not filed electronically

is timely filed, however, if on or before the last day for filing, it is:

~~(i)~~• mailed to the clerk by ~~First-Class Mail~~first-class mail, or other class of mail that is at least as expeditious, postage prepaid; or

~~(ii)~~• dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

~~(C)~~(iii) **Inmate filing.** A paper ~~filed~~not filed electronically by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day

for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

~~(D) **Electronic filing.** A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes.~~

~~A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.~~

(B) **Electronic Filing and Signing.**

(i) **By a Represented Person—Generally Required; Exceptions.** A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(ii) **By an Unrepresented Person—When Allowed or Required.** A

person not represented by an attorney:

- may file electronically only if allowed by court order or by local rule; and
- may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(iii) **Signing**. 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.

(iv) **Same as Written Paper**. A paper filed electronically is a written paper for purposes of these rules.

(3) **Filing a Motion with a Judge.** If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and give it to the clerk.

(4) **Clerk's Refusal of Documents.** The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.

(5) **Privacy Protection.** An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of

Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

(b) Service of All Papers Required. Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) Manner of Service.

(1) ~~Service~~Nonelectronic service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail; or

(C) by third-party commercial carrier for delivery within 3 days; or.

~~(D) by electronic means, if the party being served consents in writing.~~

(2) ~~If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D)~~ Electronic 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.

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and

cost, service on a ~~party~~person must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on ~~transmission~~filing or sending, unless the ~~party~~person making service is notified that the paper was not received by the ~~party~~person served.

(d) Proof of Service.

(1) A paper presented for filing must contain either of the following if it was served other than through the court's electronic-filing system:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)~~(2)(B)~~(2)(A)(ii), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

(e) Number of Copies. When these rules require the filing or furnishing of a number of copies, a court may

require a different number by local rule or by order in a particular case.

Committee Note

The amendments conform Rule 25 to the amendments to Federal Rule of Civil Procedure 5 on electronic filing, signature, service, and proof of service. They establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule. The amendments establish national rules regarding the methods of signing and serving electronic documents in Rule 25(a)(2)(B)(iii) and 25(c)(2). The amendments dispense with the requirement of proof of service for electronic filings in Rule 25(d)(1).

Rule 28.1. Cross-Appeals

* * * * *

(f) Time to Serve and File a Brief. Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 40 days after the record is filed;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

(4) the appellee's reply brief, within ~~14~~21 days after the appellant's response and reply brief is served, but at least 7 days before argument unless the court, for good cause, allows a later filing.

Committee Note

Subdivision (f)(4) is amended to extend the period for filing a reply brief from 14 days to 21 days. Before the elimination of the "three-day rule" in Rule 26(c), attorneys were accustomed to a period of 17 days within which to file a reply brief, and the committee concluded that shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods are best measured in increments of 7 days, the period is extended to 21 days.

Rule 29. Brief of an Amicus Curiae

(a) When Permitted. The United States or its officer or agency or a state may file an amicus ~~curiae~~ brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, except that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge's disqualification.

* * * * *

Committee Note

The amendment authorizes orders or local rules, such as those previously adopted in some circuits, that prohibit the filing of an amicus brief by party consent if the brief would result in a judge's disqualification. The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification.

Rule 31. Serving and Filing Briefs

(a) Time to Serve and File a Brief.

(1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within ~~14~~21 days after service of the appellee's brief but a reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing.

* * * * *

Committee Note

Subdivision (a)(1) is revised to extend the period for filing a reply brief from 14 days to 21 days. Before the elimination of the "three-day rule" in Rule 26(c), attorneys were accustomed to a period of 17 days within which to file a reply brief, and the committee concluded that shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods

are best measured in increments of 7 days, the period is extended to 21 days.

Rule 39. Costs

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(e) Costs on Appeal Taxable in the District Court. The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

(1) the preparation and transmission of the record;

(2) the reporter's transcript, if needed to determine the appeal;

(3) premiums paid for a ~~supersedeas~~bond or other ~~bond~~security to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

Committee Note

The amendment of subdivisions (e)(3) conforms this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended,

Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

(a) Contents. Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) When Issued. The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time by order. The court may extend the time only in extraordinary circumstances or under Rule 41(d).

(c) Effective Date. The mandate is effective when issued.

(d) Staying the Mandate Pending a Petition for Certiorari.

~~(1) **On Petition for Rehearing or Motion.** The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.~~

~~(2) **Pending Petition for Certiorari.**~~

~~(A)~~ (1) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the ~~certiorari~~ petition would present a substantial question and that there is good cause for a stay.

~~(B)~~ (2) The stay must not exceed 90 days, unless the period is extended for good cause or unless the

party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

~~(C)~~ (3) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

~~(D)~~ (4) The court of appeals must issue the mandate immediately ~~when~~on receiving a copy of a Supreme Court order denying the petition ~~for writ of certiorari is filed~~, unless extraordinary circumstances exist.

Committee Note

Subdivision (b). Subdivision (b) is revised to clarify that an order is required for a stay of the mandate and to specify the standard for such stays.

Before 1998, the Rule referred to a court's ability to shorten or enlarge the time for the mandate's issuance "by order." The phrase "by order" was deleted as part of the 1998 restyling of the Rule. Though the change appears to have been intended as merely stylistic, it has caused uncertainty concerning whether a court of appeals can stay its mandate through mere inaction or whether such a stay requires an order. There are good reasons to require an affirmative act by the court. Litigants—particularly those not well versed in appellate procedure—may overlook the need to check that the court of appeals has issued its mandate in due course after handing down a decision. And, in *Bell v. Thompson*, 545 U.S. 794, 804 (2005), the lack of notice of a stay was one of the factors that contributed to the Court's holding that staying the mandate was an abuse of discretion. Requiring stays of the mandate to be accomplished by court order will provide notice to litigants and can also facilitate review of the stay.

A new sentence is added to the end of subdivision (b) to specify that the court may extend the time for the mandate's issuance only in extraordinary circumstances or pursuant to Rule 41(d) (concerning stays pending petitions for certiorari). The extraordinary-circumstances requirement reflects the strong systemic and litigant interests in finality. Rule 41(b)'s presumptive date for issuance of the mandate builds in an opportunity for a losing litigant to seek rehearing, and Rule 41(d) authorizes a litigant to seek a stay pending a petition for certiorari. Delays of the mandate's issuance for other reasons should be ordered only in extraordinary circumstances.

Subdivision (d). Two changes are made in subdivision (d).

Subdivision (d)(1)—which formerly addressed stays of the mandate upon the timely filing of a motion to stay the mandate or a petition for panel or en banc rehearing—has been deleted and the rest of subdivision (d) has been renumbered accordingly. In instances where such a petition or motion is timely filed, subdivision (b) sets the presumptive date for issuance of the mandate at 7 days after entry of an order denying the petition or motion. Thus, it seems redundant to state (as subdivision (d)(1) did) that timely filing of such a petition or motion stays the mandate until disposition of the petition or motion. The deletion of subdivision (d)(1) is intended to streamline the Rule; no substantive change is intended.

Subdivision (d)(4)—i.e., former subdivision (d)(2)(D)—is amended to specify that a mandate stayed pending a petition for certiorari must issue immediately once the court of appeals receives a copy of the Supreme Court's order denying certiorari, unless the court of appeals finds that extraordinary circumstances justify a further stay. Without deciding whether the prior version of Rule 41 provided authority for a further stay of the mandate after denial of certiorari, the Supreme Court ruled that any such authority could be exercised only in "extraordinary circumstances." *Ryan v. Schad*, 133 S. Ct. 2548, 2551 (2013) (per curiam). The amendment to subdivision (d)(4) makes explicit that the court may stay the mandate after the denial of certiorari, and also makes explicit that such a stay is permissible only in extraordinary circumstances. Such a stay cannot occur through mere inaction but rather requires an order.

The reference in prior subdivision (d)(2)(D) to the *filing* of a copy of the Supreme Court's order is replaced by a reference to the court of appeals' *receipt* of a copy of the

Supreme Court's order. The filing of the copy and its receipt by the court of appeals amount to the same thing (*cf*. Rule 25(a)(2), setting a general rule that "filing is not timely unless the clerk receives the papers within the time fixed for filing"), but "upon receiving a copy" is more specific and, hence, clearer.

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

* * * * *

12. State the city and state of your legal residence.

Your daytime phone number: (___) _____

Your age: _____ Your years of schooling: _____

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

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. The draft minutes of that meeting are attached.

* * * * *

II. Action Items

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B. Item for Publication in August 2016

The Committee requests that the Standing Committee approve the following rule amendments for publication for public comment.

Action Item 4. Rule 3002.1(b) (Notice of Payment Changes) and (e) (Determination of Fees, Expenses, or Charges). As discussed in Action Item 3, Rule 3002.1 prescribes several noticing requirements for home mortgage creditors in chapter 13 cases. The rule was enacted to ensure that chapter 13 debtors who maintain mortgage payments over the life of the plan, as permitted by Bankruptcy Code § 1322(b)(5), will have the information they or trustees need to make correct payments. Rule 3002.1(b) requires chapter 13 mortgage creditors to file a notice of any change in the mortgage payment amount at least 21 days before payment is due. Unlike subdivision (e) of the rule, which governs notices of claimed postpetition fees, expenses, and charges, subdivision (b) does not provide a procedure for challenging payment changes that are noticed. Based on concerns expressed at the Committee's 2012 mini-conference on the mortgage rules, the Committee concluded that it would be beneficial to have a national procedure for raising and determining objections to payment changes.

The Committee's proposed amendment to Rule 3002.1(b) would allow a party in interest to file a motion for a determination of the validity of a payment amount change. Although the rule does not set a deadline for such a motion, it does provide that if a motion is not filed within 21 days after the notice is served, the payment change goes into effect. If a payment change is later determined to be inconsistent with the underlying agreement or governing law, the court can order that payment adjustments be made to reflect any overpayments that have occurred.

The Committee also proposes an amendment to Rule 3001.2(b) that is intended to provide more flexibility in the application of the provision to home equity lines of credit ("HELOCs"). The problem that a HELOC creditor faces in complying with Rule 3002.1(b) is illustrated by *In re Adkins*, 477 B.R. 71 (Bankr. N.D. Ohio 2012). The creditor in that case sought an order excusing it from the requirements of Rule 3002.1(b) on that ground that compliance would be "'virtually impossible.'" *Id.* at 72. The bank explained that, because the loan was an open-ended revolving line of credit, its balance was constantly changing. The payment amount could change monthly due to interest rate adjustments, increased draws on the line of credit, or payments of principal in addition to the finance charges. These frequent adjustments in the payment amount, contended the creditor, would make it especially difficult to comply with the 21-day notice requirement. *Id.*

The *Adkins* court denied the creditor's Motion to Excuse Notice. Rule 3002.1(b) clearly applied, as the creditor conceded, and the court found no authority to waive its requirements. The judge, although sympathetic with the creditor's position, pointed out that the rule provides no leeway in its application. Unlike numerous other bankruptcy rules, Rule 3002.1(b) does not say "unless the court orders otherwise." *Id.* at 73.

The difficulties of compliance expressed by the creditor in *Adkins* were echoed by participants at the mini-conference, and there was a general consensus that Rule 3002.1(b) should be amended to deal more appropriately with HELOCs.

The Subcommittees on Consumer Issues and on Forms considered a proposal for the reporting of HELOC payment changes that a chapter 13 trustee and a representative of a HELOC creditor submitted to the Committee. The proposed provision would have imposed different

requirements based on the amount of the payment change and whether the debtor or the trustee was making the mortgage payments, but the Subcommittees decided that a simpler approach would be preferable. They therefore recommended and the Committee approved at the fall 2014 meeting a proposed amendment to Rule 3002.1(b) that authorizes courts to modify the requirements of the provision for HELOCs. This would allow the details of an alternative procedure to be developed by local rulemaking or court order.

Finally, the Committee proposes a wording change to Rule 3002.1(e). Rather than providing that only a debtor or trustee may object to the assessment of a fee, expense, or charge, the amended rule would expand the category of objectors to any party in interest. This change would parallel the language of the proposed amendment to subdivision (b) and would authorize a United States trustee or bankruptcy administrator to challenge the validity of a claimed postpetition assessment.

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Excerpt from the May 10, 2016 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

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.

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II. Action Items

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B. Items for Publication

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(B2) *For publication in August 2016.*

The Committee recommends that the following rule amendments, new rule, official forms, and rules appendix be published for public comment in August 2016. The rules, forms, and appendix in this group appear in Appendix B2.

Action Item 5. Rule 5005(a)(2) (Electronic Filing and Signing). Rule 5005(a)(2) governs the filing of documents electronically in federal bankruptcy cases. Consistent with the Standing Committee's suggestion that the advisory committees work collaboratively on electronic filing and service issues, the Committee has been working with the Civil, Criminal, and Appellate Advisory Committees on matters relating to Rule 5005(a)(2). Coordination between the Civil and Bankruptcy Advisory Committees is particularly warranted because Bankruptcy Rule 7005 makes Civil Rule 5 applicable in adversary proceedings. Therefore, an amendment to Civil Rule 5(d)(3) automatically would apply in adversary proceedings unless the Committee amended Rule 7005 to provide otherwise. The bankruptcy rules, however, also address electronic filing in Rule 5005(a)(2). That rule largely tracks the language of current Civil Rule 5(d)(3). In order to make Rule 5005(a)(2) consistent with Rule 7005's incorporation of any amendments to Civil Rule 5(d)(3), the Committee would need to amend Rule 5005(a)(2) in a similar manner.

The Committee considered potential amendments to Rule 5005(a)(2) at its April 2015, October 2015, and its March 2016 meetings. The Committee reviewed the status of potential amendments to Civil Rule 5, and it examined the implications of those amendments for the bankruptcy rules. The Committee generally agreed that Rule 5005(a)(2) should be amended to the extent necessary to conform to Civil Rule 5, as made applicable to adversary proceedings by Rule 7005. The Committee also discussed in detail the proposed amendments to Civil Rule 5 and the variations on those electronic filing and service provisions being considered by the Criminal Advisory Committee with respect to Criminal Rule 49.

In light of the foregoing, the Committee unanimously approved amendments to Rule 5005(a)(2) that would be consistent, to the greatest extent possible, with the proposed amendments to 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 by the bankruptcy rules and the Bankruptcy Code.[1] The two rules are otherwise consistent. The Committee believes that it is prudent to submit Rule 5005(a)(2) for publication on the same timeline as that adopted for Civil Rule 5(d)(3). Accordingly, the Committee recommends that the Standing Committee approve the proposed amendments to Rule 5005(a)(2) for publication in August 2016, or at the same time that the amendments to Civil Rule 5(d)(3) are published. This recommendation includes any further non-material refinements to the proposed amendments necessary to conform to the Civil Rule published for comment.

[1] The civil rule uses the term "person," which under § 101(41) of the Bankruptcy Code includes an "individual, partnership, and corporation." Because only human beings may proceed without an attorney, the bankruptcy rule uses the term "individual" rather than "person." Where the civil rule refers to "a person proceeding with an attorney," the bankruptcy rule uses the term "entity," which under Code § 101(15) includes estates, trusts, governmental units, and United States trustees, as well as persons.

Action Item 6. Proposed amendments to the bankruptcy appellate rules and forms to conform to pending and proposed amendments to the Federal Rules of Appellate Procedure ("FRAP"). Part VIII of the Bankruptcy Rules (Appeals) was completely revised in 2014 to conform as closely as possible to parallel FRAP provisions. Rather than incorporating FRAP provisions by reference, the Part VIII rules largely track the language of FRAP.

The Supreme Court recently approved and transmitted to Congress a set of FRAP amendments that will go into effect on December 1, 2016, unless Congress takes action to the contrary. With one exception, the Part VIII amendments included in this action item are being proposed to bring the bankruptcy rules into conformity with relevant FRAP provisions that are being amended this year. Because there was no coordination between the two advisory committees at the time the FRAP amendments were proposed and published, the bankruptcy amendments will lag behind the FRAP amendments by two years. One other amendment, discussed below, is being proposed to conform to a parallel FRAP provision that is being proposed for publication this summer. If approved, this bankruptcy rule amendment will be able to go into effect simultaneously with the parallel FRAP amendment.

A. Rules 8002(c), 8011(a)(2)(C), and Official Form 417A (inmate filing provisions). 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 FRAP 4(c) and FRAP 25(a)(2)(C). These rules treat notices of appeal and other papers as timely filed by such inmates if the documents are deposited in the institution's internal mail system on or before the last day for filing and several other specified requirements are satisfied. The 2016 amendments to the FRAP rules are intended to clarify certain issues that have produced conflicts in the case law. They (1) make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions; (2) clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid; and (3) clarify that if sufficient evidence does not accompany the initial filing, the court of appeals has discretion to permit the later filing of a declaration or notarized statement to establish timely deposit. Rules 8002(c) and 8011(a)(2)(C) would be similarly amended.

To implement the FRAP amendments, a new appellate form has been devised to provide a suggested form for an inmate declaration under Rules 4 and 25. For bankruptcy appeals, the Committee recommends that a similar form—Director's Form 4170 (Inmate Filer's Declaration)—be adopted for that purpose. As a Director's rather than official form, its use would not be mandatory, just as will be true for Appellate Form 7. In addition, the 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.

B. Rule 8002(b) (timeliness of tolling motions). Rule 8002(b) and its counterpart, FRAP 4(a)(4), set out a list of postjudgment 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 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 Committee proposes that a similar amendment to Rule 8002(b) be published for comment.

C. Rules 8013, 8015, 8016, 8022, Official Form 417C, and Part VIII Appendix (length limits). The 2016 amendments to FRAP 5, 21, 27, 35, and 40 convert the existing page limits to word limits for documents prepared using a computer. For documents prepared without the aid of a computer, the page limits currently set out in those rules would be retained. The pending amendments employ a conversion ratio of 260 words per page. The current ratio is 280 words per page.

The FRAP amendments also reduce the word limits of Rule 32 for briefs to reflect the 260 words-per-page ratio. The 14,000-word limit for a party's principal brief becomes a 13,000-word limit; the limit for a reply brief changes from 7,000 to 6,500 words. The 2016 amendments correspondingly reduce the word limits set by Rule 28.1 for cross-appeals.

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 FRAP. Appellate Form 6 (Certificate of Compliance with Rule 32(a)) is amended to reflect the changed length limits. Finally, a new appendix collects all the FRAP length limits in one chart.

The Committee proposes 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 proposed FRAP appendix.

D. Rule 8017 (amicus filings). Rule 8017 is the bankruptcy counterpart to FRAP 29. The pending amendment to FRAP 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 rule currently does not address the topic; it is limited to amicus briefs filed in connection with the original hearing of an appeal. The 2016 amendment would not require courts to accept amicus briefs regarding rehearing, but it would provide guidelines for such briefs that are permitted.

The Committee proposes for publication a parallel amendment to Rule 8017. The proposed amendment designates the existing rule as subdivision (a) and governs amicus briefs during a court's initial consideration of a case on the merits. It adds a new subdivision (b), which governs amicus briefs during a district court's or BAP's consideration of whether to grant rehearing. The latter subdivision could be overridden by a local rule or order in a case.

The Appellate Rules Advisory Committee is proposing for publication another amendment to FRAP 29(a). It 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 Committee proposes publication of a similar amendment to Rule 8017 in order to maintain consistency between the two sets of rules. This proposed amendment is reflected in the draft of proposed Rule 8017(a)(2) that is included in Appendix B2.

Action Item 7. Additional amendments to the bankruptcy appellate rules. In addition to the conforming amendments to Part VIII rules discussed in the previous action item, the Committee proposes for publication three additional bankruptcy appellate rule amendments and a new bankruptcy appellate rule in response to a suggestion and comments that the Committee has received. The Committee has held the proposed amendments in abeyance until they could be published as part of a package of bankruptcy appellate rule amendments.

A. Rule 8002(a) (separate document requirement). In response to the August 2012 publication of the proposed revision of the Part VIII rules, Chief Judge Christopher M. Klein (Bankr. E.D. Cal.), commented that it would be useful for Rule 8002 to have a provision similar to FRAP 4(a)(7), which addresses when a judgment or order is entered for purposes of Rule 4(a). He noted that the provision would help clarify timing issues presented by the separate-document requirement.

FRAP 4(a)(7) specifies when a judgment or order is entered for purposes of Rule 4(a) (Appeal in a Civil Case). It provides that, if Civil Rule 58(a) does not require a separate document, the judgment or order is entered when it is entered in the civil docket under Civil Rule 79(a). If Rule 58(a) does require a separate document, the judgment or order is entered when it is entered in the civil docket and either (1) the judgment or order is set forth on a separate document, or (2) 150 days have run from the entry in the civil docket, whichever occurs first. The rule was amended in 2002 to resolve several circuit splits that arose out of uncertainties about how Rule 4(a)(7)'s definition of when a judgment or order is "entered" interacted with the requirement in Civil Rule 58 that, to be "effective," a judgment must be set forth on a separate document.

The Bankruptcy Rules have adopted Civil Rule 58 and its separate document requirement only for adversary proceedings. Rule 7058 was added in 2009, making Civil Rule 58 applicable in adversary proceedings. At the same time, Rule 9021was amended to provide that a "judgment or order is effective when entered under Rule 5003 [Records Kept by the Clerk]." The latter rule applies to contested matters and does not require a separate document.

The Committee concluded that the rules specifying when a separate document is required and the impact of the requirement on the date of entry of the judgment are sufficiently confusing that, as suggested by Chief Judge Klein, Rule 8002 would likely be improved by adding a provision similar to FRAP 4(a)(7). It voted at the fall 2013 meeting to propose a new subdivision (a)(5) defining entry of judgment. If so amended, it would clarify that the time for filing a notice of appeal under subdivision (a) begins to run upon docket entry in contested matters and adversary proceedings for which Rule 58 does not require a separate document. In

adversary proceedings for which Rule 58 does require a separate document, the time commences when the judgment, order, or decree is entered in the civil docket and (1) it is set forth on a separate document, or (2) 150 days have run from the entry in the civil docket, whichever occurs first.

B. Rule 8006(c) (court statement on merits of certification). The Committee proposes for publication another amendment suggested by Chief Judge Klein in response to the 2012 publication of the Part VIII amendments. 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 BAP. Chief Judge Klein suggested that a provision be added to Rule 8006(c) that would be a counterpart to Rule 8006(e)(2). The latter provision authorizes a party to file a short supplemental statement regarding the merits of certification within 14 days after the court certifies a case for direct appeal on its own motion. Chief Judge Klein suggested that the bankruptcy court should have a similar opportunity to comment when the parties certify the appeal.

At the fall 2013 meeting, the Committee concluded that the court of appeals would likely benefit from the court's statement about whether the appeal satisfies one of the grounds for certification. The Committee decided, however, that authorization should not be limited to the bankruptcy court. Because under Rule 8006(b) 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. The authorization would be permissive, however, so a court would not be required to file a statement. A new subdivision (c)(2) would authorize such supplemental statements by the court.

C. New Rule 8018.1 (district court review of a judgment that the bankruptcy court lacked constitutional authority to enter). The proposed rule would authorize a district court to treat a bankruptcy court's judgment as proposed findings of fact and conclusions of law if the district court determined that the bankruptcy court lacked constitutional authority to enter a final judgment. This procedure is consistent with the Supreme Court's decision in *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014).

In response to *Stern v. Marshall*, 131 S. Ct. 2594 (2011), Professor Alan Resnick submitted Suggestion 12-BK-H, which proposed a rule amendment to 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. Adopting a procedure that some districts have authorized by local rule, the proposed rule would allow the district court to review the judgment as if the bankruptcy court had treated the proceeding as non-core under 28 U.S.C. § 157(c)(1).[2] This procedure would eliminate the need for a remand to the bankruptcy court for the entry of proposed findings and conclusions.

[2] Section 157(c)(1) provides as follows:

> A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such a proceeding, the bankruptcy judge shall

In *Arkison* the Supreme Court held that *Stern* claims can be treated as non-core under § 157(c)(1). The Court explained that "because these *Stern* claims fit comfortably within the category of claims governed by § 157(c)(1), the Bankruptcy Court would have been permitted to follow the procedures required by that provision, *i.e.*, to submit proposed findings of fact and conclusions of law to the District Court to be reviewed *de novo*." While the case before the Court "did not proceed in precisely that fashion," the Court nevertheless affirmed. *Id.* at 2174. It concluded that the petitioner had received the equivalent of the review it was entitled to—de novo review—because the district court had reviewed the bankruptcy court's entry of summary judgment de novo and had "conclude[ed] in a written opinion that there were no disputed issues of material fact and that the trustee was entitled to judgment as a matter of law." *Id.* at 2174.

The decision made clear that *Stern* claims do not fall within a statutory gap of being neither core nor non-core. Instead, once identified as *Stern* claims, they can be treated under the statutory provisions for non-core claims, as the proposed rule authorizes. Moreover, *Arkison* shows the Court's acceptance of a pragmatic approach to dealing with errors in the handling of *Stern* claims. Rather than reversing and remanding for the bankruptcy court to handle the proceeding as a non-core matter, it accepted the district court's review as being tantamount to review of a non-core proceeding. *See also Stern*, 131 S. Ct. at 2602 (noting without criticism that "[b]ecause the District Court concluded that Vickie's counterclaim was not core, the court determined that it was required to treat the Bankruptcy Court's judgment as 'proposed[,] rather than final,' and engage in an 'independent review' of the record").

The Committee discussed at the spring 2016 meeting whether to include provisions in the rule regarding the time for filing objections and responses to the bankruptcy court's proposed findings and conclusions and addressing whether parties could choose to rely on their appellate briefs instead. In the end, the Committee was persuaded by district judge members that the rule does not need to spell out procedural details for the conduct of the proceeding once the judge determines that the bankruptcy court judgment should be treated as proposed findings of fact and conclusions of law. The complexity of cases addressed by this rule will vary, and the rule should allow flexibility for the conduct of each case. The district judge, in consultation with the parties, can decide in a given case whether the appellate briefs suffice to present the issues for which de novo review is sought or whether they should be supplemented with specific objections and responses.

D. **Rule 8023** (voluntary dismissal; cross-reference regarding settlements). The rule would be amended by adding a cross-reference to Rule 9019 (Compromise and Arbitration) to 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

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submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

Committee proposes the amendment in response to a comment by the National Conference of Bankruptcy Judges and approved it for publication at the spring 2014 meeting.

The NCBJ stated that Rule 8023 fails to 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. The NCBJ raised the concern that, by its silence, Rule 8023 could be read as overriding Rule 9019.

The Committee noted that there is a division in the courts concerning a bankruptcy court's jurisdiction, without remand, to approve the settlement of a proceeding on appeal. It concluded, however, that this jurisdictional issue does not need to be resolved by the Committee or addressed in Rule 8023. A reminder in the rule of the possible need to comply with Rule 9019 would be helpful, whether or not parties seeking approval of the settlement of an appeal must first obtain a remand from the appellate court.

Action Item 8. Official Form 309F (Notice of Chapter 11 Bankruptcy Case (For Corporations and Partnerships)). Official Form 309F is used for providing notice to creditors in a chapter 11 corporate or partnership case of the case's commencement, the date of the meeting of creditors, the deadline for filing a proof of claim, the deadline for filing a complaint to determine the dischargeability of certain debts, and the existence of the automatic stay. Line 8 of the form relates to the "Exception to discharge deadline." It states that "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)." In response to a suggestion by Bankruptcy Judge Stuart Bernstein (S.D.N.Y.) pointing out that recent caselaw identifies ambiguities in the wording of the cited statutory provision that may render the instruction incorrect, the Committee proposes for publication an amendment to the instruction.

Section 1141(d) of the Bankruptcy Code governs the scope of the discharge in a chapter 11 case. It distinguishes between debtors that are individuals and other debtors, including corporations and partnerships. It excepts from the discharge of an individual debtor "any debt that is excepted from discharge under section 523." § 1141(d)(2). Those exceptions are not generally applicable, however, to chapter 11 debtors that are corporations or partnerships. Instead, as a general matter, those debtors are discharged from "any debt that arose before the date of [the] confirmation [of a plan]." § 1141(d)(1).

In 2005 Congress added § 1141(d)(6), which does except some types of debts from the discharge of a chapter 11 corporate debtor. In addition to certain tax debts, the provision states that the confirmation of a corporate debtor's chapter 11 plan does not discharge the debtor

from any debt—

> (A) of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit, or owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar state statute . . . .

The latter statutory reference is to the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq*.

The Bankruptcy Code provisions referred to in § 1141(d)(6)(A)—paragraphs (2)(A) and (2)(B) of § 523(a)—except from discharge debts for money, property, services, or credit obtained by false pretenses, false representations, or actual fraud, or obtained by the use of a materially false written statement about the debtor's financial condition that the creditor reasonably relied upon and that the debtor made with intent to defraud. Although on its face § 523 governs only the discharge of individual debtors, by virtue of § 1141(d)(6)(A), its coverage is partially extended to corporate debtors in chapter 11 cases.

Section 523(c)(1) provides special procedural rules applicable to debts of a kind specified in § 523(a)(2), (4), and (6). Generally, an action to determine the dischargeability of a debt may be brought at any time, even after the bankruptcy case has concluded. Rule 4007(b) provides that a "complaint other than under § 523(c) may be filed at any time." Section 523(c)(1), however, provides "the debtor shall be discharged from a debt of a kind specified paragraph (2), (4), or (6) unless, on request of the creditor to whom such debt is owed, the court determines such debt to be excepted from discharge" under one of the specified provisions. Rule 4007(c) implements this provision by requiring that "a complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a)."

Recent caselaw demonstrates that § 1141(d)(6)(A) is ambiguous in at least two respects:

1. Whether the phrase "of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a)" applies both to debts owed to a domestic governmental unit and to debts "owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar state statute" or just to the former; and

2. Whether the procedure specified by § 523(c)(1) applies to a debt excepted from discharge by § 1141(d)(6)(A) because it is of a kind specified by § 523(a)(2)(A) or (B).

The bankruptcy court in *United States ex rel. Minge v. Hawker Beechcraft Corp. (In re Hawker Beechcraft, Inc.)*, 493 B.R. 696 (Bankr. S.D.N.Y. 2013), held that § 1141(d)(6)(A) covers the following types of debts: (1) debts owed to a domestic governmental unit that fall within § 523(a)(2)(A) or (B), and (2) debts owed to a person as the result of an FCA action. 493 B.R. at 710. Critical to the result in the case was the court's determination that the language—"specified in paragraph (2)(A) or (2)(B) of section 523(a)"—applies only to debts owed to

domestic governmental units and not to debts owed to persons. If that interpretation is correct, the instruction in Form 309F is overbroad. Only creditors holding debts owed to a domestic governmental unit would be required to file a complaint seeking an exception to discharge under § 1141(d)(6)(A).

On appeal in the *Hawker Beechcraft* case, the district court agreed with the bankruptcy court's interpretation, but it went further and held that, even though one part of § 1141(d)(6)(A) incorporates by reference § 523(a)(2)(A) and (B), the provision does not incorporate § 523(c)(1), nor does that procedural provision apply on its own to the discharge of debts of a chapter 11 corporate debtor. 515 B.R. 416, 425-429 (S.D.N.Y. 2014). Thus, according to that reading, there is no time limit for seeking a determination of nondischargeability under either part of § 1141(d)(6)(A), and thus the entire explanatory sentence in Form 309F is incorrect.

Although the Committee acknowledged that § 1141(d)(6)(A) can also be read in a manner that is consistent with the form's instruction, it concluded at the fall 2014 meeting that the best course is to revise the statement in Form 309F so that it does not take a position on if or when the § 523(c) procedure applies to claims described by § 1141(d)(6)(A). That approach would allow further judicial development of the issue without retaining in the form a possibly incorrect statement of the law. It therefore proposes 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."

Action Item 9. Official Forms 25A, 25B, 25C, 26 (Small Business Debtor Forms and Periodic Report Regarding Value, Operations, and Profitability). As part of the Committee's Forms Modernization Project that began in 2008, the Committee deferred consideration of certain forms relating to chapter 11 cases—specifically, Forms 25A, B, and C, and Form 26. The Committee has now reviewed each of these forms extensively and, as explained further below, is recommending each form, as revised and renumbered, for publication in August 2016.

The small business debtor forms—Forms 25A, 25B, and 25C—are renumbered as Official Forms 425A, 425B, and 425C. Official Forms 425A and 425B set forth an illustrative form plan of reorganization and disclosure statement, respectively, for small business debtors under chapter 11 of the Bankruptcy Code. Official Form 425C is the monthly operating report for small business debtors, which must be filed with the court and served on the U.S. Trustee under section 1107(a) (which incorporates, among other things, section 704(a)(8)) of the Bankruptcy Code. The revised forms incorporate stylistic and formatting changes to conform to the general structure of the modernized forms. The Committee believes that these changes make all three forms easier to read and use.

In addition, in reviewing the forms, the Committee identified several places where Official Forms 425A and 425B were inconsistent with the Bankruptcy Code or required additional information to explain fully the debtor's disclosure obligations. For example, Official Form 425A, the plan of reorganization, now provides for separate classification of priority

claims that must be classified under the plan and non-priority general unsecured claims. It also clarifies treatment options for executory contracts and unexpired leases and the timing and kinds of discharges available in the small business chapter 11 case. The Committee made parallel changes to Official Form 425B, the disclosure statement, in each appropriate place. The Committee Notes to Official Forms 425A and 425B identify and explain these and the other substantive changes made and recommended by the Committee. They also explicitly state that the plan of reorganization and the disclosure statement set forth in each form are sample documents and not required forms in small business cases.

The Committee's working group sought and received significant input from the Executive Office for U.S. Trustees on Official Form 425C, which is the monthly operating report that small business debtors must file with the court and serve on the U.S. Trustee. As explained in the Committee Note to Official Form 425C, the form is rearranged to eliminate duplicative sections and further explain the kinds of information required by the form. It also clarifies that the person completing the form on behalf of the debtor must answer all questions, unless otherwise provided, and it provides a checkbox to indicate if the report is an amended filing.

Form 26 (renumbered as Official Form 426) requires periodic disclosures by chapter 11 debtors concerning the value, operations, and profitability of entities in which they hold a substantial or controlling interest. The Judicial Conference promulgated Form 26 and related Bankruptcy Rule 2015.3 in response to section 419(a) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Section 419(a) of BAPCPA, in turn, mandated that debtors in chapter 11 cases disclose certain information on the "value, operations, and profitability of any closely held corporation, partnership or of any other entity in which the debtor holds a substantial or controlling interest." Section 419(b) explains the section's purpose as "to assist parties in interest [in] taking steps to ensure that the debtor's interest in any [controlled entity] … is used for the payment of allowed claims against the debtor."

In reviewing Form 26, the Committee determined that certain changes would help to clarify the information requested by the form in connection with Rule 2015.3. These changes involve better defining the nondebtor entities for which a debtor must provide information, as well as modifying the exhibits that describe the kinds of information that a debtor must disclose. The Committee Note to Official Form 426 explains the scope of each exhibit and the justifications for the kinds of information requested by each exhibit.

The modified exhibits to Official Form 426 eliminate the requirement that the debtor provide a valuation estimate for the nondebtor entity. In lieu of a valuation, the modified exhibits focus on the information required by existing Exhibit B (retitled as Exhibit A)—i.e., the nondebtor entity's most recent balance sheet, income statement, cash flow statement, and statement of changes in shareholders' or partners' equity (and a summary of the footnotes to those financial statements). The revised form does not change the information concerning the nondebtor entity's business description in current Exhibit C, except to require that information in retitled Exhibit B. The revised form then adds new Exhibits C, D, and E. These new exhibits focus on intercompany claims, tax allocations, and the payment of claims or administrative expenses that would otherwise have been payable by a debtor.

Excerpt from the May 10, 2016 Report of the Advisory Committee on Bankruptcy Rules

The Committee unanimously approved Official Forms 425A, 425B, 425C, and 426, finding that the forms conform to the formatting and the underlying objectives of the Forms Modernization Project, including to make the forms more understandable and easier to use. Accordingly, the Committee recommends that the Standing Committee approve Official Forms 425A, 425B, 425C, and 426 for publication in August 2016.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE[1]

Rule 3002.1 Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

* * * * *

(b) NOTICE OF PAYMENT CHANGES; OBJECTION. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest-rate or escrow-account adjustment, no later than 21 days before a payment in the new amount is due. For a claim arising from a home-equity line of credit, this requirement may be modified by court order. A party in interest that objects to the payment change shall file a motion to determine whether the change in the payment amount is required to maintain payments in

[1] New material is underlined in red; matter to be omitted is lined through.

accordance with § 1322(b)(5) of the Code. If no motion is filed within 21 days after service of the notice, the change goes into effect, unless the court orders otherwise.

* * * * *

(e) DETERMINATION OF FEES, EXPENSES, OR CHARGES. On motion of ~~the debtor or trustee~~a party in interest filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.

* * * * *

Committee Note

Subdivision (b) is amended in two respects. First, it is amended to authorize courts to modify its requirements for claims arising from home equity lines of credit (HELOCs).

Because payments on HELOCs may adjust frequently and in small amounts, the rule provides flexibility for courts to specify alternative procedures for keeping the person who is maintaining payments on the loan apprised of the current payment amount. Courts may specify alternative requirements for providing notice of changes in HELOC payment amounts by local rules or orders in individual cases.

Second, subdivision (b) is amended 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. The amended rule does not set a deadline for filing a motion for a determination of the validity of the payment change, but it provides as a general matter—subject to a contrary court order—that if no motion has been filed within 21 days after service of the notice on the debtor, the debtor's attorney, and the trustee, the announced change goes into effect. If there is a later motion and a determination that the payment change was not required to maintain payments under § 1322(b)(5), appropriate adjustments will have to be made to reflect any overpayments. If, however, a motion is made during the time specified in subdivision (b), leading to a suspension of the payment change, a determination that the payment change was valid will require the debtor to cure the resulting default in order to be current on the mortgage at the end of the bankruptcy case.

Subdivision (e) is amended to allow parties in interest in addition to the debtor or trustee, such as the United States trustee, to seek a determination regarding the validity of any claimed fee, expense, or charge.

Rule 5005. Filing and Transmittal of Papers

(a) FILING.

* * * * *

(2) *Electronic Filing and Signing~~by Electronic Means~~.*

(A) *By a Represented Entity—Generally Required; Exceptions.*~~A court may by local rule permit or require documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes.~~ An entity represented by an attorney shall file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.~~A local rule may require filing by electronic means only if reasonable exceptions are allowed.~~

(B) *By an Unrepresented Individual—When Allowed or Required.* An individual not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule; and

(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(C) *Signing.* 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.

(D) *Same as a Written Paper.* A paper ~~document~~filed electronically~~by electronic means in compliance with a local rule constitutes~~ is a written paper for ~~the~~purposes of ~~applying~~these

rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.

* * * * *

Committee Note

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts, except for filings made by an individual not represented by an attorney. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons.

Filings by an individual not represented by an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication.

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.

Rule 8002. Time for Filing Notice of Appeal

(a) IN GENERAL.

* * * * *

(5) *Entry Defined*.

(A) A judgment, order, or decree is entered for purposes of this Rule 8002(a):

(i) when it is entered in the docket under Rule 5003(a), or

(ii) if Rule 7058 applies and Rule 58(a) F.R. Civ. P. requires a separate document, when the judgment, order, or decree is entered in the docket under Rule 5003(a) and when the earlier of these events occurs:

- the judgment, order, or decree is set out in a separate document; or

• 150 days have run from entry of the judgment, order, or decree in the docket under Rule 5003(a).

(B) A failure to set out a judgment, order, or decree in a separate document when required by Rule 58(a) F.R. Civ. P. does not affect the validity of an appeal from that judgment, order, or decree.

* * * * *

(b) EFFECT OF A MOTION ON THE TIME TO APPEAL.

(1) *In General*. If a party ~~timely~~ files in the bankruptcy court any of the following motions and does so within the time allowed by these rules, the time to file an appeal runs for all parties from the

entry of the order disposing of the last such remaining motion:

* * * * *

(c) APPEAL BY AN INMATE CONFINED IN AN INSTITUTION.

(1) *In General*. If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 8002(c)(1). If an inmate ~~confined in an institution~~ files a notice of appeal from a judgment, order, or decree of a bankruptcy court, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing~~. If the institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by~~

~~a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.~~ and:

(A) it is accompanied by:

(i) a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the appellate court exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 8002(c)(1)(A)(i).

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Committee Note

Clarifying amendments are made to subdivisions (a), (b), and (c) of the rule. They are modeled on parallel provisions of F.R. App. P. 4.

Paragraph (5) is added to subdivision (a) to clarify the effect of the separate-document requirement of F.R. Civ. P. 58(a) on the entry of a judgment, order, or decree for the purpose of determining the time for filing a notice of appeal.

Rule 7058 adopts F.R. Civ. P. Rule 58 for adversary proceedings. If Rule 58(a) requires a judgment to be set out in a separate document, the time for filing a notice of appeal runs—subject to subdivisions (b) and (c)—from when the judgment is docketed and the judgment is set out in a separate document or, if no separate document is prepared, from 150 days from when the judgment is entered in the docket. The court's failure to comply with the separate-document requirement of Rule 58(a), however, does not affect the validity of an appeal.

Rule 58 does not apply in contested matters. Instead, under Rule 9021, a separate document is not required, and a judgment or order is effective when it is entered in the docket. The time for filing a notice of appeal under subdivision (a) therefore begins to run upon docket entry in contested matters, as well as in adversary proceedings for which Rule 58 does not require a separate document.

A clarifying amendment is made to subdivision (b)(1) to conform to a recent amendment to F.R. App. P. 4(a)(4)—from which Rule 8002(b)(1) is derived. Former Rule 8002(b)(1) provided that "[i]f a party timely files in the bankruptcy court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Responding to a circuit split concerning the meaning of "timely" in F.R. App. P. 4(a)(4), the amendment adopts the majority approach and rejects the approach taken in *National Ecological Foundation v. Alexander*, 496 F.3d 466 (6th Cir. 2007). A motion made after the time allowed by the Bankruptcy Rules will not qualify as a motion that, under Rule 8002(b)(1), re-starts the appeal time—and that fact is not altered by, for example, a court order that sets a due date that is later than permitted by the Bankruptcy Rules, another party's consent or failure to object to the motion's lateness, or the court's disposition of the motion without explicit reliance on untimeliness.

Subdivision (c)(1) is revised to conform to F.R. App. P. 4(c)(1), which was recently amended to streamline and clarify the operation of the inmate-filing rule. The rule requires the inmate to show timely deposit and prepayment of postage. It is amended to specify that a notice is timely if it is accompanied by a declaration or notarized statement stating the date the notice was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as directed by the former rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the

document in the institution's mail system. A new Director's Form sets out a suggested form of the declaration.

The amended rule also provides that a notice is timely without a declaration or notarized statement if other evidence accompanying the notice shows that the notice was deposited on or before the due date and that postage was prepaid. If the notice is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the appellate court—district court, BAP, or court of appeals in the case of a direct appeal—has discretion to accept a declaration or notarized statement at a later date. The rule uses the phrase "exercises its discretion to permit"—rather than simply "permits"—to help ensure that pro se inmates are aware that a court will not necessarily forgive a failure to provide the declaration initially.

Rule 8006. Certifying a Direct Appeal to the Court of Appeals

* * * * *

(c) JOINT CERTIFICATION BY ALL APPELLANTS AND APPELLEES.

(1) *How Accomplished.* A joint certification by all the appellants and appellees under 28 U.S.C. § 158(d)(2)(A) must be made by using the appropriate Official Form. The parties may supplement the certification with a short statement of the basis for the certification, which may include the information listed in subdivision (f)(2).

(2) *Supplemental Statement by the Court.* Within 14 days after the parties' certification, the bankruptcy court or the court in which the matter is then pending may file a short supplemental statement about the merits of the certification.

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Committee Note

Subdivision (c) is amended to provide authority for the court to file a statement on the merits of a certification for direct review by the court of appeals when the certification is made jointly by all of the parties to the appeal. It is a counterpart to subdivision (e)(2), which allows a party to file a similar statement when the court certifies direct review on the court's own motion.

The bankruptcy court may file a supplemental statement within 14 days after the certification, even if the appeal is no longer pending before it according to subdivision (b). If the appeal is pending in the district court or BAP during that 14-day period, the appellate court is authorized to file a statement. In all cases, the filing of a statement by the court is discretionary.

Rule 8011. Filing and Service; Signature

(a) FILING.

* * * * *

(2) *Method and Timeliness.*

* * * * *

(C) *Inmate Filing*. If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 8011(a)(2)(C). A document filed by an inmate confined in an institution is timely if it is deposited in the institution's internal mail~~ing~~ system on or before the last day for filing~~. If the institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a~~

~~notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.~~ and:

(i) it is accompanied by:

• a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or

• evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(ii) the appellate court exercises its discretion to permit the later filing of a

declaration or notarized statement that satisfies Rule 8011(a)(2)(C)(i).

* * * * *

Committee Note

Subdivision (a)(2)(C) is revised to conform to F.R. App. P. 25(a)(2)(C), which was recently amended to streamline and clarify the operation of the inmate-filing rule. The rule requires the inmate to show timely deposit and prepayment of postage. It is amended to specify that a notice is timely if it is accompanied by a declaration or notarized statement stating the date the notice was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as directed by the former rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution's mail system. A new Director's Form sets out a suggested form of the declaration.

The amended rule also provides that a notice is timely without a declaration or notarized statement if other evidence accompanying the notice shows that the notice was deposited on or before the due date and that postage was prepaid. If the notice is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the appellate court—district court, BAP, or court of appeals in the case of a direct appeal—has discretion to accept a declaration or notarized statement at a later date.

The rule uses the phrase "exercises its discretion to permit"—rather than simply "permits"—to help ensure that pro se inmates are aware that a court will not necessarily forgive a failure to provide the declaration initially.

Rule 8013. Motions; Intervention

* * * * *

(f) FORM OF DOCUMENTS; ~~PAGE~~LENGTH LIMITS; NUMBER OF COPIES.

* * * * *

(2) *Format of an Electronically Filed Document*. A motion, response, or reply filed electronically must comply with the requirements for a paper version regarding covers, line spacing, margins, typeface, and type style. It must also comply with the ~~page~~length limits under paragraph (3).

(3) ~~*Page*~~*Length Limits*. ~~Unless the district court or BAP orders otherwise:~~Except by the district court's or BAP's permission, and excluding the accompanying documents authorized by subdivision (a)(2)(C):

(A) a motion or a response to a motion ~~must not exceed 20 pages, exclusive of the corporate disclosure statement and accompanying documents authorized by subdivision (a)(2)(C)~~ produced using a computer must include a certificate under Rule 8015(h) and not exceed 5,200 words; ~~and~~

(B) ~~a reply to a response must not exceed 10 pages.~~a handwritten or typewritten motion or a response to a motion must not exceed 20 pages;

(C) a reply produced using a computer must include a certificate under Rule 8015(h) and not exceed 2,600 words; and

(D) a handwritten or typewritten reply must not exceed 10 pages.

* * * * *

Committee Note

Subdivision (f)(3) is amended to conform to F.R. App. P. 27(d)(2), which was recently amended to replace page limits with word limits for motions and responses produced using a computer. The word limits were derived from the current page limits, using the assumption that one page is equivalent to 260 words. Documents produced using a computer must include the certificate of compliance required by Rule 8015(h); Official Form 417C suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes the accompanying documents required by Rule 8013(a)(2)(C) and any items listed in Rule 8015(h).

Rule 8015. Form and Length of Briefs; Form of Appendices and Other Papers

(a) PAPER COPIES OF A BRIEF. If a paper copy of a brief may or must be filed, the following provisions apply:

* * * * *

(7) *Length.*

(A) *Page limitation.* A principal brief must not exceed 30 pages, or a reply brief 15 pages, unless it complies with subparagraph (B) ~~and (C)~~.

(B) *Type-volume limitation.*

(i) A principal brief is acceptable if it contains a certificate under Rule 8015(h) and:

· ~~it~~ contains no more than ~~14,000~~13,000 words; or

· ~~it~~ uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it includes a certificate under Rule 8015(h) and contains no more than half of the type volume specified in item (i).

~~(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules, or regulations, and any certificates of counsel do not count toward the limitation.~~

~~(C) *Certificate of Compliance.*~~

~~(i) A brief submitted under subdivision (a)(7)(B) must include a certificate signed by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:~~

~~• the number of words in the brief; or~~

~~• the number of lines of monospaced type in the brief.~~

~~(ii) The certification requirement is satisfied by a certificate of compliance that conforms substantially to the appropriate Official Form.~~

* * * * *

(f) LOCAL VARIATION. A district court or BAP must accept documents that comply with the ~~applicable~~ form requirements of this rule and the length limits set by Part VIII of these rules. By local rule or order in a particular case, a district court or BAP may accept documents that do not meet all ~~of~~the form requirements of this rule or the length limits set by Part VIII of these rules.

(g) ITEMS EXCLUDED FROM LENGTH. In computing any length limit, headings, footnotes, and quotations count toward the limit, but the following items do not:

- the cover page;
- a corporate disclosure statement;
- a table of contents;
- a table of citations;
- a statement regarding oral argument;

- an addendum containing statutes, rules, or regulations;
- certificates of counsel;
- the signature block;
- the proof of service; and
- any item specifically excluded by these rules or by local rule.

(h) CERTIFICATE OF COMPLIANCE.

(1) *Briefs and Documents That Require a Certificate*. A brief submitted under Rule 8015(a)(7)(B), 8016(d)(2), or 8017(b)(4)—and a document submitted under Rule 8013(f)(3)(A), 8013(f)(3)(C), or 8022(b)(1)—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation. The individual preparing the certificate may rely on the word or line count of the word-

processing system used to prepare the document. The certificate must state the number of words—or the number of lines of monospaced type—in the document.

(2) *Acceptable Form.* The certificate requirement is satisfied by a certificate of compliance that conforms substantially to the appropriate Official Form.

Committee Note

The rule is amended to conform to recent amendments to F.R. App. P. 32, which reduced the word limits generally allowed for briefs. When Rule 32(a)(7)(B)'s type-volume limits for briefs were adopted in 1998, the word limits were based on an estimate of 280 words per page. Amended F.R. App. P. 32 applies a conversion ratio of 260 words per page and reduces the word limits accordingly. Rule 8015(a)(7) adopts the same reduced word limits for briefs prepared by computer.

In a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in these rules, such as to include unusually voluminous information explaining relevant background or legal provisions or to respond to multiple briefs by opposing parties or amici.

The Committee expects that courts will accommodate those situations by granting leave to exceed the type-volume limitations as appropriate.

Subdivision (f) is amended to make clear a court's ability (by local rule or order in a case) to increase the length limits for briefs and other documents. Subdivision (f) already established this authority as to the length limits in Rule 8015(a)(7); the amendment makes clear that this authority extends to all length limits in Part VIII of the Bankruptcy Rules.

A new subdivision (g) is added to set out a global list of items excluded from length computations, and the list of exclusions in former subdivision (a)(7)(B)(iii) is deleted. The certificate-of-compliance provision formerly in subdivision (a)(7)(C) is relocated to a new subdivision (h) and now applies to filings under all type-volume limits (other than Rule 8014(f)'s word limit)—including the new word limits in Rules 8013, 8016, 8017, and 8022. Conforming amendments are made to Official Form 417C.

Rule 8016. Cross-Appeals

* * * * *

(d) LENGTH.

(1) *Page Limitation*. Unless it complies with paragraph~~s~~ (2)~~ and (3)~~, the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) *Type-Volume Limitation*.

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if it includes a certificate under Rule 8015(h) and:

(i) ~~it~~ contains no more than ~~14,000~~ 13,000 words; or

(ii) ~~it~~ uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if it includes a certificate under Rule 8015(h) and:

(i) ~~it~~ contains no more than ~~16,500~~ 15,300 words; or

(ii) ~~it~~ uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it includes a certificate under Rule 8015(h) and contains no more than half of the type volume specified in subparagraph (A).

~~(D) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral~~

~~argument, any addendum containing statutes, rules, or regulations, and any certificates of counsel do not count toward the limitation.~~

~~(3) *Certificate of Compliance*. A brief submitted either electronically or in paper form under paragraph (2) must comply with Rule 8015(a)(7)(C).~~

* * * * *

Committee Note

The rule is amended to conform to recent amendments to F.R. App. P. 28.1, which reduced the word limits generally allowed for briefs in cross-appeals. When Rule 28.1 was adopted in 2005, it modeled its type-volume limits on those set forth in F.R. App. P. 32(a)(7) for briefs in cases that did not involve a cross-appeal. At that time, Rule 32(a)(7)(B) set word limits based on an estimate of 280 words per page. Amended F.R. App. P. 32 and 28.1 apply a conversion ratio of 260 words per page and reduce the word limits accordingly. Rule 8016(d)(2) adopts the same reduced word limits.

In a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in these rules, such as to include unusually voluminous information explaining relevant background or legal provisions or to respond to multiple briefs by opposing parties or amici. The Committee expects that courts will accommodate those

situations by granting leave to exceed the type-volume limitations as appropriate.

Subdivision (d) is amended to refer to new Rule 8015(h) (which now contains the certificate-of-compliance provision formerly in Rule 8015(a)(7)(C)).

Rule 8017. Brief of an Amicus Curiae

(a) DURING INITIAL CONSIDERATION OF A CASE ON THE MERITS.

(1) *Applicability*. This Rule 8017(a) governs amicus filings during a court's initial consideration of a case on the merits.

(2) *When Permitted*. The United States or its officer or agency or a state may file an amicus ~~curiae~~ brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, except that a district court or BAP may strike or prohibit the filing of an amicus brief that would result in a judge's disqualification. On its own motion, and with notice to all parties to an appeal, the district court or BAP may request a brief by an amicus curiae.

~~(b)~~(3) *Motion for Leave to File*. The motion must be accompanied by the proposed brief and state:

~~(1)~~(A) the movant's interest; and

~~(2)~~(B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the appeal.

~~(c)~~(4) *Contents and Form*. An amicus brief must comply with Rule 8015. In addition to the requirements of Rule 8015, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 8012. An amicus brief need not comply with Rule 8014, but must include the following:

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

~~(2)~~(B) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;

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

~~(4)~~(D) unless the amicus curiae is one listed in the first sentence of subdivision (a)(2), a statement that indicates whether:

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

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

~~(C)~~(iii) a person—other than the amicus curiae, its members, or its counsel—

contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;

~~(5)~~(E) an argument, which may be preceded by a summary and need not include a statement of the applicable standard of review; and

~~(6)~~(F) a certificate of compliance, if required by Rule 8015(a)(7)(C) or 8015(b).

~~(d)~~(5) *Length.* Except by the district court's or BAP's permission, an amicus brief must be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

~~(e)~~(6) *Time for Filing*. An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's principal brief is filed. The district court or BAP may grant leave for later filing, specifying the time within which an opposing party may answer.

~~(f)~~(7) *Reply Brief*. Except by the district court's or BAP's permission, an amicus curiae may not file a reply brief.

~~(g)~~(8) *Oral Argument*. An amicus curiae may participate in oral argument only with the district court's or BAP's permission.

(b) DURING CONSIDERATION OF WHETHER TO GRANT REHEARING.

(1) *Applicability*. This Rule 8017(b) governs amicus filings during a district court's or BAP's consideration of whether to grant rehearing, unless a local rule or order in a case provides otherwise.

(2) *When Permitted*. The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court.

(3) *Motion for Leave to File*. Rule 8017(a)(3) applies to a motion for leave.

(4) *Contents, Form, and Length*. Rule 8017(a)(4) applies to the amicus brief. The brief must include a certificate under Rule 8015(h) and not exceed 2,600 words.

(5) *Time for Filing*. An amicus curiae supporting the motion for rehearing or supporting

neither party must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the motion is filed. An amicus curiae opposing the motion for rehearing must file its brief, accompanied by a motion for filing when necessary, no later than the date set by the court for the response.

Committee Note

Rule 8017 is amended to conform to the recent amendment to F.R. App. P. 29, which now addresses amicus filings in connection with petitions for rehearing. Former Rule 8017 is renumbered Rule 8017(a), and language is added to that subdivision (a) to state that its provisions apply to amicus filings during the district court's or BAP's initial consideration of a case on the merits. New subdivision (b) is added to address amicus filings in connection with a motion for rehearing. Subdivision (b) sets default rules that apply when a district court or BAP does not provide otherwise by local rule or by order in a case. A court remains free to adopt different rules governing whether amicus filings are permitted in connection with motions for rehearing, and governing the procedures when such filings are permitted.

The amendment to subdivision (a)(2) authorizes orders or local rules that prohibit the filing of an amicus brief by party consent if the brief would result in a judge's

disqualification. The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification. It is modeled on an amendment to F.R. App. 29(a).

Rule 8018.1. District-Court Review of a Judgment that the Bankruptcy Court Lacked the Constitutional Authority to Enter

If, on appeal, a district court determines that the bankruptcy court did not have the power under Article III of the Constitution to enter the judgment, order, or decree appealed from, the district court may treat it as proposed findings of fact and conclusions of law.

Committee Note

This rule is new. It is added to prevent a district court from having to remand an appeal whenever it determines that the bankruptcy court lacked constitutional authority to enter the judgment, order, or decree appealed from. Consistent with the Supreme Court's decision in *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014), the district court in that situation may treat the bankruptcy court's judgment as proposed findings of fact and conclusions of law. Upon making the determination to proceed in that manner, the district court may choose to allow the parties to file written objections to specific proposed findings and conclusions and to respond to another party's objections, *see* Rule 9033; treat the parties' briefs as objections and responses; or prescribe other procedures for the review of the proposed findings of fact and conclusions of law.

Rule 8022. Motion for Rehearing

* * * * *

(b) FORM OF MOTION; LENGTH. The motion must comply in form with Rule 8013(f)(1) and (2). Copies must be served and filed as provided by Rule 8011. ~~Unless the district court or BAP orders otherwise, a motion for rehearing must not exceed 15 pages.~~Except by the district court's or BAP's permission:

(1) a motion for rehearing produced using a computer must include a certificate under Rule 8015(h) and not exceed 3,900 words; and

(2) a handwritten or typewritten motion must not exceed 15 pages.

Committee Note

Subdivision (b) is amended to conform to the recent amendment to F.R. App. P. 40(b), which was one of several appellate rules in which word limits were substituted for page limits for documents prepared by computer. The word limits were derived from the previous page limits

using the assumption that one page is equivalent to 260 words. Documents produced using a computer must include the certificate of compliance required by Rule 8015(h); completion of Official Form 417C suffices to meet that requirement.

Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes any items listed in Rule 8015(g).

Rule 8023. Voluntary Dismissal

Subject to Rule 9019, ~~T~~the clerk of the district court or BAP must dismiss an appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the district court or BAP.

Committee Note

The rule is amended to 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.

Appendix:
Length Limits Stated in Part VIII of the Federal Rules of Bankruptcy Procedure

This chart shows the length limits stated in Part VIII of the Federal Rules of Bankruptcy Procedure. Please bear in mind the following:

- In computing these limits, you can exclude the items listed in Rule 8015(g).
- If you are using a word limit or line limit (other than the word limit in Rule 8014(f)), you must include the certificate required by Rule 8015(h).
- If you are using a line limit, your document must be in monospaced typeface. A typeface is monospaced when each character occupies the same amount of horizontal space.
- For the limits in Rules 8013 and 8022:
  - -- You must use the word limit if you produce your document on a computer; and
  - -- You must use the page limit if you handwrite your document or type it on a typewriter.

	Rule	Document Type	Word Limit	Page Limit	Line Limit
Motions	8013(f)(3)	• Motion • Response to a motion	5,200	20	Not applicable
	8013(f)(3)	• Reply to a response to a motion	2,600	10	Not applicable
Parties' briefs (where no cross-appeal)	8015(a)(7)	• Principal brief	13,000	30	1,300
	8015(a)(7)	• Reply brief	6,500	15	650

	Rule	Document Type	Word Limit	Page Limit	Line Limit
Parties' briefs (where cross-appeal)	8016(d)	• Appellant's principal brief • Appellant's response and reply brief	13,000	30	1,300
	8016(d)	• Appellee's principal and response brief	15,300	35	1,500
	8016(d)	• Appellee's reply brief	6,500	15	650
Party's supplemental letter	8014(f)	• Letter citing supplemental authorities	350	Not applicable	Not applicable
Amicus briefs	8017(a)(5)	• Amicus brief during initial consideration of case on merits	One-half the length set by the Part VIII Rules for a party's principal brief	One-half the length set by the Part VIII Rules for a party's principal brief	One-half the length set by the Part VIII Rules for a party's principal brief
	8017(b)(4)	• Amicus brief during consideration of whether to grant rehearing	2,600	Not applicable	Not applicable
Motion for rehearing	8022(b)	• Motion for rehearing	3,900	15	Not applicable

Information to identify the case:

Debtor _____ (Name) EIN __ __ – __ __ __ __ __ __ __

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

Case number: _____

[Date case filed for chapter 11 _____ MM / DD / YYYY OR

[Date case filed in chapter _____ _____ MM / DD / YYYY

Date case converted to chapter 11 _____ MM / DD / YYYY]

Official Form 309F (For Corporations or Partnerships)

Notice of Chapter 11 Bankruptcy Case

12/17

For the debtor listed above, a case has been filed under chapter 11 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees, including information about the meeting of creditors and deadlines. Read both pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtor or the debtor's property. For example, while the stay is in effect, creditors cannot sue, assert a deficiency, repossess property, or otherwise try to collect from the debtor. Creditors cannot demand repayment from the debtor by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees.

Confirmation of a chapter 11 plan may result in a discharge of debt. A creditor who wants to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadline specified in this notice. (See line 11 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

Do not file this notice with any proof of claim or other filing in the case.

1. **Debtor's full name**		
2. **All other names used in the last 8 years**		
3. **Address**		
4. **Debtor's attorney** Name and address		Contact phone _____ Email _____
5. **Bankruptcy clerk's office** Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.gov.		Hours open _____ Contact phone _____
6. **Meeting of creditors** The debtor's representative must attend the meeting to be questioned under oath. Creditors may attend, but are not required to do so.	_____ at _____ Date Time The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.	Location:

For more information, see page 2 ▶

7. Proof of claim deadline	**Deadline for filing proof of claim:**	[Not yet set. If a deadline is set, the court will send you another notice.] or [date, if set by the court)]
	A proof of claim is a signed statement describing a creditor's claim. A proof of claim form may be obtained at www.uscourts.gov or any bankruptcy clerk's office. Your claim will be allowed in the amount scheduled unless: ■ your claim is designated as *disputed*, *contingent*, or *unliquidated*; ■ you file a proof of claim in a different amount; or ■ you receive another notice. If your claim is not scheduled or if your claim is designated as *disputed*, *contingent*, or *unliquidated*, you must file a proof of claim or you might not be paid on your claim and you might be unable to vote on a plan. You may file a proof of claim even if your claim is scheduled. You may review the schedules at the bankruptcy clerk's office or online at www.pacer.gov. Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits a creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.	
8. Exception to discharge deadline The bankruptcy clerk's office must receive a complaint and any required filing fee by the following deadline.	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. **Deadline for filing the complaint:**	_____
9. Creditors with a foreign address	If you are a creditor receiving notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.	
10. Filing a Chapter 11 bankruptcy case	Chapter 11 allows debtors to reorganize or liquidate according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan and a disclosure statement telling you about the plan, and you may have the opportunity to vote on the plan. You will receive notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the property and may continue to operate its business.	
11. Discharge of debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. See 11 U.S.C. § 1141(d). A discharge means that creditors may never try to collect the debt from the debtor except as provided in the plan. If you want to have a particular debt owed to you excepted from the discharge under 11 U.S.C. § 1141(d)(6)(A), you must start a judicial proceeding by filing a complaint and paying the filing fee in the bankruptcy clerk's office by the deadline.	

COMMITTEE NOTE

Official Form 309F (For Corporations or Partnerships), *Notice of Chapter 11 Bankruptcy Case*, is amended at Line 8. Line 8 previously stated that a creditor seeking to have a debt excepted from discharge under § 1141(d)(6)(A) must file a complaint by the stated deadline. That statement has been revised in light of ambiguities in § 1141(d)(6)(A) regarding its relationship with § 523. Specifically, the provision is unclear about whether not only a debt "owed to a domestic governmental unit" but also a debt "owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar State statute" must be of the type described by § 523(a)(2)(A) and (B). The provision is also unclear about whether the procedural requirements of § 523(c)(1) apply, given that § 1141(d)(6)(A) specifically refers to § 523(a) but not to § 523(c). Rather than take a position on the proper interpretation of § 1141(d)(6)(A), the form leaves to creditors the determination of whether § 523(c) applies to their claims, in which case they must commence a dischargeability proceeding by the Rule 4007(c) deadline that is stated on the form.

[Caption as in Form 416A, 416B, or 416D, as appropriate]

NOTICE OF APPEAL AND STATEMENT OF ELECTION

Part 1: Identify the appellant(s)

1. Name(s) of appellant(s):
   _____

2. Position of appellant(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

   For appeals in an adversary proceeding.

   ❑ Plaintiff
   ❑ Defendant
   ❑ Other (describe) _____

   For appeals in a bankruptcy case and not in an adversary proceeding.

   ❑ Debtor
   ❑ Creditor
   ❑ Trustee
   ❑ Other (describe) _____

Part 2: Identify the subject of this appeal

1. Describe the judgment, order, or decree appealed from: _____

2. State the date on which the judgment, order, or decree was entered: _____

Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

1. Party: _____ Attorney: _____
   _____
   _____
   _____

2. Party: _____ Attorney: _____
   _____
   _____
   _____

Part 4: Optional election to have appeal heard by District Court (applicable only in certain districts)

If a Bankruptcy Appellate Panel is available in this judicial district, the Bankruptcy Appellate Panel will hear this appeal unless, pursuant to 28 U.S.C. § 158(c)(1), a party elects to have the appeal heard by the United States District Court. If an appellant filing this notice wishes to have the appeal heard by the United States District Court, check below. Do not check the box if the appellant wishes the Bankruptcy Appellate Panel to hear the appeal.

- ❑ Appellant(s) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

Part 5: Sign below

_____ Date: _____

Signature of attorney for appellant(s) (or appellant(s) if not represented by an attorney)

Name, address, and telephone number of attorney (or appellant(s) if not represented by an attorney):

_____
_____
_____
_____

Fee waiver notice: If appellant is a child support creditor or its representative and appellant has filed the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.

[**Note to inmate filers:** If you are an inmate filer in an institution and you seek the timing benefit of Fed. R. Bankr. P. 8002(c)(1), complete Director's Form 4710 (Declaration of Inmate Filing) and file that declaration along with the Notice of Appeal.]

COMMITTEE NOTE

The form is amended to include a notice to inmate filers that Director's Form 4710 may be used to provide a declaration under Rule 8002(c)(1) regarding the mailing of a notice of appeal using an institution's legal mail system.

[This certification must be appended to your document if its length is calculated by maximum number of words or lines of text rather than number of pages.]

Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

1. This document complies with [the type-volume limit of Fed. R. Bankr. P. [*insert Rule citation; e.g.,8015(a)(7)(B)*]] [the word limit of Fed. R. Bankr. P. [*insert Rule citation; e.g., 8013(f)(3)(A)*]] because, excluding the parts of the document exempted by Fed. R. Bankr. P. 8015(g) [and [*insert applicable Rule citation, if any*]]:

- ❑ this document contains [*state the number of*] words, **or**
- ❑ this brief uses a monospaced typeface and contains [*state the number of*] lines of text.

2. This document complies with the typeface requirements of Fed. R. Bankr. P. 8015(a)(5) and the type-style requirements of Fed. R. Bankr. P. 8015(a)(6) because:

- ❑ this document has been prepared in a proportionally spaced typeface using [*state name and version of word-processing program*] in [*state font size and name of type style*], **or**
- ❑ this brief has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

_____ Date: _____
Signature

Print name of person signing certificate of compliance:

_____

COMMITTEE NOTE

The form is amended to reflect changes in the length limits specified by Part VIII of the Bankruptcy Rules for appellate documents and the broadened requirement for a certificate of compliance under Rule 8015(h). The rule now requires certification of compliance with the type-volume or word limits for briefs filed under Rule 8015(a)(7)(b), 8016(d)(2), or 8017(b)(4), and documents filed under Rule 8013(f)(3)(A), 8013(f)(3)(C), or 8022(b)(1).

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

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

Case number: _____

❑ Check if this is an amended filing

Official Form 425A

Plan of Reorganization for Small Business Under Chapter 11 **12/17**

[Name of Proponent]'s Plan of Reorganization, Dated [Insert Date]

Article 1: Summary

This Plan of Reorganization (the *Plan*) under chapter 11 of the Bankruptcy Code (the *Code*) proposes to pay creditors of [insert the name of the Debtor] (the *Debtor*) from [Specify sources of payment, such as an infusion of capital, loan proceeds, sale of assets, cash flow from operations, or future income]**.**

This Plan provides for:
- [ ] classes of priority claims;
- [ ] classes of secured claims;
- [ ] classes of non-priority unsecured clams; and
- [ ] classes of equity security holders.

Non-priority unsecured creditors holding allowed claims will receive distributions, which the proponent of this Plan has valued at approximately [ ] cents on the dollar. This Plan also provides for the payment of administrative and priority claims.

All creditors and equity security holders should refer to Articles 3 through 6 of this Plan for information regarding the precise treatment of their claim. A disclosure statement that provides more detailed information regarding this Plan and the rights of creditors and equity security holders has been circulated with this Plan. **Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one. (If you do not have an attorney, you may wish to consult one.)**

Article 2: Classification of Claims and Interests

2.01	**Class 1**.....	All allowed claims entitled to priority under § 507(a) of the Code (except administrative expense claims under § 507(a)(2), ["gap" period claims in an involuntary case under § 507(a)(3),] and priority tax claims under § 507(a)(8)). [Add classes of priority claims, if applicable]
2.02	**Class 2**.....	The claim of [_____], to the extent allowed as a secured claim under § 506 of the Code. [Add other classes of secured creditors, if any. *Note*: Section 1129(a)(9)(D) of the Code provides that a secured tax claim which would otherwise meet the description of a priority tax claim under § 507(a)(8) of the Code is to be paid in the same manner and over the same period as prescribed in § 507(a)(8).]
2.03	**Class 3**.....	All non-priority unsecured claims allowed under § 502 of the Code. [Add other classes of unsecured claims, if any.]

2.04	**Class 4**.....	Equity interests of the Debtor. [If the Debtor is an individual, change this heading *to The interests of the individual Debtor in property of the estate*.]

Article 3: Treatment of Administrative Expense Claims, Priority Tax Claims, and Quarterly and Court Fees

3.01	**Unclassified claims**	Under section § 1123(a)(1), administrative expense claims, ["gap" period claims in an involuntary case allowed under § 502(f) of the Code,] and priority tax claims are not in classes.
3.02	**Administrative expense claims**	Each holder of an administrative expense claim allowed under § 503 of the Code, [and a "gap" claim in an involuntary case allowed under § 502(f) of the Code,] will be paid in full on the effective date of this Plan, in cash, or upon such other terms as may be agreed upon by the holder of the claim and the Debtor.
3.03	**Priority tax claims**	Each holder of a priority tax claim will be paid [Specify terms of treatment consistent with § 1129(a)(9)(C) of the Code].
3.04	**Statutory fees**	All fees required to be paid under 28 U.S.C. § 1930 that are owed on or before the effective date of this Plan have been paid or will be paid on the effective date.
3.05	**Prospective quarterly fees**	All quarterly fees required to be paid under 28 U.S.C. § 1930(a)(6) or (a)(7) will accrue and be timely paid until the case is closed, dismissed, or converted to another chapter of the Code.

Article 4: Treatment of Claims and Interests Under the Plan

4.01 **Claims and interests shall be treated as follows under this Plan:**

Class	Impairment	Treatment
Class 1 - **Priority claims** excluding those in Article 3	❑ Impaired ❑ Unimpaired	[Insert treatment of priority claims in this Class, including the form, amount and timing of distribution, if any. For example: "Class 1 is unimpaired by this Plan, and each holder of a Class 1 Priority Claim will be paid in full, in cash, upon the later of the effective date of this Plan, or the date on which such claim is allowed by a final non-appealable order. Except: _____."] [Add classes of priority claims if applicable]
Class 2 – **Secured claim** of [*Insert name of secured creditor*.]	❑ Impaired ❑ Unimpaired	[Insert treatment of secured claim in this Class, including the form, amount and timing of distribution, if any.] [Add classes of secured claims if applicable]
Class 3 – **Non-priority unsecured creditors**	❑ Impaired ❑ Unimpaired	[Insert treatment of unsecured creditors in this Class, including the form, amount and timing of distribution, if any.] [Add administrative convenience class if applicable]
Class 4 - **Equity security holders of the Debtor**	❑ Impaired ❑ Unimpaired	[Insert treatment of equity security holders in this Class, including the form, amount and timing of distribution, if any.]

Article 5: Allowance and Disallowance of Claims

5.01	**Disputed claim**	A *disputed claim* is a claim that has not been allowed or disallowed [by a final non-appealable order], and as to which either: (i) a proof of claim has been filed or deemed filed, and the Debtor or another party in interest has filed an objection; or (ii) no proof of claim has been filed, and the Debtor has scheduled such claim as disputed, contingent, or unliquidated.

5.02	**Delay of distribution on a disputed claim**	No distribution will be made on account of a disputed claim unless such claim is allowed [by a final non-appealable order].
5.03	**Settlement of disputed claims**	The Debtor will have the power and authority to settle and compromise a disputed claim with court approval and compliance with Rule 9019 of the Federal Rules of Bankruptcy Procedure.

Article 6: Provisions for Executory Contracts and Unexpired Leases

6.01	**Assumed executory contracts and unexpired leases**	(a) The Debtor assumes, and if applicable assigns, the following executory contracts and unexpired leases as of the effective date: [List assumed, or if applicable assigned, executory contracts and unexpired leases.]
		(b) Except for executory contracts and unexpired leases that have been assumed, and if applicable assigned, before the effective date or under section 6.01(a) of this Plan, or that are the subject of a pending motion to assume, and if applicable assign, the Debtor will be conclusively deemed to have rejected all executory contracts and unexpired leases as of the effective date. A proof of a claim arising from the rejection of an executory contract or unexpired lease under this section must be filed no later than _____ days after the date of the order confirming this Plan.

Article 7: Means for Implementation of the Plan

[Insert here provisions regarding how the plan will be implemented as required under § 1123(a)(5) of the Code. For example, provisions may include those that set out how the plan will be funded, as well as who will be serving as directors, officers or voting trustees of the reorganized Debtor.]

Article 8: General Provisions

8.01	**Definitions and rules of construction**	The definitions and rules of construction set forth in §§ 101 and 102 of the Code shall apply when terms defined or construed in the Code are used in this Plan, and they are supplemented by the following definitions: [Insert additional definitions if necessary].
8.02	**Effective date**	The effective date of this Plan is the first business day following the date that is 14 days after the entry of the confirmation order. If, however, a stay of the confirmation order is in effect on that date, the effective date will be the first business day after the date on which the stay expires or is otherwise terminated.
8.03	**Severability**	If any provision in this Plan is determined to be unenforceable, the determination will in no way limit or affect the enforceability and operative effect of any other provision of this Plan.
8.04	**Binding effect**	The rights and obligations of any entity named or referred to in this Plan will be binding upon, and will inure to the benefit of the successors or assigns of such entity.
8.05	**Captions**	The headings contained in this Plan are for convenience of reference only and do not affect the meaning or interpretation of this Plan.

[8.06 **Controlling effect**	Unless a rule of law or procedure is supplied by federal law (including the Code or the Federal Rules of Bankruptcy Procedure), the laws of the State of [ ] govern this Plan and any agreements, documents, and instruments executed in connection with this Plan, except as otherwise provided in this Plan.]
[8.07 **Corporate governance**	[If the Debtor is a corporation include provisions required by § 1123(a)(6) of the Code.]

Article 9: Discharge

Check one box.

9.01 ☐ **Discharge if the Debtor is an individual and § 1141(d)(3) is not applicable.** Confirmation of this Plan does not discharge any debt provided for in this Plan until the court grants a discharge on completion of all payments under this Plan, or as otherwise provided in § 1141(d)(5) of the Code. The Debtor will not be discharged from any debt excepted from discharge under § 523 of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

☐ **Discharge if the Debtor is a partnership and § 1141(d)(3) is not applicable.** On the effective date of this Plan, the Debtor will be discharged from any debt that arose before confirmation of this Plan, to the extent specified in § 1141(d)(1)(A) of the Code. The Debtor will not be discharged from any debt imposed by this Plan.

☐ **Discharge if the Debtor is a corporation and § 1141(d)(3) is not applicable.** On the effective date of this Plan, the Debtor will be discharged from any debt that arose before confirmation of this Plan, to the extent specified in § 1141(d)(1)(A) of the Code, except that the Debtor will not be discharged of any debt:

(i) imposed by this Plan; or

(ii) to the extent provided in § 1141(d)(6).

☐ **No discharge if § 1141(d)(3) is applicable.** In accordance with § 1141(d)(3) of the Code, the Debtor will not receive any discharge of debt in this bankruptcy case.

Article 10: Other Provisions

[Insert other provisions, as applicable.]

Respectfully submitted,

✘ _____ _____
[Signature of the Plan Proponent] [Printed Name]

✘ _____ _____
[Signature of the Attorney for the Plan Proponent] [Printed Name]

COMMITTEE NOTE

Official Form 425A, *Plan of Reorganization for Small Business Under Chapter 11*, replaces Official Form 25A, *Plan of Reorganization in Small Business Case Under Chapter 11*. It is revised as part of the Forms Modernization Project, making it easier to read, and includes formatting and stylistic changes throughout the form. It is intended to provide an illustrative format, rather than a specific prescription for the form's language or content of a plan in any particular case.

In Article 1, *Summary*, a category is added for priority claims that are required to be classified and provided for under the plan, and the category for "unsecured claims" is revised to provide for only "non-priority unsecured claims." Also, the value that the proponent estimates to be distributed to unsecured claims is revised to clarify that the estimate is limited to non-priority claims. The instruction to identify and briefly summarize priority and administrative claims that will not be paid on the effective date of the plan, to the extent permitted by the Bankruptcy Code, is eliminated because it is duplicative of the information requested in Articles 3 and 4.

In Article 2, *Classification of Claims and Interests*, section 2.01 is revised to clarify that the priority of claims is determined under section 507(a) of the Bankruptcy Code and to provide for the classification of priority claims where necessary and appropriate. *See* 11 U.S.C. § 1129(a)(9)(B). Section 2.03 is revised to clarify that Class 3 "unsecured claims" are limited to "non-priority unsecured claims."

In Article 3, *Treatment of Administrative Expense Claims, Priority Tax Claims, and Quarterly and Court Fees*, the title and categories of claims have been revised to include all unclassified administrative and priority claims and all fees payable under 28 U.S.C. § 1930 for which the Bankruptcy Code specifies the treatment under the plan. *See* 11 U.S.C. § 1129(a)(9), (12). In the title, the reference to "United States Trustee fees" is changed to "Quarterly and Court Fees" to include all of the fees payable under

28 U.S.C. § 1930. Also, section 3.04 is revised to include all statutory fees under 28 U.S.C. § 1930(a), and quarterly fees payable under 28 U.S.C. § 1930(a)(6) and (7) after the effective date of the plan are moved to a new section 3.05.

Article 4, *Treatment of Claims and Interests Under the Plan*, is revised to conform to the changes made in sections 2.01 and 2.03 of the plan to classify priority claims, if applicable, and to distinguish the non-priority unsecured claims.

In Article 6, *Provisions for Executory Contracts and Unexpired Leases*, references to the assumption of executory contracts and unexpired leases are expanded to include assignment, if applicable. Section 6.01 is revised to clarify that executory contracts and unexpired leases are assumed, and if applicable assigned, under section 6.01(a) and rejected under section 6.01(b) as of the effective date of the plan. Section 6.01(b) is revised to clarify that all executory contracts and unexpired leases that have been previously assumed, and if applicable assigned, or are the subject of a pending motion to assume, and if applicable assign, as of plan confirmation are also excluded from presumed rejection under the plan.

In Article 9, *Discharge*, the third option is revised to delete the reference to Rule 4007(c) and to clarify that corporations will not be discharged of debts to the extent specified in section 1141(d)(6) of the Bankruptcy Code.

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

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

Case number: _____

❑ Check if this is an amended filing

Official Form 425B

Disclosure Statement for Small Business Under Chapter 11 **12/17**

[Name of Proponent]'s Disclosure Statement, Dated [Insert Date]

Table of Contents. See instructions about how to modify the table of contents if you do not have all of the sections below.

[Insert when text is finalized]

I. Introduction

This is the disclosure statement (the *Disclosure Statement*) in the small business chapter 11 case of _____ (the *Debtor*). This Disclosure Statement provides information about the Debtor and the Plan filed on [insert date] (the *Plan*) to help you decide how to vote.

A copy of the Plan is attached as *Exhibit A*. **Your rights may be affected**. You should read the Plan and this Disclosure Statement carefully. You may wish to consult an attorney about your rights and your treatment under the Plan.

The proposed distributions under the Plan are discussed at pages __-__ of this Disclosure Statement. [General unsecured creditors are classified in Class ___, and will receive a distribution of ___ % of their allowed claims, to be distributed as follows _____.]

A. Purpose of This Document

This Disclosure Statement describes:

- The Debtor and significant events during the bankruptcy case,
- How the Plan proposes to treat claims or equity interests of the type you hold (*i.e.*, what you will receive on your claim or equity interest if the plan is confirmed),
- Who can vote on or object to the Plan,
- What factors the Bankruptcy Court (the *Court*) will consider when deciding whether to confirm the Plan,
- Why [the proponent] believes the Plan is feasible, and how the treatment of your claim or equity interest under the Plan compares to what you would receive on your claim or equity interest in liquidation, and
- The effect of confirmation of the Plan.

Be sure to read the Plan as well as the Disclosure Statement. This Disclosure Statement describes the Plan, but it is the Plan itself that will, if confirmed, establish your rights.

B. Deadlines for Voting and Objecting; Date of Plan Confirmation Hearing

The Court has not yet confirmed the Plan described in this Disclosure Statement. A separate order has been entered setting the following information:

- Time and place of the hearing to [finally approve this disclosure statement and] confirm the plan,
- Deadline for voting to accept or reject the plan, and
- Deadline for objecting to the [**adequacy of disclosure and**] confirmation of the plan.

If you want additional information about the Plan or the voting procedure, you should contact [insert name and address of representative of plan proponent].

C. Disclaimer

The Court has [conditionally**] approved this Disclosure Statement as containing adequate information to enable parties affected by the Plan to make an informed judgment about its terms. The Court has not yet determined whether the Plan meets the legal requirements for confirmation, and the fact that the Court has approved this Disclosure Statement does not constitute an endorsement of the Plan by the Court, or a recommendation that it be accepted.**

II. Background

A. Description and History of the Debtor's Business

The Debtor is a [corporation, partnership, etc.]. Since [insert year operations commenced], the Debtor has been in the business of _____. [Describe the Debtor's business].

B. Insiders of the Debtor

[Insert a detailed list of the names of Debtor's insiders as defined in § 101(31) of the United States Bankruptcy Code (the Code) and their relationship to the Debtor.

For each insider, list all compensation paid by the Debtor or its affiliates to that person or entity during the 2 years prior to the commencement of the Debtor's bankruptcy case, as well as compensation paid during the pendency of this chapter 11 case.]

C. Management of the Debtor During the Bankruptcy

List the name and position of all current officers, directors, managing members, or other persons in control (collectively the *Management*) who will not have a position post-confirmation that you list in III D 2.

Name	Position

D. Events Leading to Chapter 11 Filing

[Describe the events that led to the commencement of the Debtor's bankruptcy case.]

E. Significant Events During the Bankruptcy Case

[Describe significant events during the Debtor's bankruptcy case:

- Describe any asset sales outside the ordinary course of business, Debtor in Possession financing, or cash collateral orders.
- Identify the professionals approved by the court.
- Describe any adversary proceedings that have been filed or other significant litigation that has occurred (including contested claim disallowance proceedings), and any other significant legal or administrative proceedings that are pending or have been pending during the case in a forum other than the Court.
- Describe any steps taken to improve operations and profitability of the Debtor.
- Describe other events as appropriate.]

F. Projected Recovery of Avoidable Transfers

Check one box.

☐ The Debtor does not intend to pursue preference, fraudulent conveyance, or other avoidance actions.

☐ The Debtor estimates that up to $_____ may be realized from the recovery of fraudulent, preferential or other avoidable transfers. While the results of litigation cannot be predicted with certainty and it is possible that other causes of action may be identified, the following is a summary of the preference, fraudulent conveyance and other avoidance actions filed or expected to be filed in this case:

Transaction	Defendant	Amount Claimed

☐ The Debtor has not yet completed its investigation with regard to prepetition transactions. If you received a payment or other transfer within 90 days of the bankruptcy, or other transfer avoidable under the Code, the Debtor may seek to avoid such transfer.

G. Claims Objections

Except to the extent that a claim is already allowed pursuant to a final non-appealable order, the Debtor reserves the right to object to claims. Therefore, even if your claim is allowed for voting purposes, you may not be entitled to a distribution if an objection to your claim is later upheld. Disputed claims are treated in Article 5 of the Plan.

H. Current and Historical Financial Conditions

The identity and fair market value of the estate's assets are listed in *Exhibit B*. [Identify source and basis of valuation.]

The Debtor's most recent financial statements [if any] issued before bankruptcy, each of which was filed with the Court, are set forth in *Exhibit C*.

[The most recent post-petition operating report filed since the commencement of the Debtor's bankruptcy case is set forth in *Exhibit D*.]

[A summary of the Debtor's periodic operating reports filed since the commencement of the Debtor's bankruptcy case is set forth in *Exhibit D*.]

III. Summary of the Plan of Reorganization and Treatment of Claims and Equity Interests

A. What Is the Purpose of the Plan of Reorganization?

As required by the Code, the Plan places claims and equity interests in various classes and describes the treatment each class will receive. The Plan also states whether each class of claims or equity interests is impaired or unimpaired. If the Plan is confirmed, your recovery will be limited to the amount provided by the Plan.

B. Unclassified Claims

Certain types of claims are automatically entitled to specific treatment under the Code. They are not considered impaired, and holders of such claims do not vote on the Plan. They may, however, object if, in their view, their treatment under the Plan does not comply with that required by the Code. Therefore, the Plan Proponent has *not* placed the following claims in any class:

1. Administrative expenses, involuntary gap claims, and quarterly and Court fees

Administrative expenses are costs or expenses of administering the Debtor's chapter 11 case which are allowed under § 503(b) of the Code. Administrative expenses include the value of any goods sold to the Debtor in the ordinary course of business and received within 20 days before the date of the bankruptcy petition, and compensation for services and reimbursement of expenses awarded by the court under § 330(a) of the Code. The Code requires that all administrative expenses be paid on the effective date of the Plan, unless a particular claimant agrees to a different treatment. Involuntary gap claims allowed under § 502(f) of the Code are entitled to the same treatment as administrative expense claims. The Code also requires that fees owed under section 1930 of title 28, including quarterly and court fees, have been paid or will be paid on the effective date of the Plan.

The following chart lists the Debtor's estimated administrative expenses, and quarterly and court fees, and their proposed treatment under the Plan:

Type	Estimated Amount Owed	Proposed Treatment
Administrative expenses		Paid in full on the effective date of the Plan, unless the holder of a particular claim has agreed to different treatment
Involuntary gap claims		Paid in full on the effective date of the Plan, unless the holder of a particular claim has agreed to different treatment
Statutory Court fees		Paid in full on the effective date of the Plan

Statutory quarterly fees	Paid in full on the effective date of the Plan
Total	

2. Priority tax claims

Priority tax claims are unsecured income, employment, and other taxes described by § 507(a)(8) of the Code. Unless the holder of such a § 507(a)(8) priority tax claim agrees otherwise, it must receive the present value of such claim pursuant to 11 U.S.C. § 511, in regular installments paid over a period not exceeding 5 years from the order of relief.

The following chart lists the Debtor's estimated § 507(a)(8) priority tax claims and their proposed treatment under the Plan:

Description (Name and type of tax)	**Estimated Amount Owed**	**Date of Assessment**	**Treatment**		
	$		Payment interval		
			[Monthly] payment	$	
			Begin date		
			End date		
			Interest rate		%
			Total payout amount	$	
	$		Payment interval		
			[Monthly] payment	$	
			Begin date		
			End date		
			Interest rate		%
			Total payout amount	$	

C. Classes of Claims and Equity Interests

The following are the classes set forth in the Plan, and the proposed treatment that they will receive under the Plan:

1. Classes of secured claims

Allowed Secured Claims are claims secured by property of the Debtor's bankruptcy estate (or that are subject to setoff) to the extent allowed as secured claims under § 506 of the Code. If the value of the collateral or setoffs securing the creditor's claim is less than the amount of the creditor's allowed claim, the deficiency will [be classified as a general unsecured claim].

The following chart lists all classes containing Debtor's secured prepetition claims and their proposed treatment under the Plan:

Class #	Description		Insider?	Impairment?	Treatment		
	Secured claim of: Name		❑ Yes ❑ No	❑ Impaired ❑ Unimpaired	[Monthly] payment	$	
	Collateral description				Payments begin		
	Allowed secured amount	$			Payments end		
	Priority of lien				[Balloon payment]		
	Principal owed				Interest rate		%
	Pre-pet. arrearage				Treatment of lien		
	Total claim	$			[Additional payment required to cure defaults]	$	
	Secured claim of: Name		❑ Yes ❑ No	❑ Impaired ❑ Unimpaired	[Monthly] payment	$	
	Collateral description				Payment begin		
	Allowed secured amount	$			Payments end		
	Priority of lien				[Balloon payment]		
	Principal owed				Interest rate		%
	Pre-pet. arrearage				Treatment of lien		
	Total claim	$			[Additional payment required to cure defaults]	$	

2. Classes of priority unsecured claims

The Code requires that, with respect to a class of claims of a kind referred to in §§ 507(a)(1), (4), (5), (6), and (7), each holder of such a claim receive cash on the effective date of the Plan equal to the allowed amount of such claim, unless a particular claimant agrees to a different treatment or the class agrees to deferred cash payments.

The following chart lists all classes containing claims under §§ 507(a)(1), (4), (5), (6), and (7) of the Code and their proposed treatment under the Plan:

Class #	Description	Impairment?	Treatment
	Priority unsecured claim pursuant to section [insert] Total amount of claims $	❑ Impaired ❑ Unimpaired	
	Priority unsecured claim pursuant to section [insert] Total amount of claims $	❑ Impaired ❑ Unimpaired	

3. Classes of general unsecured claims

General unsecured claims are not secured by property of the estate and are not entitled to priority under § 507(a) of the Code. [Insert description of § 1122(b) convenience class if applicable.]

The following chart identifies the Plan's proposed treatment of classes ___ through ___, which contain general unsecured claims against the Debtor:

Class #	Description	Impairment?	Treatment
	[1122(b) Convenience Class]	❑ Impaired ❑ Unimpaired	[Insert proposed treatment, such as "Paid in full in cash on effective date of the Plan or when due under contract or applicable nonbankruptcy law"]
	General unsecured class	❑ Impaired ❑ Unimpaired	[Monthly] payment $ Payments begin Payments end [Balloon payment] $ Interest rate from [date] % Estimated percent of claim paid %

4. Classes of equity interest holders

Equity interest holders are parties who hold an ownership interest (*i.e.*, equity interest) in the Debtor. In a corporation, entities holding preferred or common stock are equity interest holders. In a partnership, equity interest holders include both general and limited partners. In a limited liability company (*LLC*), the equity interest holders are the members. Finally, with respect to an individual who is a debtor, the Debtor is the equity interest holder.

The following chart sets forth the Plan's proposed treatment of the classes of equity interest holders: [There may be more than one class of equity interests in, for example, a partnership case, or a case where the prepetition Debtor had issued multiple classes of stock.]

Class #	Description	Impairment?	Treatment
	Equity interest holders	❑ Impaired ❑ Unimpaired	

D. Means of Implementing the Plan

1. Source of payments

Payments and distributions under the Plan will be funded by the following:

[Describe the source of funds for payments under the Plan.]

2. Post-confirmation Management

The Post-Confirmation Management of the Debtor (including officers, directors, managing members, and other persons in control), and their compensation, shall be as follows:

Name	Position	Compensation

E. Risk Factors

The proposed Plan has the following risks:

[List all risk factors that might affect the Debtor's ability to make payments and other distributions required under the Plan.]

F. Executory Contracts and Unexpired Leases

The Plan in Article 6 lists all executory contracts and unexpired leases that the Debtor will assume, and if applicable assign, under the Plan. *Assumption* means that the Debtor has elected to continue to perform the obligations under such contracts and unexpired leases, and to cure defaults of the type that must be cured under the Code, if any. Article 6 also lists how the Debtor will cure and compensate the other party to such contract or lease for any such defaults.

If you object to the assumption, and if applicable the assignment, of your unexpired lease or executory contract under the Plan, the proposed cure of any defaults, the adequacy of assurance of performance, you must file and serve your objection to the Plan within the deadline for objecting to the confirmation of the Plan, unless the Court has set an earlier time.

All executory contracts and unexpired leases that are not listed in Article 6 or have not previously been assumed, and if applicable assigned, or are not the subject of a pending motion to assume, and if applicable assign, will be rejected under the Plan. Consult your adviser or attorney for more specific information about particular contracts or leases.

If you object to the rejection of your contract or lease, you must file and serve your objection to the Plan within the deadline for objecting to the confirmation of the Plan.

[The deadline for filing a Proof of Claim based on a claim arising from the rejection of a lease or contract is _____**.**

Any claim based on the rejection of a contract or lease will be barred if the proof of claim is not timely filed, unless the Court orders otherwise.]

G. Tax Consequences of Plan

Creditors and equity interest holders concerned with how the plan may affect their tax liability should consult with their own accountants, attorneys, and/or advisors.

The following are the anticipated tax consequences of the Plan: [List the following general consequences as a minimum:

(1) Tax consequences to the Debtor of the Plan;

(2) General tax consequences on creditors of any discharge, and the general tax consequences of receipt of plan consideration after confirmation.]

IV. Confirmation Requirements and Procedures

To be confirmable, the Plan must meet the requirements listed in §1129 of the Code. These include the requirements that:

- the Plan must be proposed in good faith;
- if a class of claims is impaired under the Plan, at least one impaired class of claims must accept the Plan, without counting votes of insiders;
- the Plan must distribute to each creditor and equity interest holder at least as much as the creditor or equity interest holder would receive in a chapter 7 liquidation case, unless the creditor or equity interest holder votes to accept the Plan; and
- the Plan must be feasible.

These requirements are not the only requirements listed in § 1129, and they are not the only requirements for confirmation.

A. Who May Vote or Object

Any party in interest may object to the confirmation of the Plan if the party believes that the requirements for confirmation are not met.

Many parties in interest, however, are not entitled to vote to accept or reject the Plan. A creditor or equity interest holder has a right to vote for or against the Plan only if that creditor or equity interest holder has a claim or equity interest that is both

(1) allowed or allowed for voting purposes and

(2) impaired.

In this case, the Plan Proponent believes that classes [ ] are impaired and that holders of claims in each of these classes are therefore entitled to vote to accept or reject the Plan. The Plan Proponent believes that classes [ ] are unimpaired and that holders of claims in each of these classes, therefore, do not have the right to vote to accept or reject the Plan.

1. What is an allowed claim or an allowed equity interest?

Only a creditor or equity interest holder with an allowed claim or an allowed equity interest has the right to vote on the Plan. Generally, a claim or equity interest is allowed if either

(1) the Debtor has scheduled the claim on the Debtor's schedules, unless the claim has been scheduled as disputed, contingent, or unliquidated, or

(2) the creditor has filed a proof of claim or equity interest, unless an objection has been filed to such proof of claim or equity interest.

When a claim or equity interest is not allowed, the creditor or equity interest holder holding the claim or equity interest cannot vote unless the Court, after notice and hearing, either overrules the objection or allows the claim or equity interest for voting purposes pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure.

The deadline for filing a proof of claim in this case was [_____]**.**

[If applicable – The deadline for filing objections to claims is [_____].]

2. What is an impaired claim or impaired equity interest?

As noted above, the holder of an allowed claim or equity interest has the right to vote only if it

is in a class that is *impaired* under the Plan. As provided in § 1124 of the Code, a class is considered *impaired* if the Plan alters the legal, equitable, or contractual rights of the members of that class.

3. Who is not entitled to vote

The holders of the following five types of claims and equity interests are *not* entitled to vote:

- holders of claims and equity interests that have been disallowed by an order of the Court;
- holders of other claims or equity interests that are not "allowed claims" or "allowed equity interests" (as discussed above), unless they have been "allowed" for voting purposes;
- holders of claims or equity interests in unimpaired classes;
- holders of claims entitled to priority pursuant to §§ 507(a)(2), (a)(3), and (a)(8) of the Code;
- holders of claims or equity interests in classes that do not receive or retain any value under the Plan; and
- administrative expenses.

Even if you are not entitled to vote on the plan, you have a right to object to the confirmation of the Plan [and to the adequacy of the Disclosure Statement].

4. Who can vote in more than one class

A creditor whose claim has been allowed in part as a secured claim and in part as an unsecured claim, or who otherwise hold claims in multiple classes, is entitled to accept or reject a Plan in each capacity, and should cast one ballot for each claim.

B. Votes Necessary to Confirm the Plan

If impaired classes exist, the Court cannot confirm the Plan unless:

(1) all impaired classes have voted to accept the Plan; or

(2) at least one impaired class of creditors has accepted the Plan without counting the votes of any insiders within that class, and the Plan is eligible to be confirmed by "cram down" of the non-accepting classes, as discussed later in Section B.2.

1. Votes necessary for a class to accept the plan

A class of claims accepts the Plan if both of the following occur:

(1) the holders of more than ½ of the allowed claims in the class, who vote, cast their votes to accept the Plan, and

(2) the holders of at least ⅔ in dollar amount of the allowed claims in the class, who vote, cast their votes to accept the Plan.

A class of equity interests accepts the Plan if the holders of at least ⅔ in amount of the allowed equity interests in the class, who vote, cast their votes to accept the Plan.

2. Treatment of non-accepting classes of secured claims, general unsecured claims, and interests

Even if one or more impaired classes reject the Plan, the Court may nonetheless confirm the Plan upon the request of the Plan proponent if the non-accepting classes are treated in the manner prescribed by § 1129(b) of the Code. A plan that binds non-accepting classes is commonly referred to as a *cram down* plan. The Code allows the Plan to bind non-accepting classes of claims or equity interests if it meets all the requirements for consensual confirmation except the voting requirements of § 1129(a)(8) of the Code, does not *discriminate unfairly*, and

is *fair and equitable* toward each impaired class that has not voted to accept the Plan.

You should consult your own attorney if a *cram down* confirmation will affect your claim or equity interest, as the variations on this general rule are numerous and complex.

C. Liquidation Analysis

To confirm the Plan, the Court must find that all creditors and equity interest holders who do not accept the Plan will receive at least as much under the Plan as such claim and equity interest holders would receive in a chapter 7 liquidation. A liquidation analysis is attached to this Disclosure Statement as *Exhibit E*.

D. Feasibility

The Court must find that confirmation of the Plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the Debtor or any successor to the Debtor, unless such liquidation or reorganization is proposed in the Plan.

1. Ability to initially fund plan

The Plan Proponent believes that the Debtor will have enough cash on hand on the effective date of the Plan to pay all the claims and expenses that are entitled to be paid on that date. Tables showing the amount of cash on hand on the effective date of the Plan, and the sources of that cash are attached to this disclosure statement as *Exhibit F*.

2. Ability to make future plan payments and operate without further reorganization

The Plan Proponent must also show that it will have enough cash over the life of the Plan to make the required Plan payments and operate the debtor's business.
The Plan Proponent has provided projected financial information. Those projections are listed in *Exhibit G*.
The Plan Proponent's financial projections show that the Debtor will have an aggregate annual average cash flow, after paying operating expenses and post-confirmation taxes, of $ _____.
The final Plan payment is expected to be paid on _____.
[Summarize the numerical projections, and highlight any assumptions that are not in accord with past experience. Explain why such assumptions should now be made.]
You should consult with your accountant or other financial advisor if you have any questions pertaining to these projections.

V. Effect of Confirmation of Plan

A. Discharge of Debtor

Check one box.

☐ **Discharge if the Debtor is an individual and 11 U.S.C. § 1141(d)(3) is not applicable.** Confirmation of the Plan does not discharge any debt provided for in the Plan until the court grants a discharge on completion of all payments under the Plan, or as otherwise provided in § 1141(d)(5) of the Code. Debtor will not be discharged from any debt excepted from discharge under § 523 of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

☐ **Discharge if the Debtor is a partnership and § 1141(d)(3) of the Code is not applicable.** On the effective date of the Plan, the Debtor shall be discharged from any debt that arose before confirmation of the Plan, subject to the occurrence of the effective date, to the extent specified in § 1141(d)(1)(A) of the Code. However, the Debtor shall not be discharged from any debt imposed by the Plan. After the effective date of the Plan your claims against the Debtor will be limited to the debts imposed by the Plan.

☐ **Discharge if the Debtor is a corporation and § 1141(d)(3) is not applicable.** On the effective date of the Plan, the Debtor shall be discharged from any debt that arose before confirmation of the Plan, subject to the occurrence of the effective date, to the extent specified in § 1141(d)(1)(A) of the Code, except that the Debtor shall not be discharged of any debt:

(i) imposed by the Plan, or

(ii) to the extent provided in 11 U.S.C. § 1141(d)(6).

☐ **No Discharge** i**f § 1141(d)(3) is applicable.** In accordance with § 1141(d)(3) of the Code, the Debtor will not receive any discharge of debt in this bankruptcy case.

B. Modification of Plan

The Plan Proponent may modify the Plan at any time before confirmation of the Plan. However, the Court may require a new disclosure statement and/or re-voting on the Plan.

[**If the Debtor is not an individual, add the following**:

The Plan Proponent may also seek to modify the Plan at any time after confirmation only if

(1) the Plan has not been substantially consummated and
(2) the Court authorizes the proposed modifications after notice and a hearing.]

[**If the Debtor is an individual, add the following:**

Upon request of the Debtor, the United States trustee, or the holder of an allowed unsecured claim, the Plan may be modified at any time after confirmation of the Plan but before the completion of payments under the Plan, to

(1) increase or reduce the amount of payments under the Plan on claims of a particular class,

(2) extend or reduce the time period for such payments, or

(3) alter the amount of distribution to a creditor whose claim is provided for by the Plan to the extent necessary to take account of any payment of the claim made other than under the Plan.]

C. Final Decree

Once the estate has been fully administered, as provided in Rule 3022 of the Federal Rules of Bankruptcy Procedure, the Plan Proponent, or such other party as the Court shall designate in the Plan Confirmation Order, shall file a motion with the Court to obtain a final decree to close the case. Alternatively, the Court may enter such a final decree on its own motion.

VI. Other Plan Provisions

[Insert other provisions here, as necessary and appropriate.]

✘ _____ _____

[Signature of the Plan Proponent] [Printed Name]

✘ _____ _____

[Signature of the Attorney for the Plan Proponent] [Printed Name]

Exhibits

Exhibit A: Copy of Proposed Plan of Reorganization

Exhibit B: Identity and Value of Material Assets of Debtor

Exhibit C: Prepetition Financial Statements

(to be taken from those filed with the court)

Exhibit D: [Most Recently Filed Postpetition Operating Report]
[Summary of Postpetition Operating Reports]

Exhibit E: Liquidation Analysis

Plan Proponent's Estimated Liquidation Value of Assets

Assets			
a.	Cash on hand		$
b.	Accounts receivable		$
c.	Inventory		$
d.	Office furniture and equipment		$
e.	Machinery and equipment		$
f.	Automobiles		$
g.	Building and land		$
h.	Customer list		$
i.	Investment property (such as stocks, bonds or other financial assets)		$
j.	Lawsuits or other claims against third-parties		$
K	Other intangibles (such as avoiding powers actions)		$
Total Assets at Liquidation Value			$
Less:	Secured creditors' recoveries	–	$
Less:	Chapter 7 trustee fees and expenses	–	$
Less:	Chapter 11 administrative expenses	–	$
Less:	Priority claims, excluding administrative expense claims	–	$
[Less:	Debtor's claimed exemptions]	–	$
(1)	Balance for unsecured claims		$
(2)	Total dollar amount of unsecured claims		$

Percentage of claims which unsecured creditors would receive or retain in a chapter 7 liquidation:	%	
Percentage of claims which unsecured creditors will receive or retain under the Plan:	%	[Divide (1) by (2)]

Exhibit F: Cash on hand on the effective date of the Plan

Cash on hand on effective date of plan			$
Less:	Amount of administrative expenses payable on effective date of the Plan	–	$
Less:	Amount of statutory costs and charges	–	$
Less:	Amount of cure payments for executory contracts	–	$
Less:	Other Plan payments due on effective date of the Plan	–	$
Balance after paying these amounts			$

The sources of the cash Debtor will have on hand by the effective date of the Plan are estimated as follows:	
Cash in Debtor's bank account now	$
Net earnings between now and effective date of the Plan [State the basis for such projections]	$
Borrowing [Separately state terms of repayment]	$
Capital contributions	$
Other	$
Total (This number should match "cash on hand" figure noted above)	$

Exhibit G: Projections of Cash Flow for Post-Confirmation Period

COMMITTEE NOTE

Official Form 425B, *Disclosure Statement for Small Business Under Chapter 11*, replaces Official Form 25B, *Disclosure Statement in Small Business Case Under Chapter 11*. It is revised as part of the Forms Modernization Project, making it easier to read, and includes formatting and stylistic changes throughout the form. Where possible, the form parallels how businesses commonly keep their financial records. It is intended to provide an illustrative format for disclosure, rather than a specific prescription for the form's language or content.

Part I, *Introduction*, is revised to clarify that the disclosure statement is being provided for purposes of voting on the plan. The instructions that the recipient discuss the plan and disclosure statement with an attorney are revised to clarify that, if the recipient has an attorney, the recipient is not required to consult with the attorney, but may wish to consult with an attorney regardless of whether it has one.

Part I.B., *Deadlines for Voting and Objecting; Date of Plan Confirmation Hearing*, is revised to provide for the court's entry of a separate order setting time frames for hearings and deadlines, *see* Official Form 313, and to delete those dates from the form as redundant. Also, this part is revised to clarify that requests for additional information about the voting procedure, in addition to the plan, should be directed to the plan proponent's representative.

In Part I.C., *Disclaimer*, the instruction to provide the date by which an objection to final approval of the disclosure statement must be filed is eliminated as duplicative of the court's order required under Part I.B. Repetitive language indicating that the court's approval of the disclosure statement is not final is eliminated.

In Part II.C., *Management of the Debtor During the Bankruptcy*, the title is revised to eliminate the reference to the debtor's management before the bankruptcy, and the instruction is revised to limit the required disclosure to those current officers,

directors, managing members, and other persons in control who will not retain a position after confirmation. The instruction to provide information regarding the debtor's pre-petition management is deleted because similar information is required in the *Statement of Financial Affairs of Non-Individuals Filing for Bankruptcy*, Official Form 207. The instruction to provide information regarding the debtor's post-confirmation management is incorporated in Part III.D.2, *Post-confirmation Management*, of the form.

In Part III.B.1, *Administrative expenses, involuntary gap claims, and quarterly and Court fees*, the title and form are revised to clarify that the debtor must provide for the treatment of all fees and expenses owed under 28 U.S.C. § 1930, including quarterly fees and court fees. *See* 11 U.S.C. § 1129(a)(12). Also, the title and form are revised to include involuntary "gap" period claims in an involuntary case under section 502(f) of the Bankruptcy Code. *See* 11 U.S.C. §§ 507(a)(3), 1129(a)(9)(A). The reference to the provision governing the allowance of administrative expenses is corrected and changed from section 507(a) to 503(b) of the Bankruptcy Code. The example is revised to include compensation for services and reimbursement of expenses awarded by the court under section 330(a) of the Bankruptcy Code. The requirement that any agreement to pay professional fees and expenses and other unclassified administrative expenses on a date other than the effective date be in writing is deleted. *See* 11 U.S.C. § 1129(a)(9). The list is revised to include a single category of administrative expenses allowed under section 503(b) of the Bankruptcy Code, deleting as redundant the specific categories for reclamation claims under section 503(b)(9) and approved professional fees and expenses under section 503(b)(2), and to clarify that any holder of an allowed administrative expense claim may agree to payment other than in full on the effective date. *Id.*

Part III.B.2, *Priority tax claims*, is revised to include a reference to section 511 of the Bankruptcy Code governing the rate of interest on tax claims.

Part III.C.2, *Classes of priority unsecured claims*, is revised to comply with section 1129(a)(9)(B), including the addition that any particular claimant may agree to treatment other than cash

payment in full on the effective date and to clarify that any class may agree to deferred cash payments. *See* 11 U.S.C. § 1129(a)(9)(B).

Part III.D.2, *Post-confirmation Management*, is revised to comply with section 1129(a)(5) of the Bankruptcy Code.

Part III.F., *Executory Contracts and Unexpired Leases*, is revised to incorporate changes to Official Form 425A, *Plan of Reorganization for Small Business Under Chapter 11*. "Exhibit 5.1" is changed to "Article 6" of the plan. References to the assumption of executory contracts and unexpired leases are expanded to include assignment, if applicable, including the requirement that a party objecting to the assignment of an executory contract or unexpired lease under the plan must timely file and serve an objection to the plan. The form is revised to clarify that executory contracts and unexpired leases that have been previously assumed, and if applicable assigned, or are the subject of a pending motion to assume, and if applicable assign, as of plan confirmation are also excluded from presumed rejection under the plan.

In Part IV, *Confirmation Requirements and Procedures*, the introduction is revised to delete references to subsections (a) and (b) to clarify that a plan must satisfy all of the requirements of section 1129 of the Bankruptcy Code. Also, the form is revised to clarify that the requirement to obtain the acceptance of at least one impaired accepting class of claims, excluding any acceptance by an insider, applies only if the plan proposes to impair at least one class of claims. *See* 11 U.S.C. § 1129(a)(10).

In Part IV.B.1, *Votes necessary for a class to accept the plan*, the standards for confirmation in the event the plan has impaired classes have been corrected. *See* 11 U.S.C. § 1129(a)(8)(A), (10) and (b).

The title to Part IV.B.2, *Treatment of non-accepting classes of secured claims, general unsecured claims, and interests*, is revised for clarity to exclude priority claimants. *See* 11 U.S.C. § 1129(b). Also, the requirement that the proponent must request

confirmation pursuant to section 1129(b) of the Bankruptcy Code is added.

In Part IV.D.2, *Ability to make future plan payments and operate without further reorganization*, the requirement that the plan proponent show that the business will have sufficient cash flow to operate the business, in addition to making the required plan payments, is new. *See* 11 U.S.C. § 1129(a)(11).

In Part V.A., *Discharge of Debtor*, the third option is revised to delete the reference to Rule 4007(c) and to clarify that corporations will not be discharged of debts to the extent specified in section 1141(d)(6) of the Bankruptcy Code.

In the title to Exhibit G, *Projections of Cash Flow for Post-Confirmation Period*, the reference to "and Earnings" is deleted to ensure consistency given the disparate ways in which "earnings" can be interpreted.

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

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

Case number: _____

❑ Check if this is an amended filing

Official Form 425C

Monthly Operating Report for Small Business Under Chapter 11 **12/17**

Month: _____ Date report filed: _____
MM / DD / YYYY

Line of business: _____ NAISC code: _____

In accordance with title 28, section 1746, of the United States Code, I declare under penalty of perjury that I have examined the following small business monthly operating report and the accompanying attachments and, to the best of my knowledge, these documents are true, correct, and complete.

Responsible party: _____

Original signature of responsible party _____

Printed name of responsible party _____

1. Questionnaire

Answer all questions on behalf of the debtor for the period covered by this report, unless otherwise indicated.

		Yes	No	N/A
	If you answer *No* to any of the questions in lines 1-9, attach an explanation and label it *Exhibit A*.			
1.	Did the business operate during the entire reporting period?	❑	❑	❑
2.	Do you plan to continue to operate the business next month?	❑	❑	❑
3.	Have you paid all of your bills on time?	❑	❑	❑
4.	Did you pay your employees on time?	❑	❑	❑
5.	Have you deposited all the receipts for your business into debtor in possession (DIP) accounts?	❑	❑	❑
6.	Have you timely filed your tax returns and paid all of your taxes?	❑	❑	❑
7.	Have you timely filed all other required government filings?	❑	❑	❑
8.	Are you current on your quarterly fee payments to the U.S. Trustee or Bankruptcy Administrator?	❑	❑	❑
9.	Have you timely paid all of your insurance premiums?	❑	❑	❑
	If you answer *Yes* to any of the questions in lines 10-18, attach an explanation and label it *Exhibit B*.			
10.	Do you have any bank accounts open other than the DIP accounts?	❑	❑	❑
11.	Have you sold any assets other than inventory?	❑	❑	❑
12.	Have you sold or transferred any assets or provided services to anyone related to the DIP in any way?	❑	❑	❑
13.	Did any insurance company cancel your policy?	❑	❑	❑
14.	Did you have any unusual or significant unanticipated expenses?	❑	❑	❑
15.	Have you borrowed money from anyone or has anyone made any payments on your behalf?	❑	❑	❑
16.	Has anyone made an investment in your business?	❑	❑	❑

17. Have you paid any bills you owed before you filed bankruptcy? ❑ ❑ ❑

18. Have you allowed any checks to clear the bank that were issued before you filed bankruptcy? ❑ ❑ ❑

2. Summary of Cash Activity for All Accounts

19. **Total opening balance of all accounts**

This amount must equal what you reported as the cash on hand at the end of the month in the previous month. If this is your first report, report the total cash on hand as of the date of the filing of this case.

$ _____

20. **Total cash receipts**

Attach a listing of all cash received for the month and label it *Exhibit C*. Include all cash received even if you have not deposited it at the bank, collections on receivables, credit card deposits, cash received from other parties, or loans, gifts, or payments made by other parties on your behalf. Do not attach bank statements in lieu of *Exhibit C*.

Report the total from *Exhibit C* here. $ _____

21. **Total cash disbursements**

Attach a listing of all payments you made in the month and label it *Exhibit D*. List the date paid, payee, purpose, and amount. Include all cash payments, debit card transactions, checks issued even if they have not cleared the bank, outstanding checks issued before the bankruptcy was filed that were allowed to clear this month, and payments made by other parties on your behalf. Do not attach bank statements in lieu of *Exhibit D*.

\- $ _____

Report the total from *Exhibit D* here.

22. **Net cash flow**

\+ $ _____

Subtract line 21 from line 20 and report the result here.
This amount may be different from what you may have calculated as *net profit*.

23. **Cash on hand at the end of the month**

Add line 22 + line 19. Report the result here.

Report this figure as the *cash on hand at the beginning of the month* on your next operating report. = $ _____

This amount may not match your bank account balance because you may have outstanding checks that have not cleared the bank or deposits in transit.

3. Unpaid Bills

Attach a list of all debts (including taxes) which you have incurred since the date you filed bankruptcy but have not paid. Label it *Exhibit E*. Include the date the debt was incurred, who is owed the money, the purpose of the debt, and when the debt is due. Report the total from *Exhibit E* here.

24. **Total payables** $ _____

(Exhibit E)

4. Money Owed to You

Attach a list of all amounts owed to you by your customers for work you have done or merchandise you have sold. Include amounts owed to you both before, and after you filed bankruptcy. Label it *Exhibit F*. Identify who owes you money, how much is owed, and when payment is due. Report the total from *Exhibit F* here.

25. **Total receivables** $ _____

(Exhibit F)

5. Employees

26. What was the number of employees when the case was filed? _____

27. What is the number of employees as of the date of this monthly report? _____

6. Professional Fees

28. How much have you paid this month in professional fees related to this bankruptcy case? $ _____

29. How much have you paid in professional fees related to this bankruptcy case since the case was filed? $ _____

30. How much have you paid this month in other professional fees? $ _____

31. How much have you paid in total other professional fees since filing the case? $ _____

7. Projections

Compare your actual cash receipts and disbursements to what you projected in the previous month. Projected figures in the first month should match those provided at the initial debtor interview, if any.

	Column A **Projected** Copy lines 35-37 from the previous month's report.	–	Column B **Actual** Copy lines 20-22 of this report.	=	*Column C* **Difference** Subtract Column B from Column A.
32. **Cash receipts**	$ _____	–	$ _____	=	$ _____
33. **Cash disbursements**	$ _____	–	$ _____	=	$ _____
34. **Net cash flow**	$ _____	–	$ _____	=	$ _____

35. Total projected cash receipts for the next month: $ _____

36. Total projected cash disbursements for the next month: - $ _____

37. Total projected net cash flow for the next month: = $ _____

8. Additional Information

If available, check the box to the left and attach copies of the following documents.

- ❑ 38. Bank statements for each open account (redact all but the last 4 digits of account numbers).
- ❑ 39. Bank reconciliation reports for each account.
- ❑ 40. Financial reports such as an income statement (profit & loss) and/or balance sheet.
- ❑ 41. Budget, projection, or forecast reports.
- ❑ 42. Project, job costing, or work-in-progress reports.

COMMITTEE NOTE

Official Form 425C, *Monthly Operating Report for Small Business Under Chapter 11*, replaces Official Form 25C, *Small Business Monthly Operating Report*. It is revised as part of the Forms Modernization Project, which was designed so that persons completing the forms would do so accurately and completely. To facilitate this, Official Form 425C is renumbered and includes formatting and stylistic changes throughout the form. The form requires basic financial information that the Internal Revenue Service recommends that businesses maintain.

The form is revised to add a checkbox to indicate if the report is an amended filing. It also clarifies that persons completing the form on behalf of the debtor should answer all questions for the period covered by the report, unless otherwise indicated. All instructions indicating that the U.S. Trustee may waive the attachments to the form are eliminated.

The form is reorganized. The previous sections for *Tax* and *Banking Information* are eliminated as redundant of information requested elsewhere within the form. The previous sections for *Income, Summary of Cash on Hand, Expenses,* and *Cash Profit* are revised and incorporated into Section 2, *Summary of Cash Activity for All Accounts*.

In Part 1, *Questionnaire*, a third checkbox column option, "N/A," has been added to indicate if the question is not applicable. New exhibits to be attached provide explanations for any negative responses to questions 1 through 9 (Exhibit A) and any affirmative answers to questions 10 through 18 (Exhibit B). The questions are reorganized and renumbered, and several are revised. Question 1 is revised to ask whether the business operated during the period. Question 8, regarding the payment of quarterly fees under 28 U.S.C. § 1930(a)(6), is revised to include payments to the bankruptcy administrator. Question 15 is expanded to include payments made on the debtor's behalf. The question whether the debtor has paid anything to an attorney or other professionals is eliminated, as redundant of information disclosed in Part 6. A new

question 17 is added inquiring whether the debtor has allowed any checks to clear the bank that were issued before the bankruptcy case.

Part 2, *Summary of Cash Activity for All Accounts*, clarifies and simplifies the reporting of the debtor's cash on hand during the period, and the letters of the attached exhibits are revised. References to "income," "expenses," and "cash profit" are eliminated. Line 19 clarifies that the cash on hand at the beginning of the month is the same as the cash on hand reported at the end of the previous month (or the commencement of the case if no prior report has been submitted). Net cash flow during the month, calculated in line 22, is equal to total cash receipts in line 20 (as itemized in Exhibit C) less total cash disbursements in line 21 (as itemized in Exhibit D). Net cash flow is added to the beginning balance to calculate the cash on hand at the end of the month in line 23. The form is revised to add explanations of the receipts and disbursements to be included in Exhibits C and D, as well as an instruction to clarify that bank statements should not be submitted in lieu of the exhibits.

In Part 3, *Unpaid Bills*, the exhibit letter is revised to *Exhibit E*.

In Part 4, *Money Owed to You*, the exhibit letter is revised to *Exhibit F*.

In Part 6, *Professional Fees*, the subheadings "*Bankruptcy Related*" and "*Non-Bankruptcy Related*" are eliminated.

Part 7, *Projections*, is revised to compare the debtor's actual cash receipts, cash disbursements, and net cash flow for the month to the projections in the previous month's report (or if the case is new, that the debtor reported at the initial debtor interview). *See* 11 U.S.C. § 308(b)(2) and (3). References to "income," "expenses," "cash profit," and the 180 day look-back period are eliminated.

Part 8, *Additional Information*, is revised to clarify which documents should be attached, if available and regardless of whether the debtor prepares them internally. These documents are:

(1) redacted bank statements for each open account; (2) bank reconciliation reports for each account; (3) financial reports such as an income statement (profit & loss) or balance sheet; (4) budget, projection, or forecast reports; and (5) project, job casting, or work-in-progress reports.

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

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

Case number: _____

Official Form 426

Periodic Report Regarding Value, Operations, and Profitability of Entities in Which the Debtor's Estate Holds a Substantial or Controlling Interest

12/17

This is the *Periodic Report* as of _____ on the value, operations, and profitability of those entities in which a Debtor holds, or two or more Debtors collectively hold, a substantial or controlling interest (a "Controlled Non-Debtor Entity"), as required by Bankruptcy Rule 2015.3. For purposes of this form, "Debtor" shall include the estate of such Debtor.

[Name of Debtor] holds a substantial or controlling interest in the following entities:

Name of Controlled Non-Debtor Entity	Interest of the Debtor	Tab #

This *Periodic Report* contains separate reports (*Entity Reports*) on the value, operations, and profitability of each Controlled Non-Debtor Entity.

Each *Entity Report* consists of five exhibits.

- *Exhibit A* contains the most recently available: balance sheet, statement of income (*loss*), statement of cash flows, and a statement of changes in shareholders' or partners' equity (*deficit*) for the period covered by the *Entity Report*, along with summarized footnotes.
- *Exhibit B* describes the Controlled Non-Debtor Entity's business operations.
- *Exhibit C* describes claims between the Controlled Non-Debtor Entity and any other Controlled Non-Debtor Entity.
- *Exhibit D* describes how federal, state or local taxes, and any tax attributes, refunds, or other benefits, have been allocated between or among the Controlled Non-Debtor Entity and any Debtor or any other Controlled Non-Debtor Entity and includes a copy of each tax sharing or tax allocation agreement to which the Controlled Non-Debtor Entity is a party with any other Controlled Non-Debtor Entity.
- *Exhibit E* describes any payment, by the Controlled Non-Debtor Entity, of any claims, administrative expenses or professional fees that have been or could be asserted against any Debtor, or the incurrence of any obligation to make such payments, together with the reason for the entity's payment thereof or incurrence of any obligation with respect thereto.

This *Periodic Report* must be signed by a representative of the trustee or debtor in possession.

The undersigned, having reviewed the *Entity Reports* for each Controlled Non-Debtor Entity, and being familiar with the Debtor's financial affairs, verifies under the penalty of perjury that to the best of his or her knowledge, (i) this *Periodic Report* and the attached *Entity Reports* are complete, accurate and truthful to the best of his or her knowledge, and (ii) the Debtor did not cause the creation of any entity with actual deliberate intent to evade the requirements of Bankruptcy Rule 2015.3

For non-individual Debtors:	✘ _____ Signature of Authorized Individual _____ Printed name of Authorized Individual Date _____ MM / DD / YYYY	
For individual Debtors:	✘ _____ Signature of Debtor 1 _____ Printed name of Debtor 1 Date _____ MM / DD / YYYY	✘ _____ Signature of Debtor 2 _____ Printed name of Debtor 2 Date _____ MM / DD / YYYY

Exhibit A: Financial Statements for [Name of Controlled Non-Debtor Entity]

Exhibit A-1: Balance Sheet for [**Name of Controlled Non-Debtor Entity**] as of [date]

[Provide a balance sheet dated as of the end of the most recent 3-month period of the current fiscal year and as of the end of the preceding fiscal year.

Describe the source of this information.]

Exhibit A-2: Statement of Income (*Loss*) for [**Name of Controlled Non-Debtor Entity**] for period ending [date]

[Provide a statement of income (*loss*) for the following periods:

(i) For the initial report:

a. the period between the end of the preceding fiscal year and the end of the most recent 3-month period of the current fiscal year; and

b. the prior fiscal year.

(ii) For subsequent reports, since the closing date of the last report.

Describe the source of this information.]

Exhibit A-3: Statement of Cash Flows for [Name of Controlled Non-Debtor Entity] for period ending [**date**]

[Provide a statement of changes in cash position for the following periods:

(i) For the initial report:

a. the period between the end of the preceding fiscal year and the end of the most recent 3-month period of the current fiscal year; and

b. the prior fiscal year.

(ii) For subsequent reports, since the closing date of the last report.

Describe the source of this information.]

Exhibit A-4: Statement of Changes in Shareholders'/Partners' Equity (*Deficit*) for [**Name of Controlled Non-Debtor Entity**] for period ending [date]

[Provide a statement of changes in shareholders'/partners equity (*deficit*) for the following periods:

(i) For the initial report:

a. the period between the end of the preceding fiscal year and the end of the most recent 3-month period of the current fiscal year; and

b. the prior fiscal year.

(ii) For subsequent reports, since the closing date of the last report.

Describe the source of this information.]

Exhibit B: Description of Operations for [**Name of Controlled Non-Debtor Entity**]

[Describe the nature and extent of the Debtor's interest in the Controlled Non-Debtor Entity.

Describe the business conducted and intended to be conducted by the Controlled Non-Debtor Entity, focusing on the entity's dominant business segments.

Describe the source of this information.]

Exhibit C: Description of Intercompany Claims

[List and describe the Controlled Non-Debtor Entity's claims against any other Controlled Non-Debtor Entity, together with the basis for such claims and whether each claim is contingent, unliquidated or disputed.

Describe the source of this information.]

Exhibit D: Allocation of Tax Liabilities and Assets

[Describe how income, losses, tax payments, tax refunds or other tax attributes relating to federal, state or local taxes have been allocated between or among the Controlled Non-Debtor Entity and one or more other Controlled Non-Debtor Entities.

Include a copy of each tax sharing or tax allocation agreement to which the entity is a party with any other Controlled Non-Debtor Entity.

Describe the source of this information.]

Exhibit E: Description of Controlled Non-Debtor Entity's payments of Administrative Expenses or Professional Fees otherwise payable by a Debtor

[Describe any payment made, or obligations incurred (or claims purchased), by the Controlled Non-Debtor Entity in connection with any claims, administrative expenses or professional fees that have been or could be asserted against any Debtor.

Describe the source of this information.]

COMMITTEE NOTE

Official Form 426, *Periodic Report Regarding Value, Operations, and Profitability of Entities in Which the Debtor's Estate Holds a Substantial or Controlling Interest*, is revised and renumbered as part of the Forms Modernization Project. It implements section 419 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005), which requires a chapter 11 debtor to file periodic reports on the profitability of any entities in which the estate holds a substantial or controlling interest. The form is to be used when required by Rule 2015.3, with such variations as may be approved by the court pursuant to subdivisions (d) and (e) of that rule.

In addition to formatting revisions, certain aspects of Official Form 426 are changed to make the form easier for the debtor to complete and to better identify the kinds of information that a debtor must disclose in accordance with section 419 of BAPCPA and Rule 2015.3.

Official Form 426 limits its application to entities in which the debtor has a substantial or controlling interest, which the rule defines as a "Controlled Non-Debtor Entity." The scope of this defined term is guided by subdivisions (a) and (c) of Rule 2015.3.

Official Form 426 eliminates the requirement to file a valuation of the Controlled Non-Debtor Entity. Exhibit A to Official Form 426 requires only periodic filings of the Controlled Non-Debtor Entity's most recently available balance sheet, statement of income (*loss*), statement of cash flows, and statement of changes in shareholders' or partners' equity (*deficit*), together with summarized footnotes for such financial statements. If any of these financial statements are not available, the debtor can seek relief under Rule 2015.3(d).

Exhibit B to Official Form 426 requires a description of the Controlled Non-Debtor Entity's business, which was required by Exhibit C of former Rule 26.

Exhibits C, D, and E to Official Form 426 are new. Exhibit C requires a description of claims between a Controlled Non-Debtor Entity and any other Controlled Non-Debtor Entity. Exhibit D requires disclosure of information relating to the allocation of taxable income, losses, and other attributes among Controlled Non-Debtor Entities. Exhibit E requires disclosure about a Controlled Non-Debtor Entity's payment of claims or administrative expenses that would otherwise have been payable by a debtor.

Excerpt from the May 12, 2016 Report of the Advisory Committee on Civil Rules
(Revised July 1, 2016)

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. 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 I of this Report presents recommendations to approve publication this summer of proposed amendments to Civil Rules 5 (e-filing and e-service); 23 (class actions); 62 (stays of execution of judgment); and 65.1 (proceedings against a surety).

* * * * *

I. RECOMMENDATIONS FOR PUBLICATION

A. RULE 23

The Civil Rules Advisory Committee recommends publication of the proposed amendments to Rule 23 that are attached. These proposals to amend the rule emerged from several years of study of class-action issues by the Advisory Committee's Rule 23 Subcommittee, which was created in 2011 to consider the possibility of further amendments to the rule. The Advisory Committee determined to take up this effort in light of several developments, including (1) the passage of time since the 2003 amendments to Rule 23 went into effect; (2) the ongoing development 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.

Excerpt from the May 12, 2016 Report of the Advisory Committee on Civil Rules
(Revised July 1, 2016)

The Rule 23 Subcommittee developed and refined a list of possible rule amendments during nearly two dozen meetings and bar conferences with diverse memberships and attendees. In addition, the Subcommittee held a mini-conference to gather additional input on potential rule amendments from a variety of stakeholders. During this consideration of possible amendments, the Subcommittee reported back regularly to the Advisory Committee. By the time of the Advisory Committee's November 2015 meeting, consensus had emerged on a basic outline of issues that appeared to warrant development of draft rule amendments. After this package was further refined, the Advisory Committee approved for publication the attached preliminary draft of Rule 23 amendments at its April 2016 meeting.

The principal topic of the proposed amendments is the process of settling class actions, which is important because many class actions settle and the court has distinctive responsibilities in reviewing such settlements. Thus, amendments to Rule 23(e)(1) specify the information that the parties must submit to the court when asking that it give notice to the class of a proposed settlement. These changes are designed to ensure that the court has the information it needs to decide whether to notify the class, and to enable members of the class to learn more about the proposed settlement when deciding whether to object or opt out.

Amendments to Rule 23(e)(2) seek to focus the court and the parties on the core considerations that should inform the court's review of a proposed settlement. The 2003 amendments to Rule 23 identified the basic criteria for settlement approval (that the settlement be fair, reasonable, and adequate). The considerations described in this proposed amendment are largely based on the lists of factors developed by various circuits, but are designed to focus and simplify the settlement-review analysis.

The third principal topic of these changes is the handling of class member objections to proposed settlements. Amendments to Rule 23(e)(5) are designed to clarify what should be included in an objection. Objectors may obtain specifics on the settlement from the information provided under Rule 23(e)(1) to support giving notice to the class. More specific objections ought to assist the court. In addition, the amendments respond to widespread concern about the behavior of some objectors or objector counsel since the 2003 amendments to Rule 23 went into effect. A new provision would require court approval for any consideration provided to objectors or objector counsel in connection with forgoing or withdrawing an objection or an appeal from approval of a settlement.

Additional proposed amendments recognize that electronic means may be the most satisfactory method of giving notice to class members, provide that a judicial decision under Rule 23(e)(1) whether to send notice to the class of a proposed settlement is not subject to immediate review under Rule 23(f), and extend the time for seeking interlocutory review under Rule 23(f) if any party is the United States or its agency, officer, or employee.

Report on Topics Still Under Study

After the Rule 23 Subcommittee gave careful attention to a range of topics not specifically included in the preliminary draft of proposed amendments to Rule 23, it decided not to proceed with several of them. It also recommended that two topics remain under study, and the Advisory Committee approved that decision. Below is a brief summary of those two topics.

Pick-off issues: In recent years, there have been a number of instances in which defendants in putative class actions have sought to "pick off" the named class representative by offering all the

individual relief he or she could obtain and moving to dismiss on grounds of mootness. In *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), the Supreme Court held that such an offer does not moot a case because "an unaccepted settlement offer has no force." The decision left open the possibility, however, that the outcome could be different if the defendant deposited the money in court and consented to entry of judgment against it in favor of the putative class representative. The Rule 23 Subcommittee has been monitoring activity in the lower courts since the Supreme Court's decision. If pick-off issues continue to be important, it may return to considering these issues.

Ascertainability: The lower courts have, in recent years, fairly frequently addressed arguments about whether the membership in a proposed class was sufficiently ascertainable to support certification. The extent to which the lower courts' views differ on this subject remains uncertain. In two cases (from the Sixth and Seventh Circuits), the Supreme Court has denied certiorari this year. Given the evolving state of this doctrine in the lower courts, and the initial difficulties the Rule 23 Subcommittee encountered in drafting possible amendments to address this issue, no proposal for amendment was brought forward. Nonetheless, the issue seemed to have sufficient currency and importance to be retained on the Subcommittee's agenda.

B. RULE 62

The Rule 62 provisions for staying execution were brought to the Committee and to the Appellate Rules Committee by independent and distinct questions. This Committee was asked about an apparent "gap" between the 14-day automatic stay provided by Rule 62(a) and the authority to issue a stay "pending disposition of" a post-judgment motion that might not be made until a time after expiration of the automatic stay. The Appellate Rules Committee was asked about authority to post security in a form other than a bond, and about authority to post a single security in a form that lasts through post-judgment proceedings in the district court and the conclusion of all proceedings on appeal. The Committee recommends publication of the proposed amendments to Rule 62, which are attached. They address all three of the questions that prompted the inquiry.

The groundwork has been laid by a subcommittee that included representatives of the Appellate and Civil Rules Committees. Judge Scott Matheson chaired the subcommittee. The subcommittee began work on the three topics that launched the project, but also developed complicated drafts that sought to address several questions not treated in Rule 62. Many of the complications proved too difficult to address with any confidence. The drafts were then simplified. These simpler drafts were discussed both in the advisory committees and in the Standing Committee. These discussions continued to prune away provisions that directly recognized open-ended district-court authority to grant, amend, or deny stays, with or without security. In the end, the proposal is limited to address only the three questions that started the work. It eliminates the "gap" at the end of the automatic stay by extending the stay from 14 days to 30 days, and qualifies the automatic stay by allowing the court to order otherwise. Security can be posted by bond or in other forms; as in the present rule, the court must approve either the bond or a different form of security. And the security can be posted on terms that continue from the time it is approved to the time specified in the bond or security.

Subdivisions (a) through (d) of present Rule 62 are rearranged to bring related provisions closer together, easing the reader's path through the rule. The remaining subdivisions, (e) through (h), are left unchanged. They were thoroughly explored in a memorandum prepared by Professor Struve as Reporter for the Appellate Rules Committee, and were considered by the subcommittee. In the end, it seemed better to leave them as they are.

Further Discussion

The Appellate Rules Committee took up Rule 62 at the suggestion of a member who was interested in making it 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. This beginning led to a comprehensive report by Professor Struve examining many different aspects of Rule 62 stays.

The Civil Rules Committee first looked at Rule 62 in response to a question raised by a district judge. The question grew from a complication in the relationship between automatic stays and the authority to order a stay pending disposition of a post-judgment motion. The complication arose from the Time Computation Project that led each of the several advisory committees to reset many of the time periods set in the various compilations of rules. Before the Time Project changes, Civil Rules 50, 52, and 59 set the time for motions at 10 days after entry of judgment. Rule 62(a) extinguished the automatic stay 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 Project reset the time for motions under Rules 50, 52, or 59 at 28 days. It also reset expiration of the automatic stay at 14 days after entry of judgment. The result was that the automatic stay expired half-way 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 judge submitted a suggestion that Rule 62 should be amended to make it clear that a stay could be issued before a post-judgment motion is made. The Committee decided against any immediate action. It believed that there is inherent authority to issue a stay as part of the court's necessary control over its own judgment. It concluded that the usual conservative approach made it sensible to wait to see whether actual problems might emerge in practice.

Consultation through the joint subcommittee led to consideration of many other questions.

The "gap" between expiration of the automatic stay and the later time allowed to make a post-trial motion was addressed from the beginning. The simplest adjustment would be to rewrite the rule to allow the court to enter a stay at any time. Several successive drafts included such a provision. It was abandoned, however, as unnecessarily broad. Instead, reliance was placed on a parallel amendment of Rule 62(a) that has carried through from the beginning of the subcommittee's work. The amendment extends the time of the automatic stay to 30 days. That time allows two days beyond the time for making a post-trial motion, an advantage that could become important in cases in which decisions whether to appeal may be affected by the absence of any post-trial motion. It also provides a brief window to arrange security for a court-ordered stay.

The possible disadvantage of extending the automatic stay is the risk that it will become easier to take steps to defeat any execution. That risk is addressed at the end of proposed Rule 62(a): the automatic stay takes hold "unless the court orders otherwise." The court may dissolve the stay, perhaps on condition that the judgment creditor post security for injuries caused by execution of a judgment that is later modified, set aside, or reversed. Or the court may supersede the automatic stay by ordering a stay on different terms, most likely by including some form of security to protect the judgment creditor.

The single-security question turned attention to present Rule 62(d)'s provisions for a stay by supersedeas bond. 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 language that recognizes this procedure "[i]f an appeal is taken," and directs that "[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."

Consideration of the stay by supersedeas bond raised the question whether there is an absolute right to a stay. Practitioners report a belief that this provision establishes a right to stay execution on posting a satisfactory bond. This belief may be supported by the rule text: "the appellant may obtain a stay by supersedeas bond * * *." There may be some offsetting implication in the further provision that the stay takes effect when the court approves the bond, although approval may be limited to considering the amount of the security, the form of the bond, and the assurance that the bond can be made good. This question was discussed at length. Successive proposed drafts recognized authority to refuse a stay for good cause even if adequate security is tendered. But in the end, ongoing practice and understanding prevailed. Proposed Rule 62(b) carries forward the critical language of present Rule 62(d): "The stay takes effect when the court approves the bond" or other security. This course means that present practice carries forward, including whatever measure of discretion the cases recognize to allow a stay on less than full security in exceptional circumstances.

The final major decision was to reorganize and carry forward 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. They are joined in proposed subdivision (d). One change is proposed. Present Rule 62(c) incorporates some, but not all, of the words used in the interlocutory injunction appeal statute, 28 U.S.C. § 1292(a)(1). The Rule refers to "an interlocutory order or final judgment that grants, dissolves, or denies an injunction." The formula in § 1292(a)(1) is more elaborate. Although the Committee is not aware of any difficulties arising from the differences, it has seemed wise to forestall any arguments about appeals from orders that "continue" or "modify" an injunction.

C. CONFORMING CIVIL RULE 65.1 TO RULE 62 AND APPELLATE RULE 8(b)

While the proposal to amend Civil Rule 62 was working through the Appellate Rules, Civil Rules, and Standing Committees, the Appellate Rules Committee undertook to remove the term "supersedeas" from the Appellate Rules that address a bond provided to secure a stay of execution. That process led them to consider the need to expand Appellate Rule 8(b), which parallels Civil Rule 65.1, to reflect the revision of Rule 62 that recognizes "a bond or other security." Rule 65.1 establishes a special enforcement procedure that applies only to a "surety" on "a bond or other undertaking." Appellate Rule 8(b) is similar.

The Appellate Rules Committee concluded that it is not safe to rely on an interpretation of "surety" that would reach every nonparty that undertakes to provide security in a form other than a bond. One likely example is a letter of credit. The Appellate Rules Committee points out that the issuer of a letter of credit is not a "surety." But if the letter is formulated to do the same things as a bond does, the enforcement procedure should be the same as for the surety on a bond.

The Standing Committee has approved publication of Rule 62 for comment. The Standing Committee has also approved publication for comment of a proposal to amend Appellate Rule 8(b) to reach "other security providers." Civil Rule 65.1 was not considered during the work that developed the proposed Rule 62 amendments. But the Standing Committee also authorized publication for comment of a Rule 65.1 proposal that imitates the changes in proposed Rule 8(b). Publication now is better than deferring publication of Rule 62 or looking toward publication of

conforming changes in Rule 65.1 a year after publication of Rule 62 and Appellate Rule 8(b). The Civil Rules Committee, voting by electronic ballot, has joined in recommending publication of the proposed Rule 65.1

The proposed amendment of Rule 65.1 adopts "other security provider" with the same variations found in the proposal to amend Appellate Rule 8(b).

D. RULE 5: E-SERVICE AND E-FILING

The Standing Committee Subcommittee on matters electronic has suspended operations. The several advisory committees, however, have cooperated in carrying forward consideration of the ways in which the several sets of rules should be revised to reflect the increasing dominance of electronic means of preserving and communicating information. For the Civil Rules, the Advisory Committee initially worked through to recommendations to publish three rules amendments for comment in August 2015: Rule 5(d)(3) on electronic filing; Rule 5(b)(2)(E) on electronic service, with the corresponding abrogation of Rule 5(b)(3) on using the court's transmission facilities ((b)(2)(E) would supersede it); and Rule 5(d)(1) on using the Notice of Electronic Filing as a certificate of service. But continuing exchanges with the other advisory committees showed that further work was needed to achieve as much uniformity as possible in language, and at times in meaning. Much of the work has involved the Criminal Rules Committee. Criminal Rule 49 now invokes the Civil Rules on filing and service. The Criminal Rules Committee has worked long and hard to create a new and self-contained Rule 49 that will be independent of the Civil Rules. They have welcomed close collaboration with the Civil Rules e-representatives in their Subcommittee deliberations. The result has been great progress that has improved the earlier Civil Rules drafts.

There are powerful reasons to make Civil Rule 5 and Criminal Rule 49 as nearly identical as possible, recognizing that the different circumstances of criminal prosecutions may at times warrant differences in substance and that the different structural and linguistic context of the full sets of rules may at times warrant differences in expression. The value of uniform expression extends beyond the Civil and Criminal Rules to include the Appellate and Bankruptcy Rules as well. But it has not seemed useful to attempt to restructure the Appellate, Bankruptcy, and Civil Rules to emulate the structure of the all-new Criminal Rule 49. All four advisory committees have cooperated in achieving what all believe to be the fullest desirable level of uniformity.

Before turning to the present proposals, it may be useful to provide a brief reminder of broader possibilities that have been put aside.

Earlier work considered an open-ended rule that would equate electrons with paper in two ways. The first provision would state that a reference to information in written form includes electronically stored information. The second provision would state that any action that can or must be completed by filing or sending paper may also be accomplished by electronic means. Each provision would be qualified by an "unless otherwise provided" clause. Reviewing these proposals against the full set of Civil Rules showed that it is still too early to attempt to adopt them as a general approach, even with exceptions—determining what exceptions to make would be difficult, and there were likely to be many of them.

A subset of these questions was considered again in preparing the present proposal. The Rules were scanned for words that direct one party to communicate with another party by means that might, or might not, embrace e-communication. There are several of these words, and they appear in many places. The most obvious example is "mail." Other familiar words include deliver

(delivery); send; and notify (notice). Somewhat less familiar words include "provide"; "return[, sequester, or destroy]"; "supplement or correct"; and "furnish." Other words seem to imply tangible embodiment in paper, most commonly "written" and "writing." Taking on all of these provisions now would needlessly delay completion of the present e-filing and e-service proposals. Practice is adjusting comfortably to the electronic era. There will be time enough for a separate project to consider which circumstances justify, or perhaps even require, communicating or acting by electronic means.

A related general question involves electronic signatures. Many local rules address this question now, often drawing from a Model Rule. A proposal to amend the Bankruptcy Rules to address electronic signatures was published and then withdrawn. There did not seem to be much difficulty with treating an electronic filing by an authorized user of the court's e-filing system as the filer's signature. But difficulty was encountered in dealing with papers signed by someone other than the authorized filer. Affidavits and declarations are common examples, as are many forms of discovery responses. The several advisory committees share the view that it is too early to take on e-signatures in a general way. Draft Rule 5(d)(3) does provide that 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.

Rule 5(d)(3): Electronic Filing

The Rule 5(d)(3) amendment would establish a uniform national rule that makes e-filing mandatory except for filings made by a person not represented by an attorney, and with a further exception that paper filing must be allowed for good cause and may be required or allowed for other reasons by local rule. A person not represented by an attorney may file electronically only if allowed by court order or local rule, and can be required to do so only by court order or by a local rule that includes reasonable exceptions. And the user name and password of an attorney of record, along with the attorney's name on a signature block, serves as the attorney's signature.

This proposal rests on the advantages that e-filing brings to the court and the parties. Local rules in most districts already require attorneys to file electronically. The risks of mistakes have been reduced by growing familiarity with, and competence in, electronic communication. At the same time, deliberation in consultation with other advisory committees showed that the general mandate should not extend to pro se parties. Although pro se parties are thus generally exempted from the requirement, the proposal allows them access to e-filing by local rule or court order. This treatment recognizes that some pro se parties have already experienced success with e-filing, and reflects an expectation that the required skills and access to electronic systems will expand. The court and other parties will share the benefits when pro se litigants can manage e-filing. Finally, the proposal allows a court to require e-filing by an unrepresented party. This provision is designed to support existing programs that direct e-filing in collateral proceedings brought by prison inmates. But e-filing can be required only by court order or by a local rule that includes reasonable exceptions. The language that a local rule must include reasonable exceptions is taken almost verbatim from present Rule 5(d)(3). It will protect against local-rule requirements that might impede access to courts, a concern that had troubled the Criminal Rules Committee with respect to habeas corpus and § 2255 proceedings.

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(Revised July 1, 2016)

Rule 5(b)(2)(E): e-Service

Present Rule 5(b)(2)(E) allows service by electronic means only if the person to be served consented in writing. It is complemented by Rule 5(b)(3), which provides that a party may use the court's transmission facilities to make electronic service "[i]f a local rule so authorizes." The proposal deletes the requirement of consent when service is made through the court's transmission facilities on a registered user. It also abrogates Rule 5(b)(3) as no longer necessary.

Consent continues to be required for electronic service in other circumstances, whether the person served is a registered user or not. A registered user might consent to service by other electronic means for papers that are not filed with the court. In civil litigation, a common example is provided by discovery materials that must not be filed until they are used in the action or until the court orders filing. A pro se litigant who is not a registered user—and very few now are—is protected by the consent requirement. In either setting, consent may be important to ensure effective service. The terms of consent can specify an appropriate address and format, and perhaps other matters as well.

Permission to Use Court's Facilities: Abrogating Rule 5(b)(3)

This package includes a proposal to abrogate Rule 5(b)(3) to reflect the amendment of Rule 5(b)(2)(E) that allows service on a registered user by filing with the court's electronic-filing system without requiring consent.

The basic reason to abrogate (b)(3) is to avoid the seeming inconsistency of authorizing service by filing with the court's system in (b)(2)(E) and then requiring authorization by a local rule as well. Probably there is no danger that a local rule might opt out of the national rule, but eliminating (b)(3) would ensure that none will. It remains important to ensure that a court can refuse to allow a particular person to become a registered user. It may be safe to rely on the Committee Note to (b)(2)(E), with added support in a Committee Note explaining the abrogation of (b)(3).

Notice of Electronic Filing as Proof of Service

Rule 5(d)(1) was amended in 1991 to require a certificate of service. It did not specify any particular form. Many lawyers include a certificate of service at the end of any paper filed in the court's electronic filing system and served through the court's transmission facilities. This practice can be made automatic by amending Rule 5(d)(1) to provide that a Notice of Electronic Filing constitutes a certificate of service on any party served by the court's electronic-filing system. The draft amendment does that, retaining the requirement for a certificate of service following service by other means.

Treating the Notice of Electronic Filing as the certificate of service will not save many electrons. The certificates generally included in documents electronically filed and served through the court's facilities are brief. It may be that cautious lawyers will continue to include them. But there is an opportunity for some saving, and protection for those who would forget to add the certificate to the original document, whether the protection is against the burden of generating and filing a separate document or against forgetting to file a certificate at all. Other parties will be spared the need to check court files to determine who was served, particularly in cases in which all parties participate in electronic filing and service.

The Notice of Electronic Filing automatically identifies the means, time, and e-address where service was made and also identifies the parties who were not authorized users of the court's electronic-filing system, thus flagging the need for service by other means. There might be some value in amending Rule 5(d)(1) further to require that the certificate for service by other means specify the date and manner of service; the names of the persons served; and the address where service was made. Still more detail might be required. The Committee considered this possibility but decided that there is no need to add this much detail to rule text. Lawyers seem to be managing nicely without it.

The draft considered by the Committee included, as a subject for discussion, a further provision that the Notice of Electronic Filing is not a certificate of service if "the serving party learns that it did not reach the person to be served." That formula appears in Rule 5(b)(2)(E), both now and in the proposed revision. The Committee concluded that this caution need not be duplicated in Rule 5(d)(1). Learning that the attempted e-service did not work means there is no service. No service, no certificate of service.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 5. Serving and Filing Pleadings and Other Papers

* * * * *

(b) Service: How Made.

* * * * *

(2) *Service in General.* A paper is served under this rule by:

(A) handing it to the person;

* * * * *

(E) sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means ~~if~~that the person consented to in writing—in either of which events service is complete upon ~~transmission~~filing or sending, but is

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

not effective if the ~~serving party~~filer or sender learns that it did not reach the person to be served; or

* * * * *

~~**(3)** *Using Court Facilities.* If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).~~ [Abrogated (Apr. __, 2018, eff. Dec. 1, 2018).]

* * * * *

(d) Filing.

(**1**) ***Required Filings; Certificate of Service.***

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served ~~— together with a certificate of service —~~ must be filed within a reasonable time after service. But disclosures under

Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

(B) *Certificate.* A certificate of service must be filed within a reasonable time after service, but a notice of electronic filing constitutes a certificate of service on any person served by the court's electronic-filing system.

* * * * *

(2) ***Nonelectronic Filing*** ~~***How Filing is Made—In General.***~~ A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) ***Electronic Filing, and Signing, or Verification.*** ~~A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed.~~

(A) *By a Represented Person—Generally Required; Exceptions.* A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) *By an Unrepresented Person—When Allowed or Required.* A person not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule; and

(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(C) *Signing.* 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.

(D) *Same as a Written Paper.* A paper filed electronically ~~in compliance with a local rule~~ is a written paper for purposes of these rules.

* * * * *

Committee Note

Rule 5 is amended to reflect the widespread transition to electronic filing and service. Almost all filings by represented parties are now made with the court's electronic-filing system.

Subdivision (b). Rule 5(b) is amended to revise the provisions for electronic service. Provision for electronic service was first made when electronic communication was not as widespread or as fully reliable as it is now. Consent of the person served to receive service by electronic means was required as a safeguard. Those concerns have substantially diminished, but have not disappeared entirely, particularly as to persons not represented by an attorney.

The amended rule recognizes electronic service on a registered user who has appeared in the action by filing with the court's electronic-filing system. A court may choose to allow registration only with the court's permission. But a party who registers will be subject to service by filing with the court's system unless the court provides otherwise. With the consent of the person served, electronic service also may be made by means that do not use the court's system. Consent can be limited to service at a prescribed address or in a specified form, and may be limited by other conditions.

Because Rule 5(b)(2)(E) now authorizes service on a registered user by filing with the court's electronic-filing system as a uniform national practice, Rule 5(b)(3) is abrogated. It is no longer necessary to rely on local rules to authorize such service.

Subdivision (d). Amended Rule 5(d)(1) provides that a notice of electronic filing generated by the court's electronic-filing system is a certificate of service on any person served by the court's electronic-filing system. But if the serving party learns that the paper did not reach the party to be served, there is no service under Rule 5(b)(2)(E) and there is no certificate of the (nonexistent) service.

When service is not made by filing with the court's electronic-filing system, a certificate of service must be filed and should specify the date as well as the manner of service.

Amended Rule 5(d)(3) recognizes increased reliance on electronic filing. Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it generally mandatory in all districts for a person represented by an attorney. But exceptions continue to be available. Nonelectronic filing must be allowed for good cause. And a local rule may allow or require nonelectronic filing for other reasons.

Filings by a person not represented by an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to

the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication. Room is also left for a court to require electronic filing by a pro se litigant by court order or by local rule. Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant. In the beginning, this authority is likely to be exercised only to support special programs, such as one requiring e-filing in collateral proceedings by pro se prisoners.

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.

Rule 23. Class Actions

* * * * *

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

* * * * *

(2) ***Notice.***

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by United States

mail, electronic means, or other appropriate means. . . .

* * * * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) *Notice to the Class.*

(A) *Information That Parties Must Provide to the Court.* The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) ***Approval of the Proposal.*** If the proposal would bind class members under Rule 23(c)(3), the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:~~.~~

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) class members are treated equitably relative to each other.

(3) ***Identification of Side Agreements.*** The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) ***New Opportunity to Be Excluded.*** If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) ***Class-Member Objections.***

(A) *In General.* Any class member may object to the proposal if it requires court approval under this subdivision (e)~~; the objection may be withdrawn only with the court's approval~~. The objection must state whether

it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required For Payment to an Objector or Objector's Counsel.* Unless approved by the court after a hearing, no payment or other consideration may be provided to an objector or objector's counsel in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure For Approval After an Appeal.* If approval under Rule 23(e)(5)(B) has not

been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1).~~if a petition for permission to appeal is filed~~ A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in

the district court unless the district judge or the court of appeals so orders.

* * * * *

Committee Note

Rule 23 is amended mainly to address issues related to settlement, and also to take account of issues that have emerged since the rule was last amended in 2003.

Subdivision (c)(2). As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of class certification and approval of the proposed settlement justifies giving notice. This decision is sometimes inaccurately called "preliminary approval" of the proposed class certification in Rule 23(b)(3) actions, and it is common to send notice to the class simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class members to decide by a certain date whether to opt out. This amendment recognizes the propriety of this notice practice. Requiring repeat notices to the class can be wasteful and confusing to class members, and costly as well.

Subdivision (c)(2) is also amended to recognize contemporary methods of giving notice to class members. Since *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), interpreted the individual notice requirement for class members in Rule 23(b)(3) class actions, many courts have read the rule to require notice by first class mail in every case. But technological change since 1974 has meant that

other forms of communication may be more reliable and important to many. Courts and counsel have begun to employ new technology to make notice more effective, and sometimes less costly. Because there is no reason to expect that technological change will halt soon, courts giving notice under this rule should consider current technology, including class members' likely access to such technology, when selecting a method of giving notice.

Rule 23(c)(2)(B) is amended to take account of these changes, and to call attention to them. The rule continues to call for giving class members "the best notice that is practicable." It does not specify any particular means as preferred. Although it may be true that electronic methods of notice, for example by email, are the most promising, it is important to keep in mind that a significant portion of class members in certain cases may have limited or no access to email or the Internet. Instead of preferring any one means of notice, therefore, courts and counsel should focus on the means most likely to be effective in the case before the court. The amended rule emphasizes that the court must exercise its discretion to select appropriate means of giving notice. Courts should take account not only of anticipated actual delivery rates, but also of the extent to which members of a particular class are likely to pay attention to messages delivered by different means. In providing the court with sufficient information to enable it to decide whether to give notice to the class of a proposed class-action settlement under Rule 23(e)(1), it may be important to include a report about the proposed method of giving notice to the class.

In determining whether the proposed means of giving notice is appropriate, the court should give careful attention

to the content and format of the notice and, if notice is given under Rule 23(e)(1) as well as Rule 23(c)(2)(B), any claim form class members must submit to obtain relief. Particularly if the notice is by electronic means, care is necessary regarding access to online resources, the manner of presentation, and any response expected of class members. As the rule directs, the notice should be the "best . . . that is practicable" in the given case. The ultimate goal of giving notice is to enable class members to make informed decisions about whether to opt out or, in instances where a proposed settlement is involved, to object or to make claims. Means, format, and content that would be appropriate for class members likely to be sophisticated, for example in a securities fraud class action, might not be appropriate for a class made up in significant part of members likely to be less sophisticated. As with the method of notice, the form of notice should be tailored to the class members' anticipated understanding and capabilities. The court and counsel may wish to consider the use of class notice experts or professional claims administrators.

Attention should focus also on the method of opting out provided in the notice. The proposed method should be as convenient as possible, while protecting against unauthorized opt-out notices. The process of opting out should not be unduly difficult or cumbersome. As with other aspects of the notice process, there is no single method that is suitable for all cases.

Subdivision (e). The introductory paragraph of Rule 23(e) is amended to make explicit that its procedural requirements apply in instances in which the court has not certified a class at the time that a proposed settlement is

presented to the court. The notice required under Rule 23(e)(1) then should also satisfy the notice requirements of amended Rule 23(c)(2)(B) for a class to be certified under Rule 23(b)(3), and trigger the class members' time to request exclusion. Information about the opt-out rate could then be available to the court when it considers final approval of the proposed settlement.

Subdivision (e)(1). The decision to give notice of a proposed settlement to the class is an important event. It should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object. The amended rule makes clear that the parties must provide the court with information sufficient to enable it to decide whether notice should be sent. At the time they seek notice to the class, the proponents of the settlement should ordinarily provide the court with all available materials they intend to submit in support of approval under Rule 23(e)(2). That would give the court a full picture and make this information available to the members of the class. The amended rule also specifies the standard the court should use in deciding whether to send notice—that it likely will be able both to approve the settlement proposal under Rule 23(e)(2) and, if it has not previously certified a class, to certify the class for purposes of judgment on the proposal.

There are many types of class actions and class-action settlements. As a consequence, no single list of topics to be addressed in the submission to the court would apply to each case. Instead, the subjects to be addressed depend on the specifics of the particular class action and proposed settlement. But some general observations can be made.

One key element is class certification. If the court has already certified a class, the only information ordinarily necessary in regard to a proposed settlement is whether the proposal calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted. But if a class has not been certified, the parties must ensure that the court has a basis for concluding that it likely will be able, after the final hearing, to certify the class. Although the standards for certification differ for settlement and litigation purposes, the court cannot make the decision regarding the prospects for certification without a suitable basis in the record. The decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement. If the settlement is not approved and certification for purposes of litigation is later sought, the parties' earlier submissions in regard to the proposed certification for settlement should not be considered in deciding on certification.

Regarding the proposed settlement, a great variety of types of information might appropriately be included in the submission to the court. A basic focus is the extent and type of benefits that the settlement will confer on the members of the class. Depending on the nature of the proposed relief, that showing may include details of the claims process that is contemplated and the anticipated rate of claims by class members. If the notice to the class calls for submission of claims before the court decides whether to approve the proposal under Rule 23(e)(2), it may be important to provide that the parties will report back to the court on the actual claims experience. And because some funds are frequently left unclaimed, it is often important for

the settlement agreement to address the use of those funds. Many courts have found guidance on this subject in § 3.07 of the American Law Institute, Principles of Aggregate Litigation (2010).

It is important for the parties to supply the court with information about the likely range of litigated outcomes, and about the risks that might attend full litigation. In that connection, information about the extent of discovery completed in the litigation or in parallel actions may often be important. In addition, as suggested by Rule 23(b)(3)(A), information about the existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal—including the breadth of any such release—may be important.

The proposed handling of an award of attorney's fees under Rule 23(h) is another topic that ordinarily should be addressed in the parties' submission to the court. In some cases, it will be important to relate the amount of an award of attorney's fees to the expected benefits to the class, and to take account of the likely claims rate. One method of addressing this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results.

Another topic that normally should be considered is any agreement that must be identified under Rule 23(e)(3).

The parties may supply information to the court on any other topic that they regard as pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court may direct the parties to supply further

information about the topics they do address, or to supply information on topics they do not address. It must not direct notice to the class until the parties' submissions show it is likely that the court will be able to approve the proposal after notice to the class and a final approval hearing.

Subdivision (e)(2). The central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate. This standard emerged from case law implementing Rule 23(e)'s requirement of court approval for class-action settlements. It was formally recognized in the rule through the 2003 amendments. By then, courts had generated lists of factors to shed light on this central concern. Overall, these factors focused on comparable considerations, but each circuit developed its own vocabulary for expressing these concerns. In some circuits, these lists have remained essentially unchanged for thirty or forty years. The goal of this amendment is not to displace any of these factors, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.

One reason for this amendment is that a lengthy list of factors can take on an independent life, potentially distracting attention from the central concerns that inform the settlement-review process. A circuit's list might include a dozen or more separately articulated factors. Some of those factors—perhaps many—may not be relevant to a particular case or settlement proposal. Those that are relevant may be more or less important to the particular case. Yet counsel and courts may feel it necessary to address every single factor on a given circuit's

list in every case. The sheer number of factors can distract both the court and the parties from the central concerns that bear on review under Rule 23(e)(2).

This amendment therefore directs the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal.

Approval under Rule 23(e)(2) is required only when class members would be bound under Rule 23(c)(3). Accordingly, in addition to evaluating the proposal itself, the court must determine whether it can certify the class under the standards of Rule 23(a) and (b) for purposes of judgment based on the proposal.

Paragraphs (A) and (B). These paragraphs identify matters that might be described as "procedural" concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement. Attention to these matters is an important foundation for scrutinizing the specifics of the proposed settlement. If the court has appointed class counsel or interim class counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus at this point is on the actual performance of counsel acting on behalf of the class.

The information submitted under Rule 23(e)(1) may provide a useful starting point in assessing these topics. For example, the nature and amount of discovery in this or other cases, or the actual outcomes of other cases, may indicate whether counsel negotiating on behalf of the class

had an adequate information base. The pendency of other litigation about the same general subject on behalf of class members may also be pertinent. The conduct of the negotiations may be important as well. For example, the involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests.

In undertaking this analysis, the court may also refer to Rule 23(g)'s criteria for appointment of class counsel; the concern is whether the actual conduct of counsel has been consistent with what Rule 23(g) seeks to ensure. Particular attention might focus on the treatment of any award of attorney's fees, with respect to both the manner of negotiating the fee award and its terms.

Paragraphs (C) and (D). These paragraphs focus on what might be called a "substantive" review of the terms of the proposed settlement. The relief that the settlement is expected to provide to class members is a central concern. Measuring the proposed relief may require evaluation of the proposed claims process and a prediction of how many claims will be made; if the notice to the class calls for pre-approval submission of claims, actual claims experience may be important. The contents of any agreement identified under Rule 23(e)(3) may also bear on the adequacy of the proposed relief, particularly regarding the equitable treatment of all members of the class.

Another central concern will relate to the cost and risk involved in pursuing a litigated outcome. Often, courts may need to forecast what the likely range of possible classwide recoveries might be and the likelihood of success

in obtaining such results. That forecast cannot be done with arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure.

If the class has not yet been certified for trial, the court may consider whether certification for litigation would be granted were the settlement not approved.

Examination of the attorney-fee provisions may also be important to assessing the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class can be an important factor in determining the appropriate fee award. Provisions for reporting back to the court about actual claims experience, and deferring a portion of the fee award until the claims experience is known, may bear on the fairness of the overall proposed settlement.

Often it will be important for the court to scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims. A claims processing method should deter or defeat unjustified claims, but unduly demanding claims procedures can impede legitimate claims. Particularly if some or all of any funds remaining at the end of the claims process must be returned to the defendant, the court must be alert to whether the claims process is unduly demanding.

Paragraph (D) calls attention to a concern that may apply to some class action settlements—inequitable treatment of some class members vis-a-vis others. Matters of concern could include whether the apportionment of

relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that affect the apportionment of relief.

Subdivision (e)(3). A heading is added to subdivision (e)(3) in accord with style conventions. This addition is intended to be stylistic only.

Subdivision (e)(4). A heading is added to subdivision (e)(4) in accord with style conventions. This addition is intended to be stylistic only.

Subdivision (e)(5). Objecting class members can play a critical role in the settlement-approval process under Rule 23(e). Class members have the right under Rule 23(e)(5) to submit objections to the proposal. The submissions required by Rule 23(e)(1) may provide information important to decisions whether to object or opt out. Objections can provide the court with important information bearing on its determination under Rule 23(e)(2) whether to approve the proposal.

Subdivision (e)(5)(A). The rule is amended to remove the requirement of court approval for every withdrawal of an objection. An objector should be free to withdraw on concluding that an objection is not justified. But Rule 23(e)(5)(B)(i) requires court approval of any payment or other consideration in connection with withdrawing the objection.

The rule is also amended to clarify that objections must provide sufficient specifics to enable the parties to respond to them and the court to evaluate them. One

feature required of objections is specification whether the objection asserts interests of only the objector, or of some subset of the class, or of all class members. Beyond that, the rule directs that the objection state its grounds "with specificity." Failure to provide needed specificity may be a basis for rejecting an objection. Courts should take care, however, to avoid unduly burdening class members who wish to object, and to recognize that a class member who is not represented by counsel may present objections that do not adhere to technical legal standards.

Subdivision (e)(5)(B). Good-faith objections can assist the court in evaluating a proposal under Rule 23(e)(2). It is legitimate for an objector to seek payment for providing such assistance under Rule 23(h). As recognized in the 2003 Committee Note to Rule 23(h): "In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as . . . attorneys who represented objectors to a proposed settlement under Rule 23(e)."

But some objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process. At least in some instances, it seems that objectors—or their counsel—have sought to extract tribute to withdraw their objections or dismiss appeals from judgments approving class settlements. And class counsel sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or other consideration to these objectors.

The court-approval requirement currently in Rule 23(e)(5) partly addresses this concern. Because the

concern only applies when consideration is given in connection with withdrawal of an objection, however, the amendment requires approval under Rule 23(e)(5)(B)(i) only when consideration is involved. The term "consideration" should be broadly interpreted, particularly when the withdrawal includes some arrangements beneficial to objector counsel. If the consideration involves a payment to counsel for an objector, the proper procedure is by motion under Rule 23(h) for an award of fees; the court may approve the fee if the objection assisted the court in understanding and evaluating the settlement even though the settlement was approved as proposed.

Rule 23(e)(5)(B)(ii) applies to consideration in connection with forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal. Because an appeal by a class-action objector may produce much longer delay than an objection before the district court, it is important to extend the court-approval requirement to apply in the appellate context. The district court is best positioned to determine whether to approve such arrangements; hence, the rule requires that the motion seeking approval be made to the district court.

Until the appeal is docketed by the circuit clerk, the district court may dismiss the appeal on stipulation of the parties. See Fed. R. App. P. 42(a). Thereafter, the court of appeals has authority to decide whether to dismiss the appeal. This rule's requirement of district court approval of any consideration in connection with such dismissal by the court of appeals has no effect on the authority of the court of appeals over the appeal. It is, instead, a requirement that applies only to providing consideration in connection with forgoing, dismissing, or abandoning an appeal. A party

dissatisfied with the district court's order under Rule 23(e)(5)(B) may appeal the order.

Subdivision (e)(5)(C). Because the court of appeals has jurisdiction over an objector's appeal from the time that it is docketed in the court of appeals, the procedure of Rule 62.1 applies. That procedure does not apply after the court of appeals' mandate returns the case to the district court.

Subdivision (f). As amended, Rule 23(e)(1) provides that the court should direct notice to the class regarding a proposed class-action settlement in cases in which class certification has not yet been granted only after determining that the prospect of eventual class certification justifies giving notice. This decision is sometimes inaccurately characterized as "preliminary approval" of the proposed class certification. But it does not grant or deny class certification, and review under Rule 23(f) would be premature. This amendment makes it clear that an appeal under this rule is not permitted until the district court decides whether to certify the class.

The rule is also amended to extend the time to file a petition for review of a class-action certification order to 45 days whenever a party is the United States, one of its agencies, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. In such a case, the extension applies to a petition for permission to appeal by any party. The extension of time recognizes—as under Rules 4(i) and 12(a) and Appellate Rules 4(a)(1)(B) and 40(a)(1)—that the United States has a special need for additional time in regard to these matters. The extension

applies whether the officer or employee is sued in an official capacity or an individual capacity; the defense is usually conducted by the United States even though the action asserts claims against the officer or employee in an individual capacity. An action against a former officer or employee of the United States is covered by this provision in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time.

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) Automatic Stay~~; Exceptions for Injunctions, Receiverships, and Patent Accountings~~. Except as provided in Rule 62(c) and (d),~~stated in this rule, no~~ execution ~~may issue~~ on a judgment~~, nor may~~ and proceedings ~~be taken~~ to enforce it~~,~~ are stayed for 30 days ~~until 14 days have passed~~ after its entry, unless the court orders otherwise. ~~But unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:~~

~~**(1)** an interlocutory or final judgment in an action for an injunction or a receivership; or~~

~~**(2)** a judgment or order that directs an accounting in an action for patent infringement.~~

~~**(b) Stay Pending the Disposition of a Motion.** On appropriate terms for the opposing party's security, the court may stay the execution of a judgment -- or~~

~~any proceedings to enforce it -- pending disposition of any of the following motions:~~

~~**(1)** under Rule 50, for judgment as a matter of law;~~

~~**(2)** under Rule 52(b), to amend the findings or for additional findings;~~

~~**(3)** under Rule 59, for a new trial or to alter or amend a judgment; or~~

~~**(4)** under Rule 60, for relief from a judgment or order.~~

(b) Stay by Bond or Other Security. At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security.

(c) Stay of an Injunction, Receivership, or Patent-Accounting Order. Unless the court orders

otherwise, the following are not stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or receivership; or

(2) a judgment or order that directs an accounting in an action for patent infringement.

(d~~c~~) Injunction Pending an Appeal. While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or ~~denies~~refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or

(2) by the assent of all its judges, as evidenced by their signatures.

~~**(d) Stay with Bond on Appeal**. If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a)(1) or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.~~

* * * * *

Committee Note

Subdivisions (a), (b), (c), and (d) of former Rule 62 are reorganized and the provisions for staying a judgment are revised.

The provisions for staying an injunction, receivership, or order for a patent accounting are reorganized by consolidating them in new subdivisions (c) and (d). There is no change in meaning. The language is revised to include all of the words used in 28 U.S.C. § 1292(a)(1) to describe the right to appeal from interlocutory actions with respect to an injunction, but subdivisions (c) and (d) apply both to interlocutory injunction orders and to final judgments that grant, refuse, or otherwise deal with an injunction.

New Rule 62(a) extends the period of the automatic stay to 30 days. Former Rule 62(a) set the period at 14 days, while former Rule 62(b) provided for a court-ordered stay "pending disposition of" motions under Rules 50, 52, 59, and 60. The time for making motions under Rules 50, 52, and 59, however, was later extended to 28 days, leaving an apparent gap between expiration of the automatic stay and any of those motions (or a Rule 60 motion) made more than 14 days after entry of judgment. The revised rule eliminates any need to rely on inherent power to issue a stay during this period. Setting the period at 30 days coincides with the time for filing most appeals in civil actions, providing a would-be appellant the full period of appeal time to arrange a stay by other means. A 30-day automatic stay also suffices in cases governed by a 60-day appeal period.

Amended Rule 62(a) expressly recognizes the court's authority to dissolve the automatic stay or supersede it by a court-ordered stay. One reason for dissolving the automatic stay may be a risk that the judgment debtor's assets will be dissipated. Similarly, it may be important to allow immediate enforcement of a judgment that does not involve a payment of money. The court may address the risks of immediate enforcement by ordering dissolution of the stay only on condition that security be posted by the judgment creditor. Rather than dissolve the stay, the court may choose to supersede it by ordering a stay that lasts longer or requires security.

Subdivision 62(b) carries forward in modified form the supersedeas bond provisions of former Rule 62(d). A stay may be obtained under subdivision (b) at any time after judgment is entered. Thus a stay may be obtained

before the automatic stay has expired, or after the automatic stay has been lifted by the court. The new rule's text makes explicit the opportunity to post security in a form other than a bond. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security—a party may find it convenient to arrange a single bond or other security that persists through completion of post-judgment proceedings in the trial court and on through completion of all proceedings on appeal by issuance of the appellate mandate. This provision does not supersede the opportunity for a stay under 28 U.S.C. § 2101(f) pending review by the Supreme Court on certiorari. Finally, subdivision (b) changes the provision in former subdivision (d) that "an appellant" may obtain a stay. Under new subdivision (b), "a party" may obtain a stay. For example, a party may wish to secure a stay pending disposition of post-judgment proceedings after expiration of the automatic stay, not yet knowing whether it will want to appeal.

Rule 65.1. Proceedings Against a Surety or Other Security Provider

Whenever these rules (including the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions) require or allow a party to give security, and security is given through a bond, other security, or other undertaking, with one or more sureties or other security providers, each ~~surety~~provider submits to the court's jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the bond, ~~or~~ undertaking, or other security. The ~~surety's~~security provider's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly mail a copy of each to every ~~surety~~security provider whose address is known.

Committee Note

Rule 65.1 is amended to reflect the amendments of Rule 62. Rule 62 allows a party to obtain a stay of a judgment "by providing a bond or other security." Limiting Rule 65.1 enforcement procedures to sureties might exclude use of those procedures against a security provider that is not a surety. All security providers are brought into Rule 65.1 by these amendments.

Excerpt from the May 14, 2016 Report of the Advisory Committee on Criminal Rules (Revised July 6, 2016)

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. Donald W. Molloy
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: May 14, 2016 (revised July 6, 2016)

I. Introduction

The Advisory Committee on Criminal Rules met on April 18, 2016, in Washington, D.C.

* * * * *

This report presents three action items. The Committee unanimously recommends publication of the following proposed amendments for public comment:

(1) Rule 49 (filing and service);
(2) Rule 45(c) (conforming amendment); and
(3) Rule 12.4 (government disclosure of organizational victims).

* * * * *

Excerpt from the May 14, 2016 Report of the
Advisory Committee on Criminal Rules (Revised July 6, 2016)

II. Action Item: Rule 49

The Criminal Rules Committee submits proposed amendments to Rule 49 governing service and filing in criminal cases, with the recommendation that the amendments be published for public comment. Parallel amendments are before the Standing Committee from the Civil, Bankruptcy, and Appellate Rules Committees.

A. Background

The proposed amendments to Criminal Rule 49 grew out of a Standing Committee initiative to adapt the rules of procedure to the modernization of the courts' electronic filing system. A subcommittee composed of representatives from each of the advisory committees concluded that the rules governing the procedure in civil, criminal, bankruptcy, and appellate cases should be amended to require, rather than allow, electronic filing and service, with appropriate exceptions. The Standing Committee endorsed that recommendation and charged the advisory committees to work closely together and coordinate the parallel amendments on e-filing and service.

Because Rule 49(b) and (d) currently provide that service and filing be made in the "manner provided for a civil action," the threshold question facing the Criminal Rules Committee was whether to retain this linkage to the Civil Rules or to draft a comprehensive Criminal Rule on filing and service. At its September 2015 meeting, the Criminal Rules Committee unanimously approved a motion instructing the Rule 49 Subcommittee to prepare a stand-alone rule. Members emphasized the different interests and policies at stake in civil and criminal litigation: criminal cases and proceedings under § 2255 involve heightened due process concerns that should be reflected in the Criminal Rules governing filing and service. Extending the Civil Rule's new presumptive e-filing requirements to pro se defendants and prisoners in criminal cases, the Committee concluded, would be particularly problematic. Members also noted that prosecutors, defense lawyers, and pro se defendants would benefit from having the rules on filing and service included in the Federal Rules of Criminal Procedure, rather than having to consult two different sets of procedural rules.

However, in drafting the new stand-alone rule, the Committee recognized that the proposed language should replicate that used in the Civil Rule when possible to avoid raising questions about the meaning or scope of the existing language in the Civil Rules. Differences in language must be rooted in differences between civil and criminal cases or differences in existing Rules of Civil and Criminal Procedure. To ensure that the proposed Rule 49 replicated the revised provisions in the Civil Rules as closely as possible, the Criminal Rules Committee worked with representatives of the Civil Rules Committee throughout the process. Members of the Civil Rules Committee and Reporters from the Civil, Appellate, and Bankruptcy Committees participated in deliberations, and the style consultants worked diligently to harmonize the phrasing and structure of the proposals. Moreover, the Committee approved the amendment at its April 2016 meeting with the understanding that the chair and reporters might need to make additional minor changes to ensure uniformity with proposals from the other committees before

submission to the Standing Committee (and, as always, to incorporate any changes made on the recommendation of the style consultants).[1]

B. Selected Features of Proposed Criminal Rule 49

Because most of the provisions on service and filing in proposed Criminal Rule 49 are identical to the provisions on service and filing in proposed Civil Rule 5, this report will focus on the differences. Generally, the proposed Criminal Rule departs from the proposed amendment to Rule 5 only where the Committee was persuaded that a departure was warranted by a difference between civil and criminal cases, or a difference between the criminal and civil rules themselves.

1. Organization and Structure.

In both Civil Rule 5 and Criminal Rule 49, the provisions on service precede those dealing with filing. Within those subsections, however, the proposed amendments to Rules 5 and 49 differ on the order in which they address electronic and nonelectronic means of filing and service. The proposed amendments to Rule 49 address electronic means first. Because most filing and service in criminal cases is through CM/ECF, the Criminal Rules Committee concluded that a new stand-alone rule providing instructions for filing and service should lead with instructions on electronic filing and service. Also, addressing electronic means in (a)(3) first provides needed context for the term "nonelectronic," which follows in the caption to (a)(4). And, importantly, placing the subsection on electronic means of service first highlights the specific restriction on use of CM/ECF by unrepresented parties. For unrepresented persons using the rule, the placement of electronic before nonelectronic service makes it crystal clear that unrepresented parties must follow different rules when it comes to CM/ECF. Because the Criminal Rules Committee was writing on a clean slate, the proposed amendment did not require reordering of preexisting numbering or lettering of these provisions, which can pose difficulties for researching applications of its provisions.

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[1] A number of such minor changes were made to the proposal after the April meeting of the Criminal Rules Committee, each approved by the Chair, Subcommittee Chair, and reporters:

(1) conforming (a)(3)(A) & (B) to the civil rule phrasing ("learns that it did not reach the person");
(2) changing the caption of 49(a)(1) from "When Required" to "What is Required";
(3) changing the phrase "unrepresented party" to "party not represented by an attorney" in several locations;
(4) changing "using the court's electronic filing system" to "filing it with the court's …";
(5) rephrasing the cross references in subsections (c) and (d) to read "as required by" Rule 49(a);
(6) relocating the phrase "on each party" in subsection (d) to earlier in the sentence; and
(7) changing phrasing in (b)(3)(A) to "the court must allow nonelectronic filing for good cause."

In contrast, the drafters of the Civil Rules were not writing on a clean slate. Civil Rule 5 now begins with the traditional means of nonelectronic filing. Electronic filing, which is a relatively recent phenomenon, was added at the end of the list of means of filing. Putting electronic filing first would have required relettering the provisions of Rule 5(d), and the Civil Rules Committee concluded that the reasons for placing electronic provisions first did not outweigh the potential downsides of renumbering and relettering Rule 5.

The consensus view of the Committees, Reporters, and Style Consultants was that each Committee had valid reasons for the difference in structure and the different order in which the forms of service were listed posed no problem. In contrast to the use of different terminology, which might raise interpretative questions, a different order of the subsections would cause no mischief.

The Criminal Rule also incorporates in a single paragraph—(b)(1)—the language from existing Civil Rule 5 regarding the timing of filing and certificate of service. The proposed Civil Rule breaks the current single paragraph into two separate subdivisions. The consensus of the Committees, Reporters, and Style Consultants was that on this point a difference between the civil and criminal rule is appropriate. Because the single paragraph in the proposed Criminal Rule is shorter than the corresponding portion of the Civil Rule, which also addresses the filing of discovery under Civil Rule 26, subdividing the single paragraph in Rule 49 was unnecessary and indeed was opposed by the Style Consultants.

Unlike Civil Rule 5(b)(2)(E), proposed new Criminal Rule 49 contains separate provisions for service through the court's electronic filing system and electronic service by other means with written consent. The structure of the Criminal Rule differs because the substantive rule regarding electronic filing by an unrepresented party differs, as explained below.

And, unlike Civil Rule 5, proposed Criminal Rule 49 distinguishes structurally (as well as substantively) between parties (the prosecution and defense) and nonparties. This is reflected structurally in (c), "Service and Filing By Nonparties," which has no counterpart in Rule 5. The various substantive differences are discussed below in sections 2(a) and (b).

Finally, the proposed Criminal Rule contains two other provisions, not found in Civil Rule 5, that incorporate provisions found elsewhere in the Rules of Civil Procedure. These provisions will be needed when the link between the Civil and Criminal Rules is severed. They are described below in section 2(c).

2. Substantive Differences

a. Filing and Service by Unrepresented Parties

The first major substantive difference from the Civil Rule is that under the proposed Criminal Rule an unrepresented party must file nonelectronically unless allowed 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. The need for different approaches to electronic filing by unrepresented parties was the main reason the Criminal Rules Committee decided that a stand-alone criminal rule was required.

As noted during the Criminal Rules Committee's report to the Standing Committee at its January 2016 meeting, electronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic confirmations, yet must be provided access to the courts under the Constitution.[2]

b. Filing and Service by Nonparties

The second substantive difference from the Civil Rule concerns filing and service by nonparties. Media representatives and crime victims are probably the most frequent nonparty filers, but there are others, including nonparty motions for the return of property under Rule 41(g), material witnesses who are detained under 18 U.S.C. § 3144, persons seeking disclosure of grand jury material under Rule 6, records custodians moving to quash subpoenas, amici filing at the district court level, and bail sureties.

The Committee concluded that good reasons support requiring all nonparties, represented or not, to file and serve nonelectronically in the absence of a court order or local rule to the contrary. First, the architecture of the current CM/ECF system allows only the prosecution and defendant(s) to file in a criminal case. Moreover, 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 may prefer a default rule of nonelectronic filing. Some, particularly victims, provide information to the court that they may not wish to have shared with the parties. A default of nonelectronic filing helps protect those interests. If a district decides that it would prefer to adopt procedures that would allow all represented media, victim, or other filers to use its electronic filing system, that would remain an option by local rule.

[2] For this reason, the Committee also expressed some concern about the application in § 2254 cases of language allowing local rules to require unrepresented parties to file electronically. Such language was added to Civil Rule 5 in order to provide authority for some existing local rules that require inmates in certain prisons to submit their petitions to staff in the prison library, who then scan the papers and file them electronically. In response to the Committee's concerns, the proposed amendment to Rule 5 was revised to state that local rules requiring pro se parties to file must allow reasonable exceptions.

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.

c. Provisions Imported from Other Civil Rules

Proposed Rule 49 contains two provisions that do not appear in Civil Rule 5, but were imported from other Civil Rules. The first comes from Civil Rule 11. The Criminal Rules Committee concluded severing the link to the Civil Rules without adding the signature provision of Civil Rule 11(a) to Rule 49 would either create[3] or maintain an existing gap in the Criminal Rules. Nothing else in the Criminal Rules requires 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 command in the existing Rule that the clerk serve notice "in a manner provided for in a civil action."[4]

d. Other Differences

The Committee also noted a few other minor differences between the proposed amendments to Rule 49 and Civil Rule 5, which it concluded were justified and unlikely to give rise to any interpretative questions or difficulties.

i. The language describing what must be served was retained from existing Rule 49(a). The current language—which is familiar to and well understood by practitioners and judges—now varies from the language of Civil Rule 5(a)(1). The Civil Rule refers to types of papers that are not filed in criminal cases. There was no intention to change the scope of the service requirement in criminal cases, and the Committee was concerned that revising the wording might generate uncertainty or work an unintended change.

ii. The language concerning service on the attorney of a represented party is retained from existing Rule 49(b). It

[3] A few courts have assumed Civil Rule 11(a) may be applicable in criminal cases, presumably as part of the "manner" of filing referenced in Rule 49(d).

[4] Proposed Rule 49(c) omits the phase "who is not in default for failing to appear," which does not apply in criminal cases, and substitutes "Rule 49(a)" for Rule 77's reference to "Rule 5(b)."

too differs slightly from that in Civil Rule 5. Unlike the criminal provision under which service on the attorney is required whenever service is required by "these" (i.e. criminal) "rules or a court order," the civil provision is restricted to service under "this rule," (i.e., Rule 5). The Note to the 2001 Amendments to Civil Rule 5 suggests that the provision on serving attorneys in the Civil Rule was restricted so that it would apply only to service made under Rules 5(a) and 77(d) and not to service under Civil Rules 4, 4.1, 45(b), and 71A(d)(3). Absent some evidence that the present scope of Criminal Rule 49(b) is presenting difficulties in criminal practice, there appears to be no basis for restricting it in the same way that the provision in the Civil Rule has been restricted.

iii. Rule 49(e)'s phrasing ("A paper filed electronically in compliance with a local rule is written or in writing under these rules") has always been slightly different than Civil Rule 5(d) ("A paper filed electronically is a written paper for purposes of these rules."). The words "or in writing," were retained because they appear in so many Rules of Criminal Procedure, including Rules 47(b), 11(a)(2), 23(b), and other rules that require the defendant to waive other important procedural rights "in writing."

e. Provisions in Civil Rules that Were Not Included.

To ensure that every deviation in the proposed amendment from the Civil Rules provisions on filing and service was identified and justified as necessary to accommodate criminal cases, the Committee examined each aspect of Civil Rule 5. The Committee also reviewed all of the other Civil Rules that might be thought to govern the "manner" of filing or service and thus fall within the rules incorporated by Criminal Rule 49(b) or (d).

Language that the Committee decided was not pertinent to criminal cases was not included in the proposed amendment to Rule 49. For example, the language in Civil Rule 5(a)(2) was not imported because there are no default judgments in criminal prosecutions or § 2255 cases. The language in Civil Rule 5(a)(3) was not imported because criminal actions are not "begun by seizing property." (Criminal forfeiture proceedings are governed by Criminal Rule 32.2.) Also the language about serving numerous defendants in Civil Rule 5(c) was not imported because it does not apply. In a criminal prosecution, even when there are many defendants, each requires notice and must be served.

Where there were detailed provisions in the current Criminal Rules addressing matters also covered in the Civil Rules, the Committee concluded those detailed provisions rebutted any

possible implication that the Civil Rule currently governs in criminal cases. For example, Civil Rule 65.1 governs service of motions to enforce a surety's liability. Criminal Rule 46(f)(3)(C) covers the same ground and rebuts any implication that Rule 49 incorporates Rule 65.1.

III. Action Item: Conforming Amendment to Rule 45

The Committee also recommends publication of a conforming amendment to Rule 45(c) in order to revise cross references that would be made obsolete by the proposed amendment of Rule 49. Although technical and conforming amendments do not require publication, in this case the Committee recommends simultaneous publication of the proposed amendments to Rule 49 and the conforming amendment to Rule 45(c).

Criminal Rule 45(c)—which governs time computation and closely matches the Civil, Bankruptcy, and Appellate Rules—now provides for additional time to take action after service by certain means authorized by Civil Rule 5. In tandem with parallel changes in the other rules, an amendment to Rule 45(c) eliminating extra time after service by electronic means is now pending before Congress. The pending 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).

The Committee recommends publication of this amendment when the proposed amendments to Rule 49 are published. Publishing the proposed amendments together will foreclose public comments suggesting that such a correction will be required.

IV. Action Item: Rule 12.4

The Criminal Rules Committee recommends publication of an amendment to Rule 12.4, which governs the parties' disclosure statements. Rule 12.4(a)(2) requires the government to identify organizational victims to assist judges in complying with their obligations under the Judicial Code of Conduct. Rule 12.4 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)." Prior to 2009, the Code of Judicial Conduct treated any victim entitled to restitution as a party, and the committee note stated that the purpose of the disclosures required by Rule 12.4 was to assist judges in determining whether to recuse. In 2009, however, the Code of Judicial Conduct was amended. It no longer treats any victim who may be entitled to restitution as a party, and it requires disclosure only when the judge has an interest "that could be substantially affected by the outcome of the proceedings."

The proposed amendment to Rule 12.4(a) brings the scope of the required disclosures in line with the 2009 amendments, allowing the court to relieve the government of the burden of

making the required disclosures upon a showing 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 a very minor harm from a price increase that might be pennies for each product purchased. In such cases, it seems unnecessarily burdensome (even if possible) for the government even to name every corporation, partnership, union, or other organizational victim. The amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations' interests could not be "substantially affected by the outcome of the proceedings."

The requirement that the government show "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. Although the style consultants expressed concern that the phrase "good cause" was vague, that phrase is used throughout the Criminal Rules where exceptions to general requirements are permitted, and it is well understood by judges and litigants. Moreover, "good cause" allows a holistic approach to the question whether to relieve the government of its disclosure responsibility, taking into account all of the relevant factors. It also allows the court to take a broad view of the scope of recusal and the information required in particular cases.

The proposed amendment to Rule 12.4(b) makes two changes.[5] It specifies that the time for making the disclosures is within 28 days after the initial appearance, and it makes clear that a supplemental filing is required not only when information that has been disclosed changes, but also when a party learns of additional information that is subject to the disclosure requirements. The Committee concluded that adding these details while amending Rule 12.4(a) would be beneficial, although they might not, by themselves, warrant an amendment.

The Appellate Rules Committee has a parallel amendment under consideration, and its reporter participated in the development of the Committee's proposed amendment. However, because the Appellate Rules proposal is part of a more comprehensive revision, it is on a slower timeline. Efforts to coordinate the changes will continue if the Appellate Rules Committee decides to move forward with an amendment on this subject.[6]

* * * * *

[5] An additional change was made to accommodate a point raised at the Standing Committee meeting. If the government was unaware there were any organizational victims until after the 28-day period had expired, it would make no initial filing and its disclosure of information subsequently learned about organizational victims would not be "supplemental." Accordingly, by post-meeting votes, the Criminal Rules Committee proposed and Standing Committee approved revising the caption and text of 12.4(b) to refer to a "later"—rather than a "supplemental"—filing.

[6] If that occurs, one of the issues will be the proposal that the Appellate Rule include disclosures not only for corporations, but also other "publicly held entities."

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[1]

Rule 12.4. Disclosure Statement

(a) Who Must File.

(1) ***Nongovernmental Corporate Party.*** Any nongovernmental corporate party to a proceeding in a district court must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(2) ***Organizational Victim***. Unless the government shows good cause, it must file a statement identifying any organizational victim of the alleged criminal activity.~~If an organization is a victim of the alleged criminal activity, the~~

[1] New material is underlined in red; matter to be omitted is lined through.

~~government must file a statement identifying the victim~~. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1) to the extent it can be obtained through due diligence.

(b) Time ~~for~~to File~~ing~~; ~~Supplemental~~Later Filing. A party must:

(1) file the Rule 12.4(a) statement within 28 days after~~upon~~ the defendant's initial appearance; and

(2) ~~promptly~~ file a ~~supplemental~~ statement at a later time promptly if the party learns of any additional required information or any changes in required information~~upon any change in the information that the statement requires~~.

Committee Note

Subdivision (a). Rule 12.4 requires the government to identify organizational victims to assist judges in complying with their obligations under the Judicial Code of

Conduct. The 2009 amendments to Canon 3(C)(1)(c) of the Judicial Code require recusal only when a judge has "an interest that could be substantially affected by the outcome of the proceeding." In some cases, there are numerous organizational victims, but the impact of the crime on each is relatively small. In such cases, the amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations' interests could not be "substantially affected by the outcome of the proceedings."

Subdivision (b). The amendment specifies that the time for making the disclosures is within 28 days after the initial appearance, and it makes clear that a supplemental filing is required not only when information that has been disclosed changes, but also when a party learns of additional information that is subject to the disclosure requirements.

Because a filing made after the 28 day period may disclose organizational victims in cases in which none were previously known or disclosed, the caption and text have also been revised to refer to a later, rather than a supplemental, filing.

Rule 45. Computing and Extending Time

* * * * *

(c) Additional Time After Certain Kinds of Service. Whenever a party must or may act within a specified time after being served and service is made under Federal Rule of ~~Civil~~Criminal Procedure 49(a)(4)(C), (D), and (E)~~5(b)(2)(C) (mailing), (D) (leaving with the clerk), or (F) (other means consented to)~~, 3 days are added after the period would otherwise expire under subdivision (a).[2]

Committee Note

Rule 49 previously required service and filing "in a manner provided" in the Civil Rules, and the time counting provisions in Criminal Rule 45(c) referred to certain forms of service under Civil Rule 5. A contemporaneous amendment moves the instructions for filing and service in criminal cases from Civil Rule 5 into Criminal Rule 49.

[2] This rule text reflects amendments adopted by the Supreme Court and transmitted to Congress on April 28, 2016, which have an anticipated effective date of December 1, 2016.

This amendment revises the cross references in Rule 45(c) to reflect this change.

Rule 49. Serving and Filing Papers

(a) Service on a Party.

(1) What is~~When~~ Required. ~~A party must serve on every other party~~Each of the following must be served on every party: any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.

~~**(b) How Made.** Service must be made in the manner provided for a civil action.~~

(2) Serving a Party's Attorney. Unless the court orders otherwise, ~~W~~when these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party~~, unless the court orders otherwise~~.

(3) *Service by Electronic Means*.

(A) *Using the Court's Electronic Filing System*. A party represented by an attorney may serve a paper on a registered user by filing it with the court's electronic-filing system. A party not represented by an attorney may do so only if allowed by court order or local rule. Service is complete upon filing, but is not effective if the serving party learns that it did not reach the person to be served.

(B) *Using Other Electronic Means*. A paper may be served by any other electronic means that the person consented to in writing. Service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served.

(4) ***Service by Nonelectronic Means***. A paper may be served by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address—in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address; or

(E) delivering it by any other means that the person consented to in writing—in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(b) Filing.

(1) *When Required; Certificate of Service.* Any paper that is required to be served—together with a certificate of service—must be filed within a reasonable time after service. A notice of electronic filing constitutes a certificate of service on any person served by the court's electronic-filing system.

(2) *Means of Filing.*

(A) *Electronically.* A paper is filed electronically by filing it with the court's electronic-filing system. 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. A paper filed electronically is written or in writing under these rules.

(B) *Nonelectronically.* A paper not filed electronically is filed by delivering it:

(i) to the clerk; or

(ii) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) *Means Used by Represented and Unrepresented Parties.*

(A) *Represented Party.* A party represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) *Unrepresented Party.* A party not represented by an attorney must file nonelectronically, unless allowed to file electronically by court order or local rule.

(4) ***Signature.*** Every written motion and other paper must be signed by at least one attorney of record in the attorney's name—or by a person filing a paper if the person is not represented by an attorney. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or person's attention.

(5) ***Acceptance by the Clerk.*** The clerk must not refuse to file a paper solely because it is not in

the form prescribed by these rules or by a local rule or practice.

(c) Service and Filing by Nonparties. A nonparty may serve and file a paper only if doing so is required or permitted by law. A nonparty must serve every party as required by Rule 49(a), but may use the court's electronic-filing system only if allowed by court order or local rule.

(d) Notice of a Court Order. When the court issues an order on any post-arraignment motion, the clerk must ~~provide notice in a manner provided for in a civil action~~ serve notice of the entry on each party as required by Rule 49(a). A party also may serve notice of the entry by the same means. Except as Federal Rule of Appellate Procedure 4(b) provides otherwise, the clerk's failure to give notice does not affect the time to appeal, or relieve—or authorize the court to

relieve—a party's failure to appeal within the allowed time.

~~**(d) Filing.** A party must file with the court a copy of any paper the party is required to serve. A paper must be filed in a manner provided for in a civil action.~~

~~**(e) Electronic Service and Filing.** A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed. A paper filed electronically in compliance with a local rule is written or in writing under these rules.~~

Committee Note

Rule 49 previously required service and filing in a "manner provided" in "a civil action." The amendments to Rule 49 move the instructions for filing and service from the Civil Rules into Rule 49. Placing instructions for filing and service in the criminal rule avoids the need to refer to two sets of rules, and permits independent development of those rules. Except where specifically noted, the amendments are intended to carry over the existing law on

filing and service and to preserve parallelism with the Civil Rules.

Additionally, the amendments eliminate the provision permitting electronic filing only when authorized by local rules, moving—with the Rules governing Appellate, Civil, and Bankruptcy proceedings—to a national rule that mandates electronic filing for parties represented by an attorney with certain exceptions. Electronic filing has matured. Most districts have adopted local rules that require electronic filing by represented parties, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts for a party represented by an attorney, except that nonelectronic filing may be allowed by the court for good cause, or allowed or required by local rule.

Rule 49(a)(1). The language from former Rule 49(a) is retained in new Rule 49(a)(1), except for one change. The new phrase, "Each of the following must be served on every party" restores to this part of the rule the passive construction that it had prior to restyling in 2002. That restyling revised the language to apply to parties only, inadvertently ending its application to nonparties who, on occasion, file motions in criminal cases. Additional guidance for nonparties appears in new subdivision (c).

Rule 49(a)(2). The language from former Rule 49(b) concerning service on the attorney of a represented party is retained here, with the "unless" clause moved to the beginning for reasons of style only.

Rule 49(a)(3) and (4). Subsections (a)(3) and (4) list the permissible means of service. These new provisions duplicate the description of permissible means from Civil Rule 5, carrying them into the criminal rule.

By listing service by filing with the court's electronic-filing system first, in (3)(A), the rule now recognizes the advantages of electronic filing and service and its widespread use in criminal cases by represented defendants and government attorneys.

But the e-filing system is designed for attorneys, and its use can pose many challenges for pro se parties. In the criminal context, the rules must ensure ready access to the courts by all pro se defendants and incarcerated individuals, filers who often lack reliable access to the internet or email. Although access to electronic filing systems may expand with time, presently many districts do not allow e-filing by unrepresented defendants or prisoners. Accordingly, subsection (3)(A) provides that represented parties may serve registered users by filing with the court's electronic-filing system, but unrepresented parties may do so only if allowed by court order or local rule.

Subparagraph (3)(B) permits service by "other electronic means," such as email, that the person served consented to in writing.

Both subparagraphs (3)(A) and (B) include the direction from Civil Rule 5 that service is complete upon e-filing or transmission, but is not effective if the serving party learns that the person to be served did not receive the notice of e-filing or the paper transmitted by other electronic means. The language mirrors Civil Rule 5(b)(2)(E). But unlike Civil Rule 5, Criminal Rule 49 contains a separate provision for service by use of the court's electronic filing system.

Subsection (a)(4) lists a number of traditional, nonelectronic means of serving papers, identical to those provided in Civil Rule 5.

Rule 49(b)(1). Filing rules in former Rule 49 appeared in subdivision (d), which provided that a party must file a copy of any paper the party is required to serve, and required filing in a manner provided in a civil action. These requirements now appear in subdivision (b).

The language requiring filing of papers that must be served is retained from former subdivision (d), but has been moved to subsection (1) of subdivision (b), and revised to restore the passive phrasing prior to the restyling in 2002. That restyling departed from the phrasing in Civil Rule 5(d)(1) and inadvertently limited this requirement to filing by parties.

The language in former subdivision (d) that required filing "in a manner provided for in a civil action" has been replaced in new subsection (b)(1) by language drawn from Civil Rule 5(d)(1). That provision used to state "Any paper . . . that is required to be served—together with a certificate of service—must be filed within a reasonable time after service." A contemporaneous amendment to Civil Rule 5(d)(1) has subdivided this provision into two parts, one of which addresses the Certificate of Service. Although the Criminal Rules version is not subdivided in the same way, it is intended to have the same meaning as the Civil Rules provision from which it was drawn.

The last sentence of subsection (b)(1), which states that a notice of electronic filing constitutes a certificate of service on a party served by using the court's electronic-filing system, mirrors the contemporaneous amendment to Civil Rule 5. When service is not made by filing with the court's electronic-filing system, a certificate of service must be filed.

Rule 49(b)(2). New subsection (b)(2) lists the three ways papers can be filed. (A) provides for electronic filing

using the court's electronic-filing system and includes a provision, drawn from the Civil Rule, stating that the user name and password of an attorney of record serves as the attorney's signature. The last sentence of subsection (b)(2)(A) contains the language of former Rule 49(d), providing that e-filed papers are "written or in writing," deleting the words "in compliance with a local rule" as no longer necessary.

Subsection (b)(2)(B) carries over from the Civil Rule two nonelectronic methods of filing a paper: delivery to the court clerk and delivery to a judge who agrees to accept it for filing.

Rule 49(b)(3). New subsection (b)(3) provides instructions for parties regarding the means of filing to be used, depending upon whether the party is represented by an attorney. Subsection (b)(3)(A) requires represented parties to use the court's electronic-filing system, but provides that nonelectronic filing may be allowed for good cause, and may be required or allowed for other reasons by local rule. This language is identical to that adopted in the contemporaneous amendment to Civil Rule 5.

Subsection (b)(3)(B) requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule. This language differs from that of the amended Civil Rule, which provides that an unrepresented party may be "required" to file electronically by a court order or local rule that allows reasonable exceptions. A different approach to electronic filing by unrepresented parties is needed in criminal cases, where electronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic

confirmations, yet must be provided access to the courts under the Constitution.

Rule 49(b)(4). This new language requiring a signature and additional information was drawn from Civil Rule 11(a). The language has been restyled (with no intent to change the meaning) and the word "party" changed to "person" in order to accommodate filings by nonparties.

Rule 49(b)(5). This new language prohibiting a clerk from refusing a filing for improper form was drawn from Civil Rule 5(d)(4).

Rule 49(c). This provision is new. It recognizes that in limited circumstances nonparties may file motions in criminal cases. Examples include representatives of the media challenging the closure of proceedings, material witnesses requesting to be deposed under Rule 15, or victims asserting rights under Rule 60. Subdivision (c) permits nonparties to file a paper in a criminal case, but only when required or permitted by law to do so. It also requires nonparties who file to serve every party and to use means authorized by subdivision (a).

The rule provides that nonparties, like unrepresented parties, may use the court's electronic-filing system only when permitted to do so by court order or local rule.

Rule 49(d). This provision carries over the language formerly in Rule 49(c) with one change. The former language requiring that notice be provided "in a manner provided for in a civil action" has been replaced by a requirement that notice be served as required by Rule 49(a). This parallels Civil Rule 77(d)(1), which requires that the clerk give notice as provided in Civil Rule 5(d).

"ELECTRONIC FILING AND SERVICE" RULES*

Appellate Rule 25[1]

Rule 25. Filing and Service

(a) Filing.

(1) **Filing with the Clerk.** A paper required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) **Filing: Method and Timeliness**.

(A) **Nonelectronic Filing**

~~(A)~~(i) **In general.** ~~Filing~~For a paper not filed electronically, filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing.

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

[1] This proposal also appears *supra* pp. 27–37.

~~(B)~~(ii) **A brief or appendix.** A brief or appendix not filed electronically is timely filed, however, if on or before the last day for filing, it is:

~~(i)~~• mailed to the clerk by ~~First-Class Mail~~first-class mail, or other class of mail that is at least as expeditious, postage prepaid; or

~~(ii)~~• dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

~~(C)~~(iii) **Inmate filing.** A paper ~~filed~~not filed electronically by an inmate confined in an institution is timely if deposited in the

institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

~~(D) **Electronic filing.** A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical~~

~~standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.~~

(B) **Electronic Filing and Signing.**

(i) **By a Represented Person—Generally Required; Exceptions.** A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(ii) **By an Unrepresented Person—When Allowed or Required.** A person not represented by an attorney:

- may file electronically only if allowed by court order or by local rule; and
- may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(iii) **Signing.** 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.

(iv) **Same as Written Paper**. A paper filed electronically is a written paper for purposes of these rules.

(3) **Filing a Motion with a Judge.** If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and give it to the clerk.

(4) **Clerk's Refusal of Documents.** The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.

(5) **Privacy Protection.** An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

(b) Service of All Papers Required. Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) Manner of Service.

(1) ~~Service~~Nonelectronic service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail; or

(C) by third-party commercial carrier for delivery within 3 days~~; or~~.

~~(D) by electronic means, if the party being served consents in writing.~~

(2) ~~If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D)~~ Electronic 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.

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a ~~party~~person must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on ~~transmission~~filing or sending, unless the ~~party~~person making service is notified that the paper was not received by the ~~party~~person served.

(d) Proof of Service.

(1) A paper presented for filing must contain either of the following if it was served other than through the court's electronic-filing system:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)~~(2)(B)~~(2)(A)(ii), the proof of service

must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

(e) Number of Copies. When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

Committee Note

The amendments conform Rule 25 to the amendments to Federal Rule of Civil Procedure 5 on electronic filing, signature, service, and proof of service. They establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule. The amendments establish national rules regarding the methods of signing and serving electronic documents in Rule 25(a)(2)(B)(iii) and 25(c)(2). The amendments dispense with the requirement of proof of service for electronic filings in Rule 25(d)(1).

Bankruptcy Rule 5005[2]

Rule 5005. Filing and Transmittal of Papers

(a) FILING.

* * * * *

(2) *Electronic Filing and Signing~~by Electronic Means~~.*

(A) *By a Represented Entity—Generally Required; Exceptions.*~~A court may by local rule permit or require documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes.~~ An entity represented by an attorney shall file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.~~A local rule~~

[2] This proposal also appears *supra* pp. 75–78.

~~may require filing by electronic means only if reasonable exceptions are allowed.~~

(B) *By an Unrepresented Individual—When Allowed or Required.* An individual not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule; and

(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(C) *Signing.* 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.

(D) *Same as a Written Paper.* A paper ~~document~~filed electronically~~by electronic means~~

~~in compliance with a local rule constitutes~~ is a written paper for ~~the~~purpose~~s~~ of ~~applying~~these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.

* * * * *

Committee Note

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts, except for filings made by an individual not represented by an attorney. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons.

Filings by an individual not represented by an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic

filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication.

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.

Civil Rule 5[3]

Rule 5. Serving and Filing Pleadings and Other Papers

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(b) Service: How Made.

* * * * *

(2) *Service in General.* A paper is served under this rule by:

(A) handing it to the person;

* * * * *

(E) sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means ~~if~~that the person consented to in writing—in either of which events service is complete upon ~~transmission~~filing or sending, but is not effective if the ~~serving party~~filer or

[3] This proposal also appears *supra* pp. 203–10.

sender learns that it did not reach the person to be served; or

* * * * *

~~**(3)** *Using Court Facilities.* If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).~~ [Abrogated (Apr. __, 2018, eff. Dec. 1, 2018).]

* * * * *

(d) Filing.

(**1**) ***Required Filings; Certificate of Service.***

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served ~~-- together with a certificate of service --~~ must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following

discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

(B) *Certificate.* A certificate of service must be filed within a reasonable time after service, but a notice of electronic filing constitutes a certificate of service on any person served by the court's electronic-filing system.

* * * * *

(2) ***Nonelectronic Filing*** ~~***How Filing is Made In General.***~~ A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) ***Electronic Filing~~,~~ and Signing~~, or Verification~~.*** ~~A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed.~~

(A) *By a Represented Person—Generally Required; Exceptions.* A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) *By an Unrepresented Person—When Allowed or Required.* A person not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule; and

(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(C) *Signing.* 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.

(D) *Same as a Written Paper.* A paper filed electronically ~~in compliance with a local rule~~ is a written paper for purposes of these rules.

* * * * *

Committee Note

Rule 5 is amended to reflect the widespread transition to electronic filing and service. Almost all filings by represented parties are now made with the court's electronic-filing system.

Subdivision (b). Rule 5(b) is amended to revise the provisions for electronic service. Provision for electronic service was first made when electronic communication was not as widespread or as fully reliable as it is now. Consent of the person served to receive service by electronic means was required as a safeguard. Those concerns have substantially diminished, but have not disappeared entirely, particularly as to persons not represented by an attorney.

The amended rule recognizes electronic service on a registered user who has appeared in the action by filing with the court's electronic-filing system. A court may choose to allow registration only with the court's permission. But a party who registers will be subject to service by filing with the court's system unless the court provides otherwise. With the consent of the person served, electronic service also may be made by means that do not use the court's system. Consent can be limited to service at a prescribed address or in a specified form, and may be limited by other conditions.

Because Rule 5(b)(2)(E) now authorizes service on a registered user by filing with the court's electronic-filing system as a uniform national practice, Rule 5(b)(3) is abrogated. It is no longer necessary to rely on local rules to authorize such service.

Subdivision (d). Amended Rule 5(d)(1) provides that a notice of electronic filing generated by the court's electronic-filing system is a certificate of service on any person served by the court's electronic-filing system. But if the serving party learns that the paper did not reach the party to be served, there is no service under Rule 5(b)(2)(E) and there is no certificate of the (nonexistent) service.

When service is not made by filing with the court's electronic-filing system, a certificate of service must be filed and should specify the date as well as the manner of service.

Amended Rule 5(d)(3) recognizes increased reliance on electronic filing. Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it generally mandatory in all districts for a person represented by an attorney. But exceptions continue to be available. Nonelectronic filing must be allowed for good cause. And a local rule may allow or require nonelectronic filing for other reasons.

Filings by a person not represented by an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to

the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication. Room is also left for a court to require electronic filing by a pro se litigant by court order or by local rule. Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant. In the beginning, this authority is likely to be exercised only to support special programs, such as one requiring e-filing in collateral proceedings by pro se prisoners.

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.

Criminal Rule 49[4]

Rule 49. Serving and Filing Papers

(a) Service on a Party.

(1) What is~~When~~ Required. ~~A party must serve on every other party~~Each of the following must be served on every party: any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.

~~**(b) How Made.** Service must be made in the manner provided for a civil action.~~

(2) Serving a Party's Attorney. Unless the court orders otherwise, ~~W~~when these rules or a court order requires or permits service on a party represented by an attorney, service must be made

[4] This proposal also appears *supra* pp. 257–69.

on the attorney instead of the party~~, unless the court orders otherwise~~.

(3) *Service by Electronic Means*.

(A) *Using the Court's Electronic Filing System*. A party represented by an attorney may serve a paper on a registered user by filing it with the court's electronic-filing system. A party not represented by an attorney may do so only if allowed by court order or local rule. Service is complete upon filing, but is not effective if the serving party learns that it did not reach the person to be served.

(B) *Using Other Electronic Means*. A paper may be served by any other electronic means that the person consented to in writing. Service is complete upon transmission, but is not effective if the

serving party learns that it did not reach the person to be served.

(4) ***Service by Nonelectronic Means***. A paper may be served by:

(A) handing it to the person;

(B) leaving it:

(i) at the person’s office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person’s dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address—in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address; or

(E) delivering it by any other means that the person consented to in writing—in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(b) Filing.

(1) ***When Required; Certificate of Service.*** Any paper that is required to be served—together with a certificate of service—must be filed within a reasonable time after service. A notice of electronic filing constitutes a certificate of

service on any person served by the court's electronic-filing system.

(2) *Means of Filing.*

(A) *Electronically.* A paper is filed electronically by filing it with the court's electronic-filing system. 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. A paper filed electronically is written or in writing under these rules.

(B) *Nonelectronically.* A paper not filed electronically is filed by delivering it:

(i) to the clerk; or

(ii) to a judge who agrees to accept it for filing, and who must then note the

filing date on the paper and promptly send it to the clerk.

(3) *Means Used by Represented and Unrepresented Parties.*

(A) *Represented Party.* A party represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) *Unrepresented Party.* A party not represented by an attorney must file nonelectronically, unless allowed to file electronically by court order or local rule.

(4) *Signature.* Every written motion and other paper must be signed by at least one attorney of record in the attorney's name—or by a person filing a paper if the person is not represented by

an attorney. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or person's attention.

(5) ***Acceptance by the Clerk.*** The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

(c) **Service and Filing by Nonparties.** A nonparty may serve and file a paper only if doing so is required or permitted by law. A nonparty must serve every party as required by Rule 49(a), but may use the court's

electronic-filing system only if allowed by court order or local rule.

(d) Notice of a Court Order. When the court issues an order on any post-arraignment motion, the clerk must ~~provide notice in a manner provided for in a civil action~~ serve notice of the entry on each party as required by Rule 49(a). A party also may serve notice of the entry by the same means. Except as Federal Rule of Appellate Procedure 4(b) provides otherwise, the clerk's failure to give notice does not affect the time to appeal, or relieve—or authorize the court to relieve—a party's failure to appeal within the allowed time.

~~**(d) Filing.** A party must file with the court a copy of any paper the party is required to serve. A paper must be filed in a manner provided for in a civil action.~~

~~**(e) Electronic Service and Filing.** A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed. A paper filed electronically in compliance with a local rule is written or in writing under these rules.~~

Committee Note

Rule 49 previously required service and filing in a "manner provided" in "a civil action." The amendments to Rule 49 move the instructions for filing and service from the Civil Rules into Rule 49. Placing instructions for filing and service in the criminal rule avoids the need to refer to two sets of rules, and permits independent development of those rules. Except where specifically noted, the amendments are intended to carry over the existing law on filing and service and to preserve parallelism with the Civil Rules.

Additionally, the amendments eliminate the provision permitting electronic filing only when authorized by local rules, moving—with the Rules governing Appellate, Civil, and Bankruptcy proceedings—to a national rule that mandates electronic filing for parties represented by an

attorney with certain exceptions. Electronic filing has matured. Most districts have adopted local rules that require electronic filing by represented parties, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts for a party represented by an attorney, except that nonelectronic filing may be allowed by the court for good cause, or allowed or required by local rule.

Rule 49(a)(1). The language from former Rule 49(a) is retained in new Rule 49(a)(1), except for one change. The new phrase, "Each of the following must be served on every party" restores to this part of the rule the passive construction that it had prior to restyling in 2002. That restyling revised the language to apply to parties only, inadvertently ending its application to nonparties who, on occasion, file motions in criminal cases. Additional guidance for nonparties appears in new subdivision (c).

Rule 49(a)(2). The language from former Rule 49(b) concerning service on the attorney of a represented party is retained here, with the "unless" clause moved to the beginning for reasons of style only.

Rule 49(a)(3) and (4). Subsections (a)(3) and (4) list the permissible means of service. These new provisions duplicate the description of permissible means from Civil Rule 5, carrying them into the criminal rule.

By listing service by filing with the court's electronic-filing system first, in (3)(A), the rule now recognizes the advantages of electronic filing and service and its

widespread use in criminal cases by represented defendants and government attorneys.

But the e-filing system is designed for attorneys, and its use can pose many challenges for pro se parties. In the criminal context, the rules must ensure ready access to the courts by all pro se defendants and incarcerated individuals, filers who often lack reliable access to the internet or email. Although access to electronic filing systems may expand with time, presently many districts do not allow e-filing by unrepresented defendants or prisoners. Accordingly, subsection (3)(A) provides that represented parties may serve registered users by filing with the court's electronic-filing system, but unrepresented parties may do so only if allowed by court order or local rule.

Subparagraph (3)(B) permits service by "other electronic means," such as email, that the person served consented to in writing.

Both subparagraphs (3)(A) and (B) include the direction from Civil Rule 5 that service is complete upon e-filing or transmission, but is not effective if the serving party learns that the person to be served did not receive the notice of e-filing or the paper transmitted by other electronic means. The language mirrors Civil Rule 5(b)(2)(E). But unlike Civil Rule 5, Criminal Rule 49 contains a separate provision for service by use of the court's electronic filing system.

Subsection (a)(4) lists a number of traditional, nonelectronic means of serving papers, identical to those provided in Civil Rule 5.

Rule 49(b)(1). Filing rules in former Rule 49 appeared in subdivision (d), which provided that a party must file a copy of any paper the party is required to serve, and required filing in a manner provided in a civil action. These requirements now appear in subdivision (b).

The language requiring filing of papers that must be served is retained from former subdivision (d), but has been moved to subsection (1) of subdivision (b), and revised to restore the passive phrasing prior to the restyling in 2002. That restyling departed from the phrasing in Civil Rule 5(d)(1) and inadvertently limited this requirement to filing by parties.

The language in former subdivision (d) that required filing "in a manner provided for in a civil action" has been replaced in new subsection (b)(1) by language drawn from Civil Rule 5(d)(1). That provision used to state "Any paper . . . that is required to be served—together with a certificate of service—must be filed within a reasonable time after service." A contemporaneous amendment to Civil Rule 5(d)(1) has subdivided this provision into two parts, one of which addresses the Certificate of Service. Although the Criminal Rules version is not subdivided in the same way, it is intended to have the same meaning as the Civil Rules provision from which it was drawn.

The last sentence of subsection (b)(1), which states that a notice of electronic filing constitutes a certificate of service on a party served by using the court's electronic-filing system, mirrors the contemporaneous amendment to Civil Rule 5. When service is not made by filing with the court's electronic-filing system, a certificate of service must be filed.

Rule 49(b)(2). New subsection (b)(2) lists the three ways papers can be filed. (A) provides for electronic filing using the court's electronic-filing system and includes a provision, drawn from the Civil Rule, stating that the user name and password of an attorney of record serves as the attorney's signature. The last sentence of subsection (b)(2)(A) contains the language of former Rule 49(d), providing that e-filed papers are "written or in writing," deleting the words "in compliance with a local rule" as no longer necessary.

Subsection (b)(2)(B) carries over from the Civil Rule two nonelectronic methods of filing a paper: delivery to the court clerk and delivery to a judge who agrees to accept it for filing.

Rule 49(b)(3). New subsection (b)(3) provides instructions for parties regarding the means of filing to be used, depending upon whether the party is represented by an attorney. Subsection (b)(3)(A) requires represented parties to use the court's electronic-filing system, but provides that nonelectronic filing may be allowed for good cause, and may be required or allowed for other reasons by local rule. This language is identical to that adopted in the contemporaneous amendment to Civil Rule 5.

Subsection (b)(3)(B) requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule. This language differs from that of the amended Civil Rule, which provides that an unrepresented party may be "required" to file electronically by a court order or local rule that allows reasonable exceptions. A different approach to electronic filing by unrepresented parties is needed in criminal cases, where

electronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic confirmations, yet must be provided access to the courts under the Constitution.

Rule 49(b)(4). This new language requiring a signature and additional information was drawn from Civil Rule 11(a). The language has been restyled (with no intent to change the meaning) and the word "party" changed to "person" in order to accommodate filings by nonparties.

Rule 49(b)(5). This new language prohibiting a clerk from refusing a filing for improper form was drawn from Civil Rule 5(d)(4).

Rule 49(c). This provision is new. It recognizes that in limited circumstances nonparties may file motions in criminal cases. Examples include representatives of the media challenging the closure of proceedings, material witnesses requesting to be deposed under Rule 15, or victims asserting rights under Rule 60. Subdivision (c) permits nonparties to file a paper in a criminal case, but only when required or permitted by law to do so. It also requires nonparties who file to serve every party and to use means authorized by subdivision (a).

The rule provides that nonparties, like unrepresented parties, may use the court's electronic-filing system only when permitted to do so by court order or local rule.

Rule 49(d). This provision carries over the language formerly in Rule 49(c) with one change. The former language requiring that notice be provided "in a manner

provided for in a civil action" has been replaced by a requirement that notice be served as required by Rule 49(a). This parallels Civil Rule 77(d)(1), which requires that the clerk give notice as provided in Civil Rule 5(d).

Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees

(as codified in *Guide to Judiciary Policy*, Vol. 1, § 440)

§ 440 Procedures for Committees on Rules of Practice and Procedure

This section contains the "Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees," last amended in September 2011. JCUS-SEP 2011, p. 35.

§ 440.10 Overview

The Rules Enabling Act, 28 U.S.C. §§ 2071–2077, authorizes the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for the federal courts. Under the Act, the Judicial Conference must appoint a standing committee, and may appoint advisory committees to recommend new and amended rules. Section 2073 requires the Judicial Conference to publish the procedures that govern the work of the Committee on Rules of Practice and Procedure (the "Standing Committee") and its advisory committees on the Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure and on the Evidence Rules. *See* 28 U.S.C. § 2073(a)(1). These procedures do not limit the rules committees' authority. Failure to comply with them does not invalidate any rules committee action. *Cf.* 28 U.S.C. § 2073(e).

§ 440.20 Advisory Committees

§ 440.20.10 Functions

Each advisory committee must engage in "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use" in its field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary. *See* 28 U.S.C. § 331.

§ 440.20.20 Suggestions and Recommendations

Suggestions and recommendations on the rules are submitted to the Secretary of the Standing Committee at the Administrative Office of the United States Courts, Washington, D.C. The Secretary will acknowledge the suggestions or recommendations and refer them to the appropriate advisory committee. If the Standing Committee takes formal action on them, that action will be reflected in the Standing Committee's minutes, which are posted on the judiciary's rulemaking website.

§ 440.20.30 Drafting Rule Changes

(a) Meetings

Each advisory committee meets at the times and places that the chair designates. Advisory committee meetings must be open to the public, except when the committee — in open session and with a majority present — determines that it is in the public interest to have all or part of the meeting closed and states the reason. Each meeting must be preceded by notice of the time and place, published in the *Federal Register* and on the judiciary's rulemaking website, sufficiently in advance to permit interested persons to attend.

(b) Preparing Draft Changes

The reporter assigned to each advisory committee should prepare for the committee, under the direction of the committee or its chair, draft rule changes, committee notes explaining their purpose, and copies or summaries of written recommendations and suggestions received by the committee.

(c) Considering Draft Changes

The advisory committee studies the rules' operation and effect. It meets to consider proposed new and amended rules (together with committee notes), whether changes should be made, and whether they should be submitted to the Standing Committee with a recommendation to approve for publication. The submission must be accompanied by a written report explaining the advisory committee's action and its evaluation of competing considerations.

§ 440.20.40 Publication and Public Hearings

(a) Publication

Before any proposed rule change is published, the Standing Committee must approve publication. The Secretary then arranges for printing and circulating the proposed change to the bench, bar, and public. Publication should be as wide as possible. The proposed change must be published in the *Federal Register* and on the judiciary's rulemaking website. The Secretary must:

(1) notify members of Congress, federal judges, and the chief justice of each state's highest court of the proposed change, with a link to the judiciary's rulemaking website; and

(2) provide copies of the proposed change to legal-publishing firms with a request to timely include it in publications.

(b) Public Comment Period

A public comment period on the proposed change must extend for at least six months after notice is published in the *Federal Register*, unless a shorter period is approved under paragraph (d) of this section.

(c) Hearings

The advisory committee must conduct public hearings on the proposed change unless eliminating them is approved under paragraph (d) of this section or not enough witnesses ask to testify at a particular hearing. The hearings are held at the times and places that the advisory committee's chair determines. Notice of the times and places must be published in the *Federal Register* and on the judiciary's rulemaking website. The hearings must be recorded. Whenever possible, a transcript should be produced by a qualified court reporter.

(d) Expedited Procedures

The Standing 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. The Standing Committee may also eliminate public notice and comment for a technical or conforming amendment if the Committee determines that they are unnecessary. When an exception is made, the chair must advise the Judicial Conference and provide the reasons.

§ 440.20.50 Procedures After the Comment Period

(a) Summary of Comments

When the public comment period ends, the reporter must prepare a summary of the written comments received and of the testimony presented at public hearings. If the number of comments is very large, the reporter may summarize and aggregate similar individual comments, identifying the source of each one.

(b) Advisory Committee Review; Republication

The advisory committee reviews the proposed change in light of any comments and testimony. If the advisory committee makes substantial changes, the proposed rule should be republished for an additional period of public comment unless the advisory committee determines that republication would not be necessary to achieve adequate public comment and would not assist the work of the rules committees.

(c) Submission to the Standing Committee

The advisory committee submits to the Standing Committee the proposed change and committee note that it recommends for approval. Each submission must:

(1) be accompanied by a separate report of the comments received;

(2) explain the changes made after the original publication; and

(3) include an explanation of competing considerations examined by the advisory committee.

§ 440.20.60 Preparing Minutes and Maintaining Records

(a) Minutes of Meetings

The advisory committee's chair arranges for preparing the minutes of the committee meetings.

(b) Records

The advisory committee's records consist of:

- written suggestions received from the public;
- written comments received from the public on drafts of proposed rules;
- the committee's responses to public suggestions and comments;
- other correspondence with the public about proposed rule changes;
- electronic recordings and transcripts of public hearings (when prepared);
- the reporter's summaries of public comments and of testimony from public hearings;
- agenda books and materials prepared for committee meetings;
- minutes of committee meetings;

- approved drafts of rule changes; and
- reports to the Standing Committee.

(c) Public Access to Records

The records must be posted on the judiciary's rulemaking website, except for general public correspondence about proposed rule changes and electronic recordings of hearings when transcripts are prepared. This correspondence and archived records are maintained by the Administrative Office of the United States Courts and are available for public inspection. Minutes of a closed meeting may be made available to the public but with any deletions necessary to avoid frustrating the purpose of closing the meeting under § 440.20.30(a).

§ 440.30 Standing Committee

§ 440.30.10 Functions

The Standing Committee's functions include:

(a) coordinating the work of the advisory committees;

(b) suggesting proposals for them to study;

(c) considering proposals they recommend for publication for public comment; and

(d) for proposed rule changes that have completed that process, deciding whether to accept or modify the proposals and transmit them with its own recommendation to the Judicial Conference, recommit them to the advisory committee for further study and consideration, or reject them.

§ 440.30.20 Procedures

(a) Meetings

The Standing Committee meets at the times and places that the chair designates. Committee meetings must be open to the public, except when the Committee — in open session and with a majority present — determines that it is in the public interest to have all or part of the meeting closed and states the reason. Each meeting must be preceded by notice of the time and place, published in the *Federal Register* and on the judiciary's rulemaking website, sufficiently in advance to permit interested persons to attend.

(b) Attendance by the Advisory Committee Chairs and Reporters

The advisory committees' chairs and reporters should attend the Standing Committee meetings to present their committees' proposed rule changes and committee notes, to inform the Standing Committee about ongoing work, and to participate in the discussions.

(c) Action on Proposed Rule Changes or Committee Notes

The Standing Committee may accept, reject, or modify a proposed change or committee note, or may return the proposal to the advisory committee with instructions or recommendations.

(d) Transmission to the Judicial Conference

The Standing Committee must transmit to the Judicial Conference the proposed rule changes and committee notes that it approves, together with the advisory committee report. The Standing Committee's report includes its own recommendations and explains any changes that it made.

§ 440.30.30 Preparing Minutes and Maintaining Records

(a) Minutes of Meetings

The Secretary prepares minutes of Standing Committee meetings.

(b) Records

The Standing Committee's records consist of:

- the minutes of Standing Committee and advisory committee meetings;
- agenda books and materials prepared for Standing Committee meetings;
- reports to the Judicial Conference; and
- official correspondence about rule changes, including correspondence with advisory committee chairs.

(c) Public Access to Records

The records must be posted on the judiciary's rulemaking website, except for official correspondence about rule changes. This correspondence and archived records are maintained by the Administrative Office of the United

States Courts and are available for public inspection. Minutes of a closed meeting may be made available to the public but with any deletions necessary to avoid frustrating the purpose of closing the meeting under § 440.30.20(a).

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