April 28, 2016

Honorable Paul D. Ryan
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are the following materials submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 9, 2015; a redline version of the rules with Committee Notes; an excerpt from the September 2015 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 4, 2015 Report of the Advisory Committee on Appellate Rules.

Sincerely,

/s/ John G. Roberts

April 28, 2016

Honorable Joseph R. Biden, Jr.
President, United States Senate
Washington, D.C. 20510

Dear Mr. President:

I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are the following materials submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 9, 2015; a redline version of the rules with Committee Notes; an excerpt from the September 2015 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 4, 2015 Report of the Advisory Committee on Appellate Rules.

Sincerely,

/s/ John G. Roberts

Corrected April 28, 2016

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6, new Form 7 and new Appendix.

[*See infra* pp. __ __ __.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2016, and shall govern in all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

* * * * *

(4) **Effect of a Motion on a Notice of Appeal.**

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those 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) 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 4(c)(1). If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing 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 court of appeals exercises its discretion to permit the later filing of a declaration or

notarized statement that satisfies Rule 4(c)(1)(A)(i).

* * * * *

Rule 5. Appeal by Permission

* * * * *

(c) Form of Papers; Number of Copies; Length Limits. All papers must conform to Rule 32(c)(2). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case. Except by the court's permission, and excluding the accompanying documents required by Rule 5(b)(1)(E):

(1) a paper produced using a computer must not exceed 5,200 words; and

(2) a handwritten or typewritten paper must not exceed 20 pages.

* * * * *

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

* * * * *

(d) Form of Papers; Number of Copies; Length Limits. All papers must conform to Rule 32(c)(2). An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. Except by the court's permission, and excluding the accompanying documents required by Rule 21(a)(2)(C):

(1) a paper produced using a computer must not exceed 7,800 words; and

(2) a handwritten or typewritten paper must not exceed 30 pages.

Rule 25. Filing and Service

(a) Filing.

* * * * *

(2) **Filing: 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 25(a)(2)(C). A paper filed by an inmate is timely if it is deposited in the institution's internal mail system on or before the last day for filing 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 paper was so deposited and that postage was prepaid; or

(ii) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 25(a)(2)(C)(i).

* * * * *

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

* * * * *

(4) **''Last Day'' Defined.** Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing in the district court, at midnight in the court's time zone;

(B) for electronic filing in the court of appeals, at midnight in the time zone of the circuit clerk's principal office;

(C) for filing under Rules 4(c)(1), 25(a)(2)(B), and 25(a)(2)(C)—and filing by mail under Rule 13(a)(2)—at the latest time for the

method chosen for delivery to the post office, third-party commercial carrier, or prison mailing system; and

(D) for filing by other means, when the clerk's office is scheduled to close.

* * * * *

(c) Additional Time after Certain Kinds of Service. When a party may or must act within a specified time after being served, 3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is treated as delivered on the date of service stated in the proof of service.

Rule 27. Motions

* * * * *

(d) Form of Papers; Length Limits; Number of Copies.

* * * * *

(2) **Length Limits.** Except by the court's permission, and excluding the accompanying documents authorized by Rule 27(a)(2)(B):

(A) a motion or response to a motion produced using a computer must not exceed 5,200 words;

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

(C) a reply produced using a computer must not exceed 2,600 words; and

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

* * * * *

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

* * * * *

(10) the certificate of compliance, if required by Rule 32(g)(1).

* * * * *

Rule 28.1. Cross-Appeals

* * * * *

(e) Length.

(1) **Page Limitation.** Unless it complies with Rule 28.1(e)(2), 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:

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

(ii) 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:

(i) contains no more than 15,300 words; or

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

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

* * * * *

Rule 29. Brief of an Amicus Curiae

(a) During Initial Consideration of a Case on the Merits.

(1) **Applicability.** This Rule 29(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.

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

(A) the movant's interest; and

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

(4) **Contents and Form.** An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following:

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

(B) a table of contents, with page references;

(C) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—

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

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

(E) unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), a statement that indicates whether:

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

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

(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;

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

(G) a certificate of compliance under Rule 32(g)(1), if length is computed using a word or line limit.

(5) **Length.** Except by the court's permission, an amicus brief may 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.

(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 or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

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

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

(b) During Consideration of Whether to Grant Rehearing.

(1) **Applicability.** This Rule 29(b) governs amicus filings during a court's consideration of whether to grant panel rehearing or rehearing en banc, 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-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.

(3) **Motion for Leave to File.** Rule 29(a)(3) applies to a motion for leave.

(4) **Contents**, **Form**, **and Length**. Rule 29(a)(4) applies to the amicus brief. The brief must not exceed 2,600 words.

(5) **Time for Filing.** An amicus curiae supporting the petition 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 petition is filed. An amicus curiae opposing the petition must file its brief, accompanied by a motion for filing when necessary, no later than the date set by the court for the response.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

* * * * *

(7) **Length.**

(A) **Page Limitation.** A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B).

(B) **Type-Volume Limitation.**

(i) A principal brief is acceptable if it:

- contains no more than 13,000 words; or
- uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type

volume specified in Rule 32(a)(7)(B)(i).

* * * * *

(e) Local Variation. Every court of appeals must accept documents that comply with the form requirements of this rule and the length limits set by these rules. By local rule or order in a particular case, a court of appeals may accept documents that do not meet all the form requirements of this rule or the length limits set by these rules.

(f) 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.

(g) Certificate of Compliance.

(1) **Briefs and Papers That Require a Certificate.** A brief submitted under Rules 28.1(e)(2), 29(b)(4), or 32(a)(7)(B)—and a paper submitted under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A), 27(d)(2)(C), 35(b)(2)(A), or 40(b)(1)—must include a certificate by the attorney, or an unrepresented party, that the document 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 document. The certificate must state the number of words—or the number of lines of monospaced type—in the document.

(2) **Acceptable Form.** Form 6 in the Appendix of Forms meets the requirements for a certificate of compliance.

Rule 35. En Banc Determination

* * * * *

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc.

* * * * *

(2) Except by the court's permission:

(A) a petition for an en banc hearing or rehearing produced using a computer must not exceed 3,900 words; and

(B) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages.

(3) For purposes of the limits in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are

filed separately, unless separate filing is required by local rule.

* * * * *

Rule 40. Petition for Panel Rehearing

* * * * *

(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Except by the court's permission:

(1) a petition for panel rehearing produced using a computer must not exceed 3,900 words; and

(2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.

Form 1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court

United States District Court for the _____
District of _____
File Number _____

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

Notice is hereby given that ___(here name all parties taking the appeal)__, (plaintiffs) (defendants) in the above named case,* hereby appeal to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from an order (describing it)) entered in this action on the _____ day of _____, 20___.

(s) _____
Attorney for _____
Address:_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.*]

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* See Rule 3(c) for permissible ways of identifying appellants.

Form 5. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court or a Bankruptcy Appellate Panel

United States District Court for the _____
District of _____

In re _____, Debtor _____, Plaintiff v. _____, Defendant	File No. _____

Notice of Appeal to United States Court of Appeals for the _____ Circuit

_____, the plaintiff [or defendant or other party] appeals to the United States Court of Appeals for the _____ Circuit from the final judgment [or order or decree] of the district court for the district of _____ [or bankruptcy appellate panel of the _____ circuit], entered in this case on _____, 20__ [here describe the judgment, order, or decree] _____

The parties to the judgment [or order or decree] appealed from and the names and addresses of their respective attorneys are as follows:

Dated _____
Signed _____
Attorney for Appellant
Address: _____
_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.*]

Form 6. Certificate of Compliance With Type-Volume Limit

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. App. P. [*insert Rule citation; e.g., 32(a)(7)(B)*]] [the word limit of Fed. R. App. P. [*insert Rule citation; e.g., 5(c)(1)*]] because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) [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. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(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 document 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].

(s)_____

Attorney for _____

Dated: _____

Form 7. Declaration of Inmate Filing

_____

[*insert name of court; for example, United States District Court for the District of Minnesota*]

A.B., Plaintiff v. C.D., Defendant	Case No. _____

I am an inmate confined in an institution. Today, _____ [*insert date*], I am depositing the _____ [*insert title of document; for example, "notice of appeal"*] in this case in the institution's internal mail system. First-class postage is being prepaid either by me or by the institution on my behalf.

I declare under penalty of perjury that the foregoing is true and correct (see 28 U.S.C. § 1746; 18 U.S.C. § 1621).

Sign your name here_____

Signed on _____ [*insert date*]

[***Note to inmate filers:*** *If your institution has a system designed for legal mail, you must use that system in order to receive the timing benefit of Fed. R. App. P. 4(c)(1) or Fed. R. App. P. 25(a)(2)(C).*]

Appendix:
Length Limits Stated in the
Federal Rules of Appellate Procedure

This chart summarizes the length limits stated in the Federal Rules of Appellate Procedure. Please refer to the rules for precise requirements, and bear in mind the following:

- In computing these limits, you can exclude the items listed in Rule 32(f).
- If you use a word limit or a line limit (other than the word limit in Rule 28(j)), you must file the certificate required by Rule 32(g).
- For the limits in Rules 5, 21, 27, 35, and 40:
  - 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.
- For the limits in Rules 28.1, 29(a)(5), and 32:
  - You may use the word limit or page limit, regardless of how you produce the document; or
  - You may use the line limit if you type or print your document with a monospaced typeface. A typeface is monospaced when each character occupies the same amount of horizontal space.

	Rule	Document type	Word limit	Page limit	Line limit
Permission to appeal	5(c)	• Petition for permission to appeal • Answer in opposition • Cross-petition	5,200	20	Not applicable

	Rule	Document type	Word limit	Page limit	Line limit
Extraordinary writs	21(d)	• Petition for writ of mandamus or prohibition or other extraordinary writ • Answer	7,800	30	Not applicable
Motions	27(d)(2)	• Motion • Response to a motion	5,200	20	Not applicable
	27(d)(2)	• Reply to a response to a motion	2,600	10	Not applicable
Parties' briefs (where no cross-appeal)	32(a)(7)	• Principal brief	13,000	30	1,300
	32(a)(7)	• Reply brief	6,500	15	650
Parties' briefs (where cross-appeal)	28.1(e)	• Appellant's principal brief • Appellant's response and reply brief	13,000	30	1,300
	28.1(e)	• Appellee's principal and response brief	15,300	35	1,500
	28.1(e)	• Appellee's reply brief	6,500	15	650
Party's supplemental letter	28(j)	• Letter citing supplemental authorities	350	Not applicable	Not applicable

	Rule	Document type	Word limit	Page limit	Line limit
Amicus briefs	29(a)(5)	• Amicus brief during initial consideration of case on merits	One-half the length set by the Appellate Rules for a party's principal brief	One-half the length set by the Appellate Rules for a party's principal brief	One-half the length set by the Appellate Rules for a party's principal brief
	29(b)(4)	• Amicus brief during consideration of whether to grant rehearing	2,600	Not applicable	Not applicable
Rehearing and en banc filings	35(b)(2) & 40(b)	• Petition for hearing en banc • Petition for panel rehearing; petition for rehearing en banc	3,900	15	Not applicable

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

October 9, 2015

MEMORANDUM

To: The Chief Justice of the United States and
Associate Justices of the Supreme Court

From: James C. Duff

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6 of the Federal Rules of Appellate Procedure, along with proposed new Form 7 and new Appendix, which were approved by the Judicial Conference at its September 2015 session. The Judicial Conference recommends that the amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) "clean" copies of the affected rules and forms incorporating the proposed amendments and accompanying Committee Notes; (ii) a redline version of the same; (iii) an excerpt from the September 2015 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the May 2015 Report of the Advisory Committee on the Federal Rules of Appellate Procedure.

Attachments

PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 4. Appeal as of Right—When Taken

* * * * *

(c) Appeal by an Inmate Confined in an Institution.

(1) <u>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 4(c)(1).</u> If an inmate ~~confined in an institution~~ files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail 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~~

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

~~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 court of appeals exercises its discretion to permit the later filing of a declaration or

31 notarized statement that satisfies

32 Rule 4(c)(1)(A)(i).

33 * * * * *

Committee Note

Rule 4(c)(1) is revised to streamline and clarify the operation of the inmate-filing rule.

The Rule requires the inmate to show timely deposit and prepayment of postage. The Rule 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. New Form 7 in the Appendix of Forms 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 court of appeals 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 inmate litigants are aware that a court will not necessarily forgive a failure to provide the declaration initially.

Rule 25. Filing and Service

(a) Filing.

* * * * *

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

* * * * *

(C) **Inmate F~~f~~iling.** 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 25(a)(2)(C). A paper 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 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.~~ 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 paper was so deposited and that postage was prepaid; or

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

34 declaration or notarized statement that

35 satisfies Rule 25(a)(2)(C)(i).

36 * * * * *

Committee Note

Rule 25(a)(2)(C) is revised to streamline and clarify the operation of the inmate-filing rule.

The Rule requires the inmate to show timely deposit and prepayment of postage. The Rule is amended to specify that a paper is timely if it is accompanied by a declaration or notarized statement stating the date the paper 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. New Form 7 in the Appendix of Forms sets out a suggested form of the declaration.

The amended rule also provides that a paper is timely without a declaration or notarized statement if other evidence accompanying the paper shows that the paper was deposited on or before the due date and that postage was prepaid. If the paper is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the court of appeals 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 inmate litigants are aware that a court will not necessarily forgive a failure to provide the declaration initially.

Form 1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court

United States District Court for the _____
District of _____
File Number _____

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

Notice is hereby given that ___(here name all parties taking the appeal)__, (plaintiffs) (defendants) in the above named case,* hereby appeal to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from an order (describing it)) entered in this action on the _____ day of _____, 20___.

(s) _____
Attorney for _____
Address:_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.*]

* See Rule 3(c) for permissible ways of identifying appellants.

Form 5. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court or a Bankruptcy Appellate Panel

United States District Court for the _____
District of _____

In re _____, Debtor _____, Plaintiff v. _____, Defendant	File No. _____

Notice of Appeal to United States Court of Appeals for the _____ Circuit

_____, the plaintiff [or defendant or other party] appeals to the United States Court of Appeals for the _____ Circuit from the final judgment [or order or decree] of the district court for the district of _____ [or bankruptcy appellate panel of the _____ circuit], entered in this case on _____, 20__ [here describe the judgment, order, or decree] _____

The parties to the judgment [or order or decree] appealed from and the names and addresses of their respective attorneys are as follows:

20 Dated _____
21 Signed _____
22 *Attorney for Appellant*
23 Address: _____
24 _____

25 [***Note to inmate filers:*** *If you are an inmate confined in an*
26 *institution and you seek the timing benefit of Fed. R. App.*
27 *P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing)*
28 *and file that declaration along with this Notice of Appeal.*]

Form 7. Declaration of Inmate Filing

_____

[*insert name of court; for example, United States District Court for the District of Minnesota*]

A.B., Plaintiff v. C.D., Defendant	Case No. _____

I am an inmate confined in an institution. Today, _____ [*insert date*], I am depositing the _____ [*insert title of document; for example, "notice of appeal"*] in this case in the institution's internal mail system. First-class postage is being prepaid either by me or by the institution on my behalf.

I declare under penalty of perjury that the foregoing is true and correct (see 28 U.S.C. § 1746; 18 U.S.C. § 1621).

Sign your name here_____

Signed on _____ [*insert date*]

[***Note to inmate filers:*** *If your institution has a system designed for legal mail, you must use that system in order to receive the timing benefit of Fed. R. App. P. 4(c)(1) or Fed. R. App. P. 25(a)(2)(C).*]

1 **Rule 4. Appeal as of Right—When Taken**

2 **(a) Appeal in a Civil Case.**

3 * * * * *

4 (4) **Effect of a Motion on a Notice of Appeal.**

5 (A) If a party ~~timely~~ files in the district court
6 any of the following motions under the
7 Federal Rules of Civil Procedure~~,~~ and
8 does so within the time allowed by those
9 rules—the time to file an appeal runs for all
10 parties from the entry of the order disposing
11 of the last such remaining motion:

12 * * * * *

Committee Note

A clarifying amendment is made to subdivision (a)(4). Former Rule 4(a)(4) provided that "[i]f a party timely files in the district 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 this provision, 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 Civil Rules will not qualify as a motion that, under Rule 4(a)(4)(A), 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 Civil 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.

Rule 5. Appeal by Permission

* * * * *

(c) Form of Papers; Number of Copies; Length Limits. All papers must conform to Rule 32(c)(2). ~~Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E).~~ An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case. Except by the court's permission, and excluding the accompanying documents required by Rule 5(b)(1)(E):

(1) a paper produced using a computer must not exceed 5,200 words; and

(2) a handwritten or typewritten paper must not exceed 20 pages.

18 * * * * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms 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 5(b)(1)(E) and any items listed in Rule 32(f).

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

* * * * *

(d) Form of Papers; Number of Copies; Length Limits. All papers must conform to Rule 32(c)(2). ~~Except by the court's permission, a paper must not exceed 30 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C).~~ An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. Except by the court's permission, and excluding the accompanying documents required by Rule 21(a)(2)(C):

(1) a paper produced using a computer must not exceed 7,800 words; and

17 (2) a handwritten or typewritten paper must not

18 exceed 30 pages.

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms 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 21(a)(2)(C) and any items listed in Rule 32(f).

Rule 27. Motions

* * * * *

(d) Form of Papers; Length Limits; ~~Page Limits; and~~ Number of Copies.

* * * * *

(2) **~~Page~~ Length Limits.** ~~A motion or a response to a motion must not exceed 20 pages, exclusive of the corporate disclosure statement and accompanying documents authorized by Rule 27(a)(2)(B), unless the court permits or directs otherwise. A reply to a response must not exceed 10 pages.~~Except by the court's permission, and excluding the accompanying documents authorized by Rule 27(a)(2)(B):

(A) a motion or response to a motion produced using a computer must not exceed 5,200 words;

18 (B) a handwritten or typewritten motion or
19 response to a motion must not exceed 20
20 pages;
21 (C) a reply produced using a computer must not
22 exceed 2,600 words; and
23 (D) a handwritten or typewritten reply to a
24 response must not exceed 10 pages.
25 * * * * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms 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 27(a)(2)(B) and any items listed in Rule 32(f).

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

* * * * *

(10) the certificate of compliance, if required by Rule ~~32(a)(7)~~32(g)(1).

* * * * *

Committee Note

Rule 28(a)(10) is revised to refer to Rule 32(g)(1) instead of Rule 32(a)(7), to reflect the relocation of the certificate-of-compliance requirement.

Rule 28.1. Cross-Appeals

* * * * *

(e) Length.

(1) **Page Limitation.** Unless it complies with Rule 28.1(e)(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:

(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:

(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 contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

~~(3) **Certificate of Compliance.** A brief submitted under Rule 28.1(e)(2) must comply with Rule 32(a)(7)(C).~~

* * * * *

Committee Note

When Rule 28.1 was adopted in 2005, it modeled its type-volume limits on those set forth in Rule 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.

In the course of adopting word limits for the length limits in Rules 5, 21, 27, 35, and 40, and responding to concern about the length of briefs, the Committee has reevaluated the conversion ratio (from pages to words) and decided to apply a conversion ratio of 260 words per page. Rules 28.1 and 32(a)(7)(B) are amended to reduce the word limits accordingly.

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.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

* * * * *

(7) **Length.**

(A) **Page Limitation.** A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B)~~ and (C)~~.

(B) **Type-Volume Limitation.**

(i) A principal brief is acceptable if it:

- ~~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 contains no more than half of the type

18 volume specified in Rule
19 32(a)(7)(B)(i).
20 ~~(iii) Headings, footnotes, and quotations~~
21 ~~count toward the word and line~~
22 ~~limitations. The corporate disclosure~~
23 ~~statement, table of contents, table of~~
24 ~~citations, statement with respect to~~
25 ~~oral argument, any addendum~~
26 ~~containing statutes, rules or~~
27 ~~regulations, and any certificates of~~
28 ~~counsel do not count toward the~~
29 ~~limitation.~~
30 ~~**(C) Certificate of compliance.**~~
31 ~~(i) A brief submitted under~~
32 ~~Rules 28.1(e)(2) or 32(a)(7)(B) must~~
33 ~~include a certificate by the attorney, or~~
34 ~~an unrepresented party, that the brief~~

35 ~~complies with the type-volume~~
36 ~~limitation. The person preparing the~~
37 ~~certificate may rely on the word or~~
38 ~~line count of the word-processing~~
39 ~~system used to prepare the brief. The~~
40 ~~certificate must state either:~~
41 ~~● the number of words in the brief;~~
42 ~~or~~
43 ~~● the number of lines of~~
44 ~~monospaced type in the brief.~~
45 ~~(ii) Form 6 in the Appendix of Forms is a~~
46 ~~suggested form of a certificate of~~
47 ~~compliance. Use of Form 6 must be~~
48 ~~regarded as sufficient to meet the~~
49 ~~requirements of Rules 28.1(e)(3) and~~
50 ~~32(a)(7)(C)(i).~~
51 * * * * *

52 **(e) Local Variation.** Every court of appeals must accept
53 documents that comply with the form requirements of
54 this rule and the length limits set by these rules. By
55 local rule or order in a particular case, a court of
56 appeals may accept documents that do not meet all ~~of~~
57 the form requirements of this rule or the length limits
58 set by these rules.
59 **(f) Items Excluded from Length.** In computing any
60 length limit, headings, footnotes, and quotations count
61 toward the limit but the following items do not:
62 ● the cover page;
63 ● a corporate disclosure statement;
64 ● a table of contents;
65 ● a table of citations;
66 ● a statement regarding oral argument;
67 ● an addendum containing statutes, rules, or
68 regulations;

69 ● certificates of counsel;

70 ● the signature block;

71 ● the proof of service; and

72 ● any item specifically excluded by these rules or

73 by local rule.

74 **(g) Certificate of Compliance.**

75 (1) **Briefs and Papers That Require a Certificate.**

76 A brief submitted under Rules 28.1(e)(2),

77 29(b)(4), or 32(a)(7)(B)—and a paper submitted

78 under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A),

79 27(d)(2)(C), 35(b)(2)(A), or 40(b)(1)—must

80 include a certificate by the attorney, or an

81 unrepresented party, that the document complies

82 with the type-volume limitation. The person

83 preparing the certificate may rely on the word or

84 line count of the word-processing system used to

85 prepare the document. The certificate must state

86 the number of words—or the number of lines of
87 monospaced type—in the document.
88 (2) **Acceptable Form.** Form 6 in the Appendix of
89 Forms meets the requirements for a certificate of
90 compliance.

Committee Note

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. In the course of adopting word limits for the length limits in Rules 5, 21, 27, 35, and 40, and responding to concern about the length of briefs, the Committee has reevaluated the conversion ratio (from pages to words) and decided to apply a conversion ratio of 260 words per page. Rules 28.1 and 32(a)(7)(B) are amended to reduce the word limits accordingly.

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 (e) 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 (e) already established this authority as to the length limits in Rule 32(a)(7); the amendment makes clear that this authority extends to all length limits in the Appellate Rules.

A new subdivision (f) 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 Rule 32(a)(7)(C) is relocated to a new Rule 32(g) and now applies to filings under all type-volume limits (other than Rule 28(j)'s word limit)—including the new word limits in Rules 5, 21, 27, 29, 35, and 40. Conforming amendments are made to Form 6.

Rule 35. En Banc Determination

* * * * *

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc.

* * * * *

(2) Except by the court's permission~~, a petition for an en banc hearing or rehearing must not exceed 15 pages, excluding material not counted under Rule 32.~~:

(A) a petition for an en banc hearing or rehearing produced using a computer must not exceed 3,900 words; and

(B) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages.

(3) For purposes of the ~~page~~ limits in Rule 35(b)(2), if a party files both a petition for panel rehearing

18 and a petition for rehearing en banc, they are
19 considered a single document even if they are
20 filed separately, unless separate filing is required
21 by local rule.
22 * * * * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms 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 32(f).

Rule 40. Petition for Panel Rehearing

* * * * *

(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. ~~Unless the court permits or a local rule provides otherwise, a petition for panel rehearing must not exceed 15 pages.~~Except by the court's permission:

(1) a petition for panel rehearing produced using a computer must not exceed 3,900 words; and

(2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the

certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms 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 32(f).

Form 6. Certificate of Compliance With ~~Rule 32(a)~~ Type-Volume Limit

Certificate of Compliance With Type-Volume Limit~~ation~~, Typeface Requirements, and Type-Style Requirements

1. This ~~brief~~document complies with [the type-volume limit~~ation~~ of Fed. R. App. P. ~~32(a)(7)(B)~~[*insert Rule citation; e.g., 32(a)(7)(B)*]] [the word limit of Fed. R. App. P. [*insert Rule citation; e.g., 5(c)(1)*]] because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) [and [*insert applicable Rule citation, if any*]]:

☐ this ~~brief~~document contains [*state the number of*] words, ~~excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii),~~ **or**

☐ this brief uses a monospaced typeface and contains [*state the number of*] lines of text~~, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)~~.

2. This ~~brief~~document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

☐ this ~~brief~~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**

25 ☐ this ~~brief~~document has been prepared in a
26 monospaced typeface using [*state name and*
27 *version of word-processing program*] with [*state*
28 *number of characters per inch and name of type*
29 *style*].

30 (s)_____

31 Attorney for _____

32 Dated: _____

1 **Appendix:**
2 **Length Limits Stated in the**
3 **Federal Rules of Appellate Procedure**

4 This chart summarizes the length limits stated in the Federal Rules of Appellate Procedure.
5 Please refer to the rules for precise requirements, and bear in mind the following:

6 • In computing these limits, you can exclude the items listed in Rule 32(f).

7 • If you use a word limit or a line limit (other than the word limit in Rule 28(j)), you must
8 file the certificate required by Rule 32(g).

9 • For the limits in Rules 5, 21, 27, 35, and 40:

10 - You must use the word limit if you produce your document on a computer; and

11 - You must use the page limit if you handwrite your document or type it on a
12 typewriter.

13 • For the limits in Rules 28.1, 29(a)(5), and 32:

14 - You may use the word limit or page limit, regardless of how you produce the
15 document; or

16 - You may use the line limit if you type or print your document with a monospaced
17 typeface. A typeface is monospaced when each character occupies the same
18 amount of horizontal space.

	Rule	Document type	Word limit	Page limit	Line limit
Permission to appeal	5(c)	• Petition for permission to appeal • Answer in opposition • Cross-petition	5,200	20	Not applicable

	Rule	Document type	Word limit	Page limit	Line limit
Extraordinary writs	21(d)	• Petition for writ of mandamus or prohibition or other extraordinary writ • Answer	7,800	30	Not applicable
Motions	27(d)(2)	• Motion • Response to a motion	5,200	20	Not applicable
	27(d)(2)	• Reply to a response to a motion	2,600	10	Not applicable
Parties' briefs (where no cross-appeal)	32(a)(7)	• Principal brief	13,000	30	1,300
	32(a)(7)	• Reply brief	6,500	15	650
Parties' briefs (where cross-appeal)	28.1(e)	• Appellant's principal brief • Appellant's response and reply brief	13,000	30	1,300
	28.1(e)	• Appellee's principal and response brief	15,300	35	1,500
	28.1(e)	• Appellee's reply brief	6,500	15	650
Party's supplemental letter	28(j)	• Letter citing supplemental authorities	350	Not applicable	Not applicable

	Rule	Document type	Word limit	Page limit	Line limit
Amicus briefs	29(a)(5)	• Amicus brief during initial consideration of case on merits	One-half the length set by the Appellate Rules for a party's principal brief	One-half the length set by the Appellate Rules for a party's principal brief	One-half the length set by the Appellate Rules for a party's principal brief
	29(b)(4)	• Amicus brief during consideration of whether to grant rehearing	2,600	Not applicable	Not applicable
Rehearing and en banc filings	35(b)(2) & 40(b)	• Petition for hearing en banc • Petition for panel rehearing; petition for rehearing en banc	3,900	15	Not applicable

Rule 29. Brief of an Amicus Curiae

(a) During Initial Consideration of a Case on the Merits.

(1) **Applicability.** This Rule 29(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.

~~(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

16 ~~(2)~~ (B) the reason why an amicus brief is desirable
17 and why the matters asserted are relevant to
18 the disposition of the case.
19 ~~(c)~~ (4) **Contents and Form.** An amicus brief must
20 comply with Rule 32. In addition to the
21 requirements of Rule 32, the cover must identify
22 the party or parties supported and indicate
23 whether the brief supports affirmance or reversal.
24 An amicus brief need not comply with Rule 28,
25 but must include the following:
26 ~~(1)~~ (A) if the amicus curiae is a corporation, a
27 disclosure statement like that required of
28 parties by Rule 26.1;
29 ~~(2)~~ (B) a table of contents, with page references;
30 ~~(3)~~ (C) a table of authorities—cases (alphabetically
31 arranged), statutes, and other authorities—

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

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

~~(5)~~ (E) unless the amicus curiae is one listed in the first sentence of Rule 29(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;

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

~~(7)~~ (G) a certificate of compliance under Rule 32(g)(1), if ~~required by Rule 32(a)(7)~~ length is computed using a word or line limit.

~~(d)~~ (5) **Length.** Except by the court's permission, an amicus brief may 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.

66 ~~(e)~~ (6) **Time for Filing.** An amicus curiae must file its
67 brief, accompanied by a motion for filing when
68 necessary, no later than 7 days after the principal
69 brief of the party being supported is filed. An
70 amicus curiae that does not support either party
71 must file its brief no later than 7 days after the
72 appellant's or petitioner's principal brief is filed.
73 A court may grant leave for later filing,
74 specifying the time within which an opposing
75 party may answer.
76 ~~(f)~~ (7) **Reply Brief.** Except by the court's permission,
77 an amicus curiae may not file a reply brief.
78 ~~(g)~~ (8) **Oral Argument.** An amicus curiae may
79 participate in oral argument only with the court's
80 permission.
81 **(b) During Consideration of Whether to Grant**
82 **Rehearing.**

83 (1) **Applicability.** This Rule 29(b) governs amicus
84 filings during a court's consideration of whether
85 to grant panel rehearing or rehearing en banc,
86 unless a local rule or order in a case provides
87 otherwise.
88 (2) **When Permitted.** The United States or its
89 officer or agency or a state may file an amicus-
90 curiae brief without the consent of the parties or
91 leave of court. Any other amicus curiae may file
92 a brief only by leave of court.
93 (3) **Motion for Leave to File.** Rule 29(a)(3) applies
94 to a motion for leave.
95 (4) **Contents, Form, and Length**. Rule 29(a)(4)
96 applies to the amicus brief. The brief must not
97 exceed 2,600 words.
98 (5) **Time for Filing.** An amicus curiae supporting
99 the petition for rehearing or supporting neither

100 party must file its brief, accompanied by a
101 motion for filing when necessary, no later than 7
102 days after the petition is filed. An amicus curiae
103 opposing the petition must file its brief,
104 accompanied by a motion for filing when
105 necessary, no later than the date set by the court
106 for the response.

Committee Note

Rule 29 is amended to address amicus filings in connection with requests for panel rehearing and rehearing en banc.

Existing Rule 29 is renumbered Rule 29(a), and language is added to that subdivision (a) to state that its provisions apply to amicus filings during the court's initial consideration of a case on the merits. Rule 29(c)(7) becomes Rule 29(a)(4)(G) and is revised to accord with the relocation and revision of the certificate-of-compliance requirement. New Rule 32(g)(1) states that "[a] brief submitted under Rules 28.1(e)(2), 29(b)(4), or 32(a)(7)(B) . . . must include" a certificate of compliance. An amicus brief submitted during initial consideration of a case on the merits counts as a "brief submitted under Rule[] . . . 32(a)(7)(B)" if the amicus computes Rule 29(a)(5)'s length limit by taking half of a type-volume limit in

Rule 32(a)(7)(B). Rule 29(a)(4)(G) restates Rule 32(g)(1)'s requirement functionally, by providing that a certificate of compliance is required if an amicus brief's length is computed using a word or line limit.

New subdivision (b) is added to address amicus filings in connection with a petition for panel rehearing or rehearing en banc. Subdivision (b) sets default rules that apply when a court 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 petitions for rehearing, and governing the procedures when such filings are permitted.

Rule 26. Computing and Extending Time

* * * * *

(c) Additional Time after Certain Kinds of Service. When a party may or must act within a specified time after ~~service~~being served, 3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is ~~not~~ treated as delivered on the date of service stated in the proof of service.

Committee Note

Rule 26(c) is amended to remove service by electronic means under Rule 25(c)(1)(D) from the modes of service that allow 3 added days to act after being served.

Rule 25(c) was amended in 2002 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were

concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28- day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

Rule 26(c) has also been amended to refer to instances when a party "may or must act . . . after being served" rather than to instances when a party "may or must act . . . after service." If, in future, an Appellate Rule sets a

deadline for a party to act after *that party itself effects service* on another person, this change in language will clarify that Rule 26(c)'s three added days are not accorded to the party who effected service.

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

* * * * *

(4) **''Last Day'' Defined.** Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing in the district court, at midnight in the court's time zone;

(B) for electronic filing in the court of appeals, at midnight in the time zone of the circuit clerk's principal office;

(C) for filing under Rules 4(c)(1), 25(a)(2)(B), and 25(a)(2)(C)—and filing by mail under Rule ~~13(b)~~13(a)(2)—at the latest time for

18 the method chosen for delivery to the post
19 office, third-party commercial carrier, or
20 prison mailing system; and
21 (D) for filing by other means, when the clerk's
22 office is scheduled to close.
23 * * * * *

Committee Note

Subdivision (a)(4)(C). The reference to Rule 13(b) is revised to refer to Rule 13(a)(2) in light of a 2013 amendment to Rule 13. The amendment to subdivision (a)(4)(C) is technical and no substantive change is intended.

EXCERPT FROM THE SEPTEMBER 2015
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

* * * * *

FEDERAL RULES OF APPELLATE PROCEDURE

Rules and Forms Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6, and a proposed new Form 7, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and public for comment in August 2014, and were offered for approval as published except as noted below.

Inmate-Filing Rules

Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7. Proposed amendments to Rules 4(c)(1) and 25(a)(2)(C), and Forms 1 and 5, and proposed new Form 7, are designed to clarify and improve the inmate-filing rules. Proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions. The amendments further 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. New Form 7 is a suggested form of declaration. Forms 1 and 5, which are suggested forms of notices of appeal, are revised to include a reference alerting inmate filers to the existence of new Form 7. The amendments also clarify that if sufficient evidence

does not accompany the initial filing, then the court of appeals may permit the later filing of a declaration or notarized statement to establish timely deposit.

The Advisory Committee received seven comments on this proposal. Commentators were divided on the published proposal to delete the requirement in Rules 4(c)(1) and 25(a)(2)(C) that an inmate use the institution's legal mail system (if one is available) in order to receive the benefit of the inmate-filing rules. After considering the comments and conducting further research, the Advisory Committee decided to abandon its proposal to delete the legal-mail-system requirement from Rules 4(c)(1) and 25(a)(2)(C). The Advisory Committee also made several post-publication technical improvements to the Forms.

Appeal Time After Post-judgment Motions

Rule 4(a)(4). A circuit split exists regarding whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as timely filed under Appellate Rule 4(a)(4). Rule 4(a)(4) provides that certain "timely" post-judgment motions restart the time to take a civil appeal. The proposed amendment addresses the split by adopting the majority view. Under the proposed rule, a motion restarts the time for taking an appeal only if it is filed within the time allowed by the Rules of Civil Procedure.

Rule 4(a)(4) provides that "[i]f a party timely files in the district 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." Five circuits have held that a motion is "timely" only if it is filed within the deadline set by the rules. One circuit, however, ruled that if a district court mistakenly extends the time for filing a post-judgment motion (contrary to the prohibition in Civil Rule 6(b)), then the motion is "timely" for purposes of Rule 4(a)(4).

Given the conflict in authority, the Advisory Committee determined to clarify the meaning of Rule 4(a)(4). The proposed amendment adopts the majority view that post-judgment motions made outside the deadlines set by the Civil Rules do not restart the appeal time under Rule 4(a)(4). This rule ensures a uniform deadline for post-judgment motions and sets a definite point in time when litigation will end. The Advisory Committee also was concerned that the minority approach taken by one circuit was "uncomfortably close" to the "unique circumstances" doctrine that the Supreme Court disapproved in *Bowles v. Russell*, 551 U.S. 205, 214 (2007). *See Blue v. Int'l Bhd. of Elec. Workers Local Union 159*, 676 F.3d 579, 583 (7th Cir. 2012).

Five of six comments received on this proposal were supportive. The Advisory Committee discussed the concerns raised by the one objector, but ultimately adhered to its initial determination to amend the rule to adopt the majority view. No changes were made following publication.

Length Limits

Rules 5, 21, 27, 28, 28.1, 32, 35, and 40, and Form 6. The proposed amendments affect length limits set by the Appellate Rules for briefs and other documents. The Advisory Committee first addressed length limits that are expressed in page limits. The committee believed that these limits have been overtaken by technology and are vulnerable to manipulation. While considering how to convert page limits to word limits, the committee also examined the present length limit for briefs. The length limit for principal briefs was converted from 50 pages to 14,000 words in 1998. Members of the judiciary have expressed concern that briefs filed under the current limit are too long. Others have questioned whether the 14,000-word limit (which reflects a conversion ratio of 280 words per page) is an accurate translation of the traditional fifty-page limit.

The proposal amends Rules 5, 21, 27, 35, and 40 to convert the existing page limits to word limits for documents, other than briefs, that are prepared using a computer. The amendment uses a conversion ratio of 260 words per page in order to approximate traditional volume and to avoid increasing the length of documents such as motions, petitions for rehearing, and petitions for permission to appeal. For documents prepared without a computer, the proposed amendments retain the current page limits.

The proposed amendment to Rule 32 amends the word limits for briefs to reflect the pre-1998 page limits multiplied by 260 words per page. As a result, the current 14,000-word limit for a party's principal brief would become a 13,000-word limit; the word limit for a reply brief would change from 7,000 to 6,500 words. The proposal correspondingly reduces the word limits set by Rule 28.1 for cross-appeals.

New Rule 32(f) sets out a uniform list of the items that can be excluded when computing a document's length. A new appendix collects in one chart all length limits stated in the Appellate Rules. Form 6 concerning certificates of compliance is amended to account for the proposed amendments to length limits.

Under the proposal, a court of appeals that wants to retain the existing word limits for briefs may do so by local rule or by order in a case. The local variation provision of existing Rule 32(e) is amended to highlight a court's authority to do so. Unlike the present rule, however, the proposal does not require a court of appeals that prefers the amended limits to accept longer briefs that judges believe are burdensome and unnecessary.

The Advisory Committee received a large number of public comments in response to the proposed amendments. The committee also received testimony from four appellate lawyers during a public hearing. As published, the proposal would have employed a conversion ratio of

250 words per page and reduced the limit for principal briefs to 12,500 words. In an effort to accommodate views expressed by appellate lawyers who opposed the change, while still recognizing the validity of concerns voiced by judges and others with the length of briefs under the current rules, the Advisory Committee made changes to the amendments as published for comment. The proposal as forwarded employs a conversion ratio of 260 words per page, rather than 250 words per page as published. Accordingly, the length limit for a principal brief is set at 13,000 words, rather than 12,500. The committee note also acknowledges that in a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in the rules.[1]

Amicus Filings in Connection with Rehearing

Rule 29. Proposed new Rule 29(b) establishes default rules for the treatment of amicus filings in connection with petitions for rehearing. There is no national rule that establishes a filing deadline or a length limit for amicus briefs in connection with petitions for rehearing. Most circuits have no local rule on point. Attorneys reported confusion caused by the lack of guidance. The proposal developed by the Advisory Committee does not require acceptance of amicus briefs, but establishes guidelines for the filing of briefs when permitted. Most of the features of current Rule 29 are incorporated for the rehearing stage, including the authorization for certain governmental entities to file amicus briefs without party consent or court permission. Under the proposal, a circuit may alter the default federal rules on timing, length, and other matters by local rule or by order in a case.

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[1]The proposed amendments to Rule 32, as revised for style after the public comment period, required a corresponding change to Rule 28(a)(10) to reflect the relocation of the certificate-of-compliance requirement from Rule 32(a)(7) to Rule 32(g)(1).

Overall, commentators expressed support for amending Rule 29 to address amicus filings in connection with rehearing petitions and offered varying suggestions as to length and timing. Based on the comments, the Advisory Committee changed the length limit under Rule 29(b) from 2,000 words to 2,600 words, and revised the deadline for amicus filings in support of a rehearing petition from three to seven days after the filing of the petition.

3-Day Rule

Rule 26(c). A proposed amendment to Rule 26(c) eliminates the so-called "3-day rule" in cases of electronic service. The 3-day rule adds three days to a given period if that period is measured after service and service is accomplished by certain methods. A subcommittee charged with overseeing an integrated approach to issues arising from electronic filing recommended that the "3-day rule" be amended to exclude electronic service. The proposed amendment to Appellate Rule 26(c) parallels proposed amendments to Civil Rule 6(d), Criminal Rule 45(c), and Bankruptcy Rule 9006(f) as part of a "3-day rule package."

Under current Appellate Rule 26(c), applicability of the 3-day rule depends on whether the paper in question is delivered on the date of service stated in the proof of service; if so, then the 3-day rule is inapplicable. The proposed amendment to Rule 26(c) excludes electronic service from the 3-day rule by deeming a paper served electronically as delivered on the date of service stated in the proof of service.

The Advisory Committee voted to approve the amendment as published. But in response to concerns expressed by commentators about whether the 14 days allowed by Appellate Rule 31(a)(1) is sufficient time for the preparation of a reply brief, the Advisory Committee agreed to study whether that deadline should be adjusted.

The Department of Justice proposed adding language to the Committee Note accompanying each rule in the 3-day rule package to recognize that extensions of time may be warranted to prevent prejudice in certain circumstances. In the interest of uniformity, each Advisory Committee approved adding such language to the published Committee Notes. The Standing Committee concurred, with a minor modification.

Technical Amendment

Rule 26(a)(4)(C). In 2013, then-existing Rule 13 governing appeals as of right from the Tax Court became Rule 13(a). A new Rule 13(b)—providing that Rule 5 governs permissive appeals from the Tax Court—was added. Rule 26(a)(4)(C)'s reference to "filing by mail under Rule 13(b)" should have been amended to refer to "filing by mail under Rule 13(a)(2)." The proposed amendment to Rule 26(a)(4)(C) updates the cross-reference. Because the proposed amendment is technical in nature, publication for public comment is not required.

The Standing Committee concurred with the Advisory Committee's recommendation as follows:

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6, and proposed new Form 7, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,

Jeffrey S. Sutton, Chair

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

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WILLIAM K. SESSIONS III
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MEMORANDUM

DATE: May 4, 2015

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

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

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 23 and 24 in Philadelphia, Pennsylvania. The Committee gave final approval to six sets of proposed amendments, relating to (1) the inmate-filing provisions under Rules 4(c) and 25(a); (2) tolling motions under Rule 4(a)(4); (3) length limits for appellate filings; (4) amicus briefs in connection with rehearing; (5) Rule 26(c)'s "three-day rule"; and (6) a technical amendment to Rule 26(a)(4)(C). The Committee discussed a number of other items and added one issue to its study agenda.

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

* * * * *

II. Action Items—for Final Approval

The Committee seeks final approval of six sets of proposed amendments.

A. Inmate filings: Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7

Under the Federal Rules of Appellate Procedure, documents are timely filed if they are received by the court on or before the due date. Rules 4(c)(1) and 25(a)(2)(C) offer an alternative way for inmates to establish timely filing of documents. If the requirements of the relevant rule are met, then the filing date is deemed to be the date the inmate deposited the document in the institution's mail system rather than the date the court received the document. *See generally Houston v. Lack*, 487 U.S. 266 (1988).

The Committee has studied the workings of the inmate-filing rules since 2007, in light of concerns expressed about conflicts in the case law, unintended consequences of the current language, and ambiguity in the current text. Must an inmate prepay postage to benefit from the rule? There are decisions saying that an inmate need not prepay postage if he uses a prison's system designed for legal mail, but must prepay postage if he does not use that system. Must an inmate file a declaration or notarized statement averring the date of filing to benefit from the rule? One court held, over a dissent from denial of rehearing en banc, that a document is untimely if there is no declaration or notarized statement, even when other evidence such as a postmark shows that the document was timely deposited in the prison mail system. When must an inmate submit a declaration designed to demonstrate timeliness? One circuit has published inconsistent decisions, holding in one case that the declaration must accompany the notice and in another that the declaration may be filed at a later date.

The Committee seeks final approval of proposed amendments that are designed to clarify and improve the inmate-filing rules. The amendments to Rules 4(c)(1) and 25(a)(2)(C) would make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions. The amendments 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. New Form 7 is a suggested form of declaration that would satisfy the Rule. Forms 1 and 5 (which are suggested forms of notices of appeal) are revised to include a reference alerting inmate filers to the existence of Form 7. The amendments also clarify that if sufficient evidence does not accompany the initial filing, then the court of appeals has discretion to permit the later filing of a declaration or notarized statement to establish timely deposit.

1. Text of proposed amendments and Committee Note

The Committee recommends final approval of the proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) and Forms 1 and 5, and proposed new Form 7, as revised after publication and set out in the enclosure to this report.

2. Changes made after publication and comment

After publication, the Committee decided to abandon its proposal to delete the legal-mail-system requirement from Rules 4(c)(1) and 25(c)(2)(C). The Committee also made several improvements to the Forms.

Rules 4(c)(1) and 25(a)(2)(C), as published, would have deleted the requirement that an inmate use a system designed for legal mail (if one is available) in order to receive the benefit of

the inmate-filing rules. The Committee proposed deleting that requirement because it perceived no purpose for it. The Committee had learned from the Deputy General Counsel of the U.S. Bureau of Prisons that the distinction between legal and non-legal mail systems, in BOP facilities, had more to do with privacy concerns than other reasons. And an inquiry to the Chief Deputy Clerk of the U.S. Supreme Court had likewise disclosed no reason to retain the legal-mail-system requirement.

Commentators were divided on the question of the legal-mail-system requirement. One commentator specifically expressed support for the published amendments' deletion of the requirement. Another commentator, however, pointed out that correctional institutions in the State of Florida log the date of deposit of inmates' legal mail but do not log the date of deposit of inmates' non-legal mail, and argued that the legal-mail-system requirement provided the State with an important way to provide evidence of the date of inmates' legal mail. The Committee's Reporter, with the assistance of the Director and Chief Counsel of the National Association of Attorneys General Center for Supreme Court Advocacy, investigated whether correctional institutions in jurisdictions other than Florida make a similar distinction (date-logging legal but not non-legal mail). The responses—from 21 states and the District of Columbia—disclosed that an appreciable number of the states do make such a distinction.[1] Further inquiry also determined that the federal Bureau of Prisons date-stamps legal mail, but does not log non-legal mail.

This new information, in the view of the Committee, provides reason to retain the legal-mail-system requirement. Requiring an inmate to use a legal mail system where available continues to serve a useful purpose by ensuring that mail is logged or date-stamped and avoiding unnecessary litigation over the timing of deposits. Accordingly, the Committee decided to restore that requirement to proposed Rules 4(c)(1) and 25(a)(2)(C). The Committee also revised proposed new Form 7, and the proposed amendments to Forms 1 and 5, to make all three forms more user-friendly and to make the new form more accurate. In particular, the Committee revised Form 7 to use the present tense ("Today ... I am depositing") rather than the past tense ("I deposited ..."), to reflect that the inmate will fill out the declaration before depositing both the declaration and the underlying filing in the institution's mail system.

The Committee decided not to implement other proposed changes to the amendments. The Committee did not adopt a suggestion that the Rules should *authorize* the later filing of the declaration (as opposed to giving the court the discretion to permit its later filing). Members considered it important to encourage the inmate to provide the declaration contemporaneously, while recollections are fresh. The Committee gave careful consideration to style comments advocating deletion of the Rules' reference to a court's ability to "exercise[] its discretion to permit the later filing" of the declaration (the style suggestion was to say simply "permit[]"). But Committee members were swayed by substantive concerns about the desire to ensure that inmates understand that later filing will not necessarily be permitted. The Committee also did

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[1] Four states—Colorado, North Carolina, Tennessee, and Washington State—have systems that (like Florida's) log the date of legal mail but not non-legal mail. Two additional states—Alaska and Delaware—have such systems in at least some of their facilities. And though Pennsylvania does not currently date-log any outgoing mail, the Deputy Chief Counsel for Litigation at the Pennsylvania Department of Corrections reports that Pennsylvania is considering date-logging outgoing legal mail in order to provide evidence of the date of filing.

not adopt suggestions that the Rules should authorize courts to excuse an inmate's failure to prepay postage, as courts already have adequate authority to act if an institution refuses to provide postage when it is constitutionally required. The Committee considered whether to delete the Rules' reference to a notarized statement (as an alternative to a declaration), and decided to retain that reference because notaries are available in a number of correctional institutions, and similar language appears in the inmate-filing provisions in the Supreme Court Rules and the rules for habeas and Section 2255 proceedings. There was no opposition to the notarized statement option during the comment period.

B. Tolling motions: Rule 4(a)(4)

The proposed amendment to Appellate Rule 4(a)(4) addresses a circuit split concerning whether a motion filed outside a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Rule 4(a)(4) if a court has mistakenly ordered an "extension" of the deadline for filing the motion.

Caselaw in the wake of *Bowles v. Russell*, 551 U.S. 205 (2007), holds that statutory appeal deadlines are jurisdictional but that nonstatutory appeal deadlines are nonjurisdictional claim-processing rules. The statutory appeal deadline for civil appeals is set by 28 U.S.C. § 2107. The statute does not mention so-called "tolling motions" filed in the district court that have the effect of extending the appeal deadline, but "§ 2107 was enacted against a doctrinal backdrop in which the role of tolling motions had long been clear." 16A Wright et al., Federal Practice & Procedure § 3950.4. At the time of enactment, "caselaw stated that certain postjudgment motions tolled the time for taking a civil appeal." *Id*. Commentators have presumed, therefore, that Congress incorporated the preexisting caselaw into § 2107, and that appeals filed within a recognized tolling period may be considered timely consistent with *Bowles*.

The federal rule on tolling motions, Appellate Rule 4(a)(4), provides that "[i]f a party timely files in the district 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." A number of circuits have ruled that the Civil Rules' deadlines for post-judgment motions are nonjurisdictional claim-processing rules. On this view, where a district court mistakenly "extends" the time for making such a motion, and no party objects to that extension, the district court has authority to decide the motion on its merits. But does the motion count as a "timely" one that, under Rule 4(a)(4), tolls the time to appeal? The Third, Seventh, Ninth, and Eleventh Circuits have issued post-*Bowles* rulings stating that such a motion does not toll the appeal time. *E.g.*, *Blue v. Int'l Bhd. of Elec. Workers Local Union 159*, 676 F.3d 579, 582-84 (7th Cir. 2012); *Lizardo v. United States*, 619 F.3d 273, 278-80 (3d Cir. 2010). Pre-*Bowles* caselaw from the Second Circuit accords with this position. The Sixth Circuit, however, has held to the contrary. *Nat'l Ecological Found. v. Alexander*, 496 F.3d 466, 476 (6th Cir. 2007).

The Committee feels it is important to clarify the meaning of "timely" in Rule 4(a)(4), because the conflict in authority arises from arguable ambiguity in the current Rule, and timely filing of a notice of appeal is a jurisdictional requirement. The proposed amendment would adopt the majority view—i.e., that postjudgment motions made outside the deadlines set by the Civil Rules are not "timely" under Rule 4(a)(4). Such an amendment would work the least change in current law. And, as the court noted in *Blue*, 676 F.3d at 583, the majority approach

tracks the spirit of the Court's decision in *Bowles*, which held that the Court has "no authority to create equitable exceptions to jurisdictional requirements." 551 U.S. at 214.

1. Text of proposed amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 4(a)(4) as set out in the enclosure to this report.

2. Changes made after publication and comment

No changes were made after publication and comment.

All but one of the commentators who addressed this proposal voiced support for it. The sole opponent argued that both the current Rule and the proposed amended Rule set a trap for unwary litigants. That commentator also argued that it is incongruous that a district court has power to rule on the merits of an untimely postjudgment motion if the opposing party fails to object to the untimeliness but that same motion lacks tolling effect under Rule 4(a)(4).

The commentator's objections tracked concerns that had already been discussed by the Committee in its prior deliberations. After noting the comment, the Committee adhered to its substantive judgment that the Rule should be amended to adopt the majority view. Committee members discussed whether the amendment, as published, could be revised to make its meaning clearer. Specifically, the Committee discussed the possibility of adding rule text specifying that a motion made outside the time permitted by the relevant Civil Rule "is not rendered timely by, for instance: (i) a court order setting a due date that is later than allowed by the Federal Rules of Civil Procedure; (ii) another party's consent or failure to object; or (iii) the court's disposition of the motion." Committee members, however, expressed concern that this addition would distend an already long and complex Rule and that a list of this nature could be read to exclude other possible scenarios. Committee members observed, moreover, that these examples are stated in the Committee Note, so lawyers and litigants should have adequate notice to avoid a "trap."

C. Length limits: Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6

The proposed amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6—approved unanimously by the Advisory Committee after post-publication changes—would affect length limits set by the Appellate Rules for briefs and other documents. The proposal would amend Rules 5, 21, 27, 35, and 40 to convert the existing page limits to word limits for documents prepared using a computer. For documents prepared without the aid of a computer, the proposed amendments would retain the page limits currently set out in those rules. The proposed amendments employ a conversion ratio of 260 words per page for Rules 5, 21, 27, 35, and 40.

The amendments would also reduce Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 260 words per page. The 14,000-word limit for a party's principal brief would become a 13,000-word limit; the limit for a reply brief would change from 7,000 to 6,500 words. The proposals correspondingly reduce the word limits set by Rule 28.1 for cross-appeals. New Rule 32(f) sets out a uniform list of the items that can be excluded when

computing a document's length. A new appendix collects in one chart all the length limits stated in the Appellate Rules.

Any court of appeals that wishes to retain the existing limits, including 14,000 words for a principal brief, may do so under the proposed amendments. The local variation provision of existing Rule 32(e) would be amended to highlight a court's ability (by order or local rule) to set length limits that exceed those in the Appellate Rules.

* * *

The genesis of this project was the suggestion that length limits set in terms of pages have been overtaken by advances in technology, and that use of page limits rather than word limits invites gamesmanship by attorneys. As noted, the proposal would amend Rules 5, 21, 27, 35, and 40 to address that concern.

Drafting those amendments required the Committee to select a conversion ratio from pages to words. The 1998 amendments transmuted the prior 50-page limit for briefs into a 14,000-word limit—that is, the 1998 amendments used a conversion ratio of 280 words per page. In formulating the published proposal, the Committee relied upon two studies indicating that a traditional 50-page brief filed in the courts of appeals under the pre-1998 rules contained fewer than 280 words per page. A study in 1993 by the D.C. Circuit Advisory Committee recommended a conversion ratio of 250 words per page; based on this study, the D.C. Circuit applied a length limit of 12,500 words for principal briefs from 1993 to 1998. A 2013 study by the Committee's clerk representative found an average of 259 words per page (or 12,950 per fifty pages) in 210 randomly-selected appellate briefs filed by counsel in the Eighth Circuit from 1995 through 1998. The 1998 Advisory Committee Note to Rule 32 did not explain the reason for the selection of the 280 words per page conversion ratio, and the published proposal said that the basis for the estimate was unknown.

As published for comment, the proposed amendments employed a conversion ratio of 250 words per page for Rules 5, 21, 27, 35, and 40. The published proposal also reduced Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 250 words per page—that is, 12,500 words for a principal brief. The proposals correspondingly reduced the word limits set by Rule 28.1 for cross-appeals. The published proposed amendments were subject to the local variation provision of Rule 32(e), which permits a court to increase the length limit by order or local rule.

During consideration of the proposed shift to type-volume limits, the Committee also observed that the rules do not provide a uniform list of the items that can be excluded when computing a document's length. The published proposals would add a new Rule 32(f) setting forth such a list.

1. Text of proposed amendment and Committee Note

The Committee recommends final approval of the proposed amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, as revised after publication and set out in the enclosure to this report.

2. Changes made after publication and comment

The Committee received a large number of public comments on these proposed amendments. The Committee also received testimony from four appellate lawyers at a public hearing.

For documents other than briefs, a number of commentators voiced support for converting page limits to word limits. Two professional associations expressed support for the proposed amendments to Rules 5, 21, 27, 35, and 40 as published, but several commentators disagreed with the choice of word limits in some or all of those rules. Several of those commentators argued that the page-to-word conversion ratio should be 280 words per page or more, rather than the 250 words per page employed in formulating the published proposals. Commentators advocating a conversion ratio greater than 250 words per page noted that the issues addressed by these documents can be complex and important.

The Committee was not convinced to use a conversion ratio of 280 words per page. The principal basis for that ratio is the 1998 conversion of the limit for principal briefs from 50 pages to 14,000 words. The Committee was advised during the comment period that the 1998 conversion ratio was based on a word count in commercially printed briefs filed at the Supreme Court of the United States. The Committee was not persuaded that it should use the number of words in a commercially printed Supreme Court brief as the measure of equivalence for motions, petitions for rehearing, and other documents filed in the courts of appeals.

Other data informed the Committee's deliberations. Before publication, the Committee received the studies described above, which showed average length of 251 and 259 words per page, respectively, in appellate briefs filed before the conversion from page limits to word counts in 1998. One commentator submitted anecdotal reports that briefs filed under the current Appellate Rules (with 14-point font) average 240 words per page. The clerk's representative sampled twenty-eight rehearing petitions filed in late 2014 in the Eighth Circuit and found that selected pages in those filings averaged 255 words per page, with most pages containing between 245 and 260 words. In sum, the available data suggest that a conversion ratio of 280 words per page would not accurately reflect the number of words that naturally fit on a page. The Committee ultimately determined to employ a conversion ratio of 260 words per page.

On the length of briefs, many appellate lawyers opposed a reduction in the length limit, arguing principally that some complex appeals require 14,000 words. On the other hand, judges of two courts of appeals formally favored the proposal. Judges submitted public comments stating that unnecessarily long briefs interfere with the efficient and expeditious administration of justice. Appellate judges on the Committee shared those concerns and reported informal input from judicial colleagues who expressed similar views. In considering the suggestion of commentators to withdraw the proposal, therefore, the Committee was required to ask whether the federal rule should continue to require some courts of appeals to accept lengthy briefs that the courts say they do not need and do not want.

During committee deliberations and in public comments, there were two principal reasons advanced for amending the length limit for appellate briefs: (1) concern that the conversion from pages to words in 1998 effectively increased the length limit above the length of traditional briefs filed in the courts of appeals, and (2) concern that regardless of the history,

briefs filed under the current rules are too long, and that courts of appeals that wish to apply a shorter limit should be permitted to do so. The Committee received comment and gathered additional data on both points.

Judge Frank Easterbrook submitted a comment explaining that he, as a member of the Standing Committee, drafted the 1998 amendments to Rule 32. According to Judge Easterbrook, the 14,000 word limit came from a Seventh Circuit rule, which in turn was based on a word count of printed briefs filed in the Supreme Court. Judge Easterbrook reported that a similar study of briefs filed by law firms without printing showed an average of about 13,000 words for fifty pages. He wrote that the Advisory Committee selected a limit of 14,000 words, "thinking it best to err on the side of generosity if only because that would curtail the number of motions that counsel would file seeking permission to go longer." Judge Easterbrook reported that "[m]embers of the Advisory Committee (and in turn the Standing Committee) thought it more important to adopt a simple rule that would prevent cheating (by using tracking controls, smaller type, moving text to footnotes, and so on) than to clamp down on the maximum size of a brief."

The Committee also studied the official records of the Advisory Committee and the Standing Committee regarding the 1998 amendments. The 1998 Advisory Committee Note to Rule 32 states that the 14,000 word limit "approximate[s] the current 50-page limit." After hearing testimony that a 50-page brief prepared with an office typewriter would have contained approximately 12,500 words, the Committee in 1994 published a proposal to convert the 50-page limit to 12,500 words. Commentators objected on the ground that the 12,500 limit "reduces the length below the traditional 50 page limit." The Committee then published a new proposal setting a limit of 14,000 words. There was discussion in April 1997 "about reducing the word count from 14,000 to 13,000 because 14,000 is not a good equivalent to the old 50-page brief," and that 14,000 words "is closer to the length of a professionally printed brief." But the minutes of the Advisory Committee reflect that "[i]n order to avoid reopening the controversy" over the length of briefs, "several members spoke in favor of retaining the 14,000 word limit," and "[a] majority favored staying with 14,000." When the chair of the Advisory Committee presented the proposal to the Standing Committee, "[h]e pointed out that a 50-page brief would include about 14,000 words." When the Standing Committee forwarded the 1998 amendment to the Judicial Conference, the Standing Committee's report said that the rule "establishes length limitations of 14,000 words . . . (which equates roughly to the traditional fifty pages)."

Among the commentators supporting the proposed reduction in brief length limits were the judges of the D.C. Circuit; all non-recused active judges of the Tenth Circuit and a majority of the senior judges of the Tenth Circuit; two professional associations; and three individual lawyers. The Department of Justice supported the proposed reduction, while urging the Committee to include language in rule text or a committee note concerning the need for extra length in certain cases. The Solicitor General "agree[d] that in most appeals the parties can and should submit briefs substantially shorter than the current word limits permit," but noted that "in some cases parties will justifiably need to file longer briefs."

Commentators supporting a word-limit reduction asserted that the current word limits allow more length than is needed to brief most appeals. In cases where the full length is unneeded, the 14,000-word limit allows lawyers to avoid pruning away extraneous facts and tenuous arguments. A tighter word limit will drive lawyers to focus on the key facts and dispositive law. Overlong, loosely written briefs divert scarce judicial time. These

commentators noted that courts retain authority to grant leave to file overlength briefs in rare cases where 12,500 words are truly inadequate. A circuit that prefers longer limits also may enlarge the limits by local rule.

Among the commentators opposing the reduction in length limits for briefs were one judge; 22 law firms (or practice groups within law firms) or public interest groups; 10 professional associations; 19 non-government lawyers; and two government lawyers. Commentators opposing the reduction in word limits asserted that the current word limit has been unproblematic since its adoption in 1998. They asserted that in simple appeals where even 12,500 words is longer than necessary, the proposed reduction will not address prolixity. These commentators expressed concern that the full 14,000-word length is necessary to brief a complex, important appeal. They noted that inadequately-briefed issues are waived, and stated that it can be difficult to predict which arguments will persuade the court. They warned that motions for extra length will not be an adequate safety valve because a number of circuits strongly discourage such motions. A number of circuits require or instruct that motions for extra length be made a stated time in advance of the brief's due date, and the Fifth Circuit adds the requirement that a draft brief be included with the motion. A summary of all comments is included with this report, and the comments are available for review at Regulations.gov.

One commentator submitted two studies showing that lawyers could fit 300 words (or more) on a page under the pre-1998 Appellate Rules or a similar state-court framework. This information was not surprising, however, given the Standing Committee's conclusion in 1997 that "computer software programs make it possible . . . to create briefs that comply with a limitation stated in a number of pages, but that contain up to 40% more material than a normal brief."

Professor Gregory Sisk submitted a study in which he and his coauthor examined briefs filed in the Ninth Circuit. The Sisk and Heise study reports a correlation between appellant brief length and reversal. But correlation does not show causation, and the authors caution that it would be "absurd to suggest that greater brief length in itself could have a direct causal link to success on appeal."

In collecting more recent data, the Committee's clerk representative found that only two circuits had readily available data on length of briefs. In the Eighth Circuit, approximately 19 percent of briefs in argued cases contained between 12,500 and 14,000 words; another 4 percent contained more than 14,000. In the D.C. Circuit, 23 percent of all briefs contained between 12,500 and 14,000 words, and 4 percent included more than 14,000; data for argued cases only were unavailable in that circuit.

The Committee members carefully discussed the concerns raised during the public comment period, and decided to revise the published length limits to reflect a conversion ratio of 260 words per page, rather than 250 words per page as published. The length limit for a principal brief (14,000 words under the current rule) is adjusted to 13,000 words from 12,500 in the published proposal. This change addresses to some extent the points raised by commentators while still meaningfully recognizing the validity of the concerns expressed by judges and others about the current rule. For those moved by the historical data, the ratio selected also best approximates the average length of fifty-page briefs filed in courts of appeals governed by a page limit in the years immediately preceding the 1998 amendment. The Committee voted to amend

Rule 32(e) to highlight a circuit court's ability to increase any or all of the Appellate Rules' length limits by local rule. The Committee added language to the Committee Notes to Rules 28.1 and 32 to recognize the need for extra length in appropriate cases. The Committee adopted style changes proposed by Professor Kimble. As an aid to users of the Appellate Rules, the Committee endorsed an appendix collecting the length limits stated in the Appellate Rules.

The Committee deleted as unnecessary the alternative line limits from the length limits for documents other than briefs. The Committee retained line limits for briefs, because the length limits for briefs work differently than the proposed length limits for other documents. The 1998 amendments put in place page limits that were significantly more stringent than the new type-volume limits for briefs: For litigants who do not use Rule 32(a)(7)(B)'s type-volume limits, the 1998 amendments reduced the page limits by 40 percent. By including line limits in the type-volume limits for briefs, the 1998 amendments assured that the more generous type-volume limits would be available to litigants who prepared their briefs without the aid of a computer.

A majority of Committee members voiced support for some version of the proposal to reduce the length limit for briefs, while two attorney members spoke in opposition. As noted, the Committee made several changes in an effort to address concerns, and the ultimate vote was unanimous in favor of the proposal as shown in the attachment to this report.

D. Amicus filings in connection with rehearing: Rule 29

The proposed amendments to Rule 29 would re-number the existing Rule as Rule 29(a) and would add a new Rule 29(b) to set default rules for the treatment of amicus filings in connection with petitions for rehearing. The proposed amendment would not require any circuit to accept amicus briefs, but would establish guidelines for the filing of briefs when they are permitted.

Attorneys who file amicus briefs in connection with petitions for rehearing understandably seek clear guidance about the filing deadlines for, and permitted length of, such briefs. There is no federal rule on the topic. *See Fry v. Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723, 725 (7th Cir. 2009) (Easterbrook, C.J., in chambers). Most circuits have no local rule on point, and attorneys have reported frustration with their inability to obtain accurate guidance.

The proposed amendments would establish default rules concerning timing and length of amicus briefs in connection with petitions for rehearing. They also would incorporate (for the rehearing stage) most of the features of current Rule 29. A circuit could alter the default federal rules on timing, length, and other matters by local rule or by order in a case, but the new federal rule would ensure that some rule governs the filings in every circuit.

1. Text of proposed amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 29, as revised after publication and set out in the enclosure to this report.

2. Changes made after publication and comment

A number of commentators expressed general support for the idea of amending Rule 29 to address amicus filings in connection with rehearing petitions. Objections and suggestions focused mainly on the issues of length and timing; a third suggestion concerned amicus filings in connection with merits briefing at times other than the initial briefing of an appeal. In response to the public comments, the Committee decided to change the length limit under Rule 29(b) from 2,000 words to 2,600 words and to change the deadline for amicus filings in support of a rehearing petition (or in support of neither party) from three days after the petition's filing to seven days after the petition's filing. The Committee also deleted the alternative line limit from the length limit as unnecessary.

The published proposal's 2,000-word limit had been derived by taking half of the 15-page limit for the party's petition, rounding up (to eight pages), and multiplying by 250 words per page. The published proposal drew from current Rule 29(d), which provides that amicus filings in connection with the merits briefing of an appeal are limited to half the length of "a party's principal brief."

The ten commentators who specifically addressed this feature of the proposal advocated setting a longer limit. Not all of these commentators stated a preferred alternative, but proposals ranged from 2,240 words to 4,200 words. The arguments in favor of a longer limit related to the nature of the cases, the nature of the issues, the quality of the party's petition, and the required contents of the amicus's brief. Rehearing petitions tend to be filed in difficult cases. Issues may include late-breaking developments in the law. The party's petition may be poorly drafted. The party may neglect the larger implications of a ruling and might not focus on ways that a ruling might usefully be narrowed while preserving the result in the case at hand. Amicus filings must include the statement of the amicus's identity, interest, and authority to file and (usually) the authorship and funding disclosure.

The Committee considered this input and examined the local rules in the four circuits that address the question of length: Two give amici essentially the same length limit as parties, and two give amici more than one-half the length limit for parties but less than the full amount. The Committee then opted to increase the proposed length limit for the federal rule from one-half of the length allowed for a party's petition to two-thirds of that length. Applying the 260-words-per-page conversion ratio noted in Part II.C.2 of this report, the Committee arrived at a revised length limit of 2,600 words.

The published proposal would set a time lag of three days between the filing of the petition and the due date of any amicus filings in support of the petition (or in support of neither party). It would give an amicus curiae opposing the petition the same due date as that set by the court for the response. Two commentators expressed support for the proposed timing rules; eight commentators believed that one or both of the periods would be too short.

Seven of those commentators proposed lengthening the period for amicus filings in support of a rehearing petition and four proposed lengthening the deadline for amicus filings in opposition. Commentators argued that the published proposal's deadlines would generate motions for extensions of time and decrease the quality of amicus filings. They noted that it may not be practicable for an amicus to coordinate with the party whose position it supports. One

commentator observed that government lawyers may need time to seek relevant approvals before filing an amicus brief. One commentator advocated adoption of a two-step process, under which the rule would set a three-day deadline by which the amicus must file a notice of intent to file a brief and a further seven- or ten-day deadline for the actual brief.

The Committee noted that in four circuits that have local provisions addressing the timing of amicus filings in support of rehearing petitions, the time allowed ranges from seven to 14 days after the filing of the party's petition. The Committee also recognized that any circuit could shorten the time period by local rule if it were concerned, for example, about inefficiencies resulting from an amicus brief arriving after a responding party has drafted a response to a petition. The Committee thus decided to adopt a deadline of seven days after the petition's filing for amicus filings in support of the petition (or in support of neither party). The Committee did not alter the deadline for amicus filings in opposition. It is rare for a court to request a response to a rehearing petition, and when the court does so, the order requesting a response can readily alter the due date for amicus filings if such an alteration is desirable.

One commentator suggested adopting a rule to govern amicus filings after the grant of rehearing en banc or after a remand from the Supreme Court. The proposed rule that was published for comment did not address those topics. In deciding not to address them, the Committee took into account three considerations. First, any new provision addressing those contexts would need to be published for comment, and it would not be worthwhile to hold up the already-published proposal for that purpose. Second, amicus filings in those contexts occur only rarely, giving reason to doubt the need for a national rule on the subject. Third, it seems likely that the courts of appeals take flexible approaches to the procedure in those contexts, suggesting that the wiser course might be to leave those topics for treatment in local provisions and orders in particular cases.

E. Amending the "three-day rule": Rule 26(c)

The proposed amendment to Rule 26(c) implements a recommendation by the Standing Committee's CM/ECF Subcommittee that the "three-day rule" in each set of national Rules be amended to exclude electronic service. The three-day rule adds three days to a given period if that period is measured after service and service is accomplished by certain methods. Now that electronic service is well-established, it no longer makes sense to include that method of service among the types of service that trigger application of the three-day rule.

The proposed amendment to Rule 26(c) accomplishes the same result as the proposed amendments to Civil Rule 6, Criminal Rule 45, and Bankruptcy Rule 9006, but does so using different wording in light of Appellate Rule 26(c)'s current structure. Under that structure, the applicability of the three-day rule depends on whether the paper in question is delivered on the date of service stated in the proof of service; if so, then the three-day rule is inapplicable. The change is thus accomplished by amending the rule to state that a paper served electronically is deemed (for this purpose) to have been delivered on the date of service stated in the proof of service.

1. Text of proposed amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 26(c), as revised after publication and set out in the enclosure to this report.

2. Changes made after publication and comment

The Committee voted to approve the amendment as published. But recognizing that the Criminal Rules Committee had voted to add certain language to the Committee Note accompanying the proposed amendment to Rule 45, the Committee gave the chair discretion to accede to the addition of the same language to Rule 26(c)'s Committee Note depending on discussions with the Standing Committee. It now appears that the Bankruptcy and Civil Rules Committees are prepared to accommodate the strongly-held preference of the Criminal Rules Committee. Under those circumstances, the Appellate Rules Committee would not object to including the same language in the Committee Note.

A number of commentators supported the proposal to exclude electronic service from the three-day rule. Others conceded its appeal, but proposed changes to offset its anticipated consequences. Still others opposed the proposal altogether.

Commentators' concerns fall into four basic categories: unfair behavior by opponents, hardship for the party being served, the need for time to draft reply briefs and/or motion papers, and inefficiency that would result from motions for extensions of time. Electronic service, unlike personal service, can occur outside of business hours. For example, it may be made late at night on a Friday before a holiday weekend in a different time zone. Some commentators worried that electronically served papers are more likely to be overlooked. Hardships might fall more heavily on lawyers who operate in small offices or as solo practitioners, and on lawyers who must draft complex response papers. Commentators stated that the three extra days are especially important to provide extra time to draft reply briefs, responses to motions, and replies to such responses. They state that, with the prevalence of electronic filing and service, the extra three days have become a "de facto" part of the time periods for such documents. The Department of Justice notes that government lawyers need time to confer with relevant personnel. Other commentators say that lawyers need time to deal with the competing demands of other cases and to communicate with clients who are incarcerated. Acknowledging that an extension of time could address the problems noted above, commentators argued that such motions do not provide a good solution, because making and adjudicating those motions consume lawyer and court time.

A number of commentators suggested modifications to the proposal or additional amendments that would offset some effects of the proposal. Some of the suggested revisions applied equally to the three-day rules in the Civil, Criminal, and Bankruptcy Rules. Others were specific to the Appellate Rules.

The Department of Justice proposed the addition, to each Committee Note, of language encouraging the grant of extensions when appropriate. After some discussion, the Department circulated a revised proposal that read: "The ease of making electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice." The

Criminal Rules Committee voted to add the proposed language to the Committee Note to Criminal Rule 45, and noted the importance of taking a flexible approach and resolving issues on their merits in criminal cases. The other Advisory Committees now are prepared to acquiesce in that language.

Other commentators made a variety of suggestions. Two commentators proposed that although electronic service should not give rise to an automatic three-day extension, a more limited automatic extension (of one or two days) would be appropriate. One commentator proposed the adoption of a provision that would address the computation of response time when a document "is submitted with a motion for leave to file or is not accepted for filing." Two sets of comments suggested lengthening the deadline for reply briefs.

The Committee did not adopt the proposals for a one-or-two-day extension or for a provision addressing documents that are not immediately accepted for filing. Some committee members, however, were sympathetic to the concerns about the timing for reply briefs. As the commentators pointed out, the "de facto" deadline for reply briefs is now 17 days (14 day under Rule 31(a)(1), plus three days under Rule 26(c)). Before the advent of electronic service, the three-day rule existed to offset transit time in the mail; if the mail took three days, then the de facto response time would be the same as the nominal deadline, namely, 14 days. But in 2002, Rule 25 was amended to permit electronic service, and as electronic service has become more widespread, lawyers have become accustomed to a period of 17 days for filing a reply brief. A number of Committee members expressed concern that a 14-day deadline is very short and that it can be difficult to seek extensions of time.

Committee members concluded that the amendment to Rule 26(c) should proceed together with the amendments to the three-day rules in the other sets of rules. But the Committee added to its study agenda a new item concerning the deadline for reply briefs. The Committee also discussed that before the amendment to the three-day rule takes effect on December 1, 2016, the chair could alert the chief judges of the courts of appeals about the Committee's work relating to the filing deadline for reply briefs. Such notice would permit local courts to consider whether to extend the deadline for reply briefs by local rule, especially if the Committee is considering a national rule amendment on that topic.

F. Updating a cross-reference in Rule 26(a)(4)(C)

In 2013, Rule 13—governing appeals as of right from the Tax Court—was revised and became Rule 13(a). A new Rule 13(b)—providing that Rule 5 governs permissive appeals from the Tax Court—was added. At that time, Rule 26(a)(4)(C)'s reference to "filing by mail under Rule 13(b)" should have been updated to refer to "filing by mail under Rule 13(a)(2)."

The Committee voted to give final approval to an amendment to Rule 26(a)(4)(C) to update this cross-reference. The Committee noted that the change is a technical amendment that can proceed without publication.

* * * * *

April 28, 2016

Honorable Paul D. Ryan
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are the following materials submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: transmittal letters to the Court; redline versions of the rules with Committee Notes; excerpts from the Reports of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; excerpts from the Reports of the Advisory Committee on Bankruptcy Rules; and a Memorandum to the Court from James C. Duff, Secretary of the Judicial Conference of the United States, with attachments.

Sincerely,

/s/ John G. Roberts

April 28, 2016

Honorable Joseph R. Biden, Jr.
President, United States Senate
Washington, D.C. 20510

Dear Mr. President:

I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are the following materials submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: transmittal letters to the Court; redline versions of the rules with Committee Notes; excerpts from the Reports of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; excerpts from the Reports of the Advisory Committee on Bankruptcy Rules; and a Memorandum to the Court from James C. Duff, Secretary of the Judicial Conference of the United States, with attachments.

Sincerely,

/s/ John G. Roberts

_____, 2016

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1010, 1011, 2002, 3002.1, 7008, 7012, 7016, 9006, 9027, and 9033, and new Rule 1012.

[*See infra* pp. __ __ __.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2016, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 1010. Service of Involuntary Petition and Summons

(a) SERVICE OF INVOLUNTARY PETITION AND SUMMONS. On the filing of an involuntary petition, the clerk shall forthwith issue a summons for service. When an involuntary petition is filed, service shall be made on the debtor. The summons shall be served with a copy of the petition in the manner provided for service of a summons and complaint by Rule 7004(a) or (b). If service cannot be so made, the court may order that the summons and petition be served by mailing copies to the party's last known address, and by at least one publication in a manner and form directed by the court. The summons and petition may be served on the party anywhere. Rule 7004(e) and Rule 4(*l*) F.R.Civ.P. apply when service is made or attempted under this rule.

* * * * *

Rule 1011. Responsive Pleading or Motion in Involuntary Cases

(a) WHO MAY CONTEST PETITION. The debtor named in an involuntary petition may contest the petition. In the case of a petition against a partnership under Rule 1004, a nonpetitioning general partner, or a person who is alleged to be a general partner but denies the allegation, may contest the petition.

* * * * *

(f) CORPORATE OWNERSHIP STATEMENT. If the entity responding to the involuntary petition is a corporation, the entity shall file with its first appearance, pleading, motion, response, or other request addressed to the court a corporate ownership statement containing the information described in Rule 7007.1.

Rule 1012. Responsive Pleading in Cross-Border Cases

(a) WHO MAY CONTEST PETITION. The debtor or any party in interest may contest a petition for recognition of a foreign proceeding.

(b) OBJECTIONS AND RESPONSES; WHEN PRESENTED. Objections and other responses to the petition shall be presented no later than seven days before the date set for the hearing on the petition, unless the court prescribes some other time or manner for responses.

(c) CORPORATE OWNERSHIP STATEMENT. If the entity responding to the petition is a corporation, then the entity shall file a corporate ownership statement containing the information described in Rule 7007.1 with its first appearance, pleading, motion, response, or other request addressed to the court.

Rule 2002. Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee

* * * * *

(q) NOTICE OF PETITION FOR RECOGNITION OF FOREIGN PROCEEDING AND OF COURT'S INTENTION TO COMMUNICATE WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES.

(1) *Notice of Petition for Recognition*. After the filing of a petition for recognition of a foreign proceeding, the court shall promptly schedule and hold a hearing on the petition. The clerk, or some other person as the court may direct, shall forthwith give the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under §1519 of the Code, all parties to

litigation pending in the United States in which the debtor is a party at the time of the filing of the petition, and such other entities as the court may direct, at least 21 days' notice by mail of the hearing. The notice shall state whether the petition seeks recognition as a foreign main proceeding or foreign nonmain proceeding and shall include the petition and any other document the court may require. If the court consolidates the hearing on the petition with the hearing on a request for provisional relief, the court may set a shorter notice period, with notice to the entities listed in this subdivision.

* * * * *

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

(a) IN GENERAL. This rule applies in a chapter 13 case to claims (1) that are secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments. Unless the court orders otherwise, the notice requirements of this rule cease to apply when an order terminating or annulling the automatic stay becomes effective with respect to the residence that secures the claim.

* * * * *

Rule 7008. General Rules of Pleading

Rule 8 F.R.Civ.P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy court, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy court.

Rule 7012. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings

* * * * *

(b) APPLICABILITY OF RULE 12(b)-(i) F.R.CIV.P. Rule 12(b)-(i) F.R.Civ.P. applies in adversary proceedings. A responsive pleading shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy court.

Rule 7016. Pretrial Procedures

(a) PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT. Rule 16 F.R.Civ.P. applies in adversary proceedings.

(b) DETERMINING PROCEDURE. The bankruptcy court shall decide, on its own motion or a party's timely motion, whether:

(1) to hear and determine the proceeding;

(2) to hear the proceeding and issue proposed findings of fact and conclusions of law; or

(3) to take some other action.

Rule 9006. Computing and Extending Time; Time for Motion Papers

* * * * *

(f) ADDITIONAL TIME AFTER SERVICE BY MAIL OR UNDER RULE 5(b)(2)(D) OR (F) F.R.CIV.P. When there is a right or requirement to act or undertake some proceedings within a prescribed period after being served and that service is by mail or under Rule 5(b)(2)(D) (leaving with the clerk) or (F) (other means consented to) F.R.Civ.P., three days are added after the prescribed period would otherwise expire under Rule 9006(a).

* * * * *

Rule 9027. Removal

(a) NOTICE OF REMOVAL.

(1) *Where Filed; Form and Content*. A notice of removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending. The notice shall be signed pursuant to Rule 9011 and contain a short and plain statement of the facts which entitle the party filing the notice to remove, contain a statement that upon removal of the claim or cause of action, the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy court, and be accompanied by a copy of all process and pleadings.

* * * * *

(e) PROCEDURE AFTER REMOVAL.

* * * * *

(3) Any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, shall file a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy court. A statement required by this paragraph shall be signed pursuant to Rule 9011 and shall be filed not later than 14 days after the filing of the notice of removal. Any party who files a statement pursuant to this paragraph shall mail a copy to every other party to the removed claim or cause of action.

* * * * *

Rule 9033. Proposed Findings of Fact and Conclusions of Law

(a) SERVICE. In a proceeding in which the bankruptcy court has issued proposed findings of fact and conclusions of law, the clerk shall serve forthwith copies on all parties by mail and note the date of mailing on the docket.

* * * * *

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

October 9, 2015

MEMORANDUM

To: The Chief Justice of the United States and
Associate Justices of the Supreme Court

From: James C. Duff

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 1010, 1011, 2002, 3002.1, and 9006, and new Rule 1012 of the Federal Rules of Bankruptcy Procedure, which were approved by the Judicial Conference at its September 2015 session. The Judicial Conference recommends that the amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) "clean" copies of the affected rules incorporating the proposed amendments and accompanying Committee Notes; (ii) a redline version of the same; (iii) an excerpt from the September 2015 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the May 2015 Report of the Advisory Committee on the Federal Rules of Bankruptcy Procedure.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 1010. Service of Involuntary Petition and Summons~~; Petition for Recognition of a Foreign Nonmain Proceeding~~

(a) SERVICE OF INVOLUNTARY PETITION AND SUMMONS~~; SERVICE OF PETITION FOR RECOGNITION OF FOREIGN NONMAIN PROCEEDING~~. On the filing of an involuntary petition~~ or a petition for recognition of a foreign nonmain proceeding~~, the clerk shall forthwith issue a summons for service. When an involuntary petition is filed, service shall be made on the debtor. ~~When a petition for recognition of a foreign nonmain proceeding is filed, service shall be made on the debtor, any entity against whom provisional relief is sought under § 1519 of the Code, and on any other party as the court may direct.~~ The summons shall be served with a copy of the petition in the manner provided for service of a

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

17 summons and complaint by Rule 7004(a) or (b). If service
18 cannot be so made, the court may order that the summons
19 and petition be served by mailing copies to the party's last
20 known address, and by at least one publication in a manner
21 and form directed by the court. The summons and petition
22 may be served on the party anywhere. Rule 7004(e) and
23 Rule 4(*l*) F.R.Civ.P. apply when service is made or
24 attempted under this rule.

25 * * * * *

Committee Note

Subdivision (a) of this rule is amended to remove provisions regarding the issuance of a summons for service in certain chapter 15 proceedings. The requirements for notice and service in chapter 15 proceedings are found in Rule 2002(q).

Rule 1011. Responsive Pleading or Motion in Involuntary~~ and Cross-Border~~ Cases

(a) WHO MAY CONTEST PETITION. The debtor named in an involuntary petition~~, or a party in interest to a petition for recognition of a foreign proceeding,~~ may contest the petition. In the case of a petition against a partnership under Rule 1004, a nonpetitioning general partner, or a person who is alleged to be a general partner but denies the allegation, may contest the petition.

* * * * *

(f) CORPORATE OWNERSHIP STATEMENT. If the entity responding to the involuntary petition~~ or the petition for recognition of a foreign proceeding~~ is a corporation, the entity shall file with its first appearance, pleading, motion, response, or other request addressed to the court a corporate ownership statement containing the information described in Rule 7007.1.

Committee Note

This rule is amended to remove provisions regarding chapter 15 proceedings. The requirements for responses to a petition for recognition of a foreign proceeding are found in Rule 1012.

Rule 1012. Responsive Pleading in Cross-Border Cases

(a) WHO MAY CONTEST PETITION. The debtor or any party in interest may contest a petition for recognition of a foreign proceeding.

(b) OBJECTIONS AND RESPONSES; WHEN PRESENTED. Objections and other responses to the petition shall be presented no later than seven days before the date set for the hearing on the petition, unless the court prescribes some other time or manner for responses.

(c) CORPORATE OWNERSHIP STATEMENT. If the entity responding to the petition is a corporation, then the entity shall file a corporate ownership statement containing the information described in Rule 7007.1 with its first appearance, pleading, motion, response, or other request addressed to the court.

Committee Note

This rule is added to govern responses to petitions for recognition in cross-border cases. It incorporates provisions formerly found in Rule 1011. Subdivision (a) provides that the debtor or a party in interest may contest the petition. Subdivision (b) provides for presentation of responses no later than 7 days before the hearing on the petition, unless the court directs otherwise. Subdivision (c) governs the filing of corporate ownership statements by entities responding to the petition.

Rule 2002. Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee

* * * * *

(q) NOTICE OF PETITION FOR RECOGNITION OF FOREIGN PROCEEDING AND OF COURT'S INTENTION TO COMMUNICATE WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES.

(1) *Notice of Petition for Recognition*. After the filing of a petition for recognition of a foreign proceeding, the court shall promptly schedule and hold a hearing on the petition. The clerk, or some other person as the court may direct, shall forthwith give the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under §1519 of the Code, all parties to

21 litigation pending in the United States in which the
22 debtor is a party at the time of the filing of the
23 petition, and such other entities as the court may
24 direct, at least 21 days' notice by mail of the hearing
25 ~~on the petition for recognition of a foreign proceeding~~.
26 The notice shall state whether the petition seeks
27 recognition as a foreign main proceeding or foreign
28 nonmain proceeding and shall include the petition and
29 any other document the court may require. If the
30 court consolidates the hearing on the petition with the
31 hearing on a request for provisional relief, the court
32 may set a shorter notice period, with notice to the
33 entities listed in this subdivision.
34 * * * * *

Committee Note

Subdivision (q) is amended to clarify the procedures for giving notice in cross-border proceedings. The amended rule provides, in keeping with Code § 1517(c), for the court to schedule a hearing to be held promptly on the

petition for recognition of a foreign proceeding. The amended rule contemplates that a hearing on a request for provisional relief may sometimes overlap substantially with the merits of the petition for recognition. In that case, the court may choose to consolidate the hearing on the request for provisional relief with the hearing on the petition for recognition, see Rules 1018 and 7065, and accordingly shorten the usual 21-day notice period.

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

(a) IN GENERAL. This rule applies in a chapter 13 case to claims (1) that are ~~(1)~~secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments~~provided for under § 1322(b)(5) of the Code in the debtor's plan~~. Unless the court orders otherwise, the notice requirements of this rule cease to apply when an order terminating or annulling the automatic stay becomes effective with respect to the residence that secures the claim.

* * * * *

Committee Note

Subdivision (a) is amended to clarify the applicability of the rule. Its provisions apply whenever a chapter 13 plan provides that contractual payments on the debtor's home mortgage will be maintained, whether they will be paid by the trustee or directly by the debtor. The reference to § 1322(b)(5) of the Code is deleted to make

clear that the rule applies even if there is no prepetition arrearage to be cured. So long as a creditor has a claim that is secured by a security interest in the debtor's principal residence and the plan provides that contractual payments on the claim will be maintained, the rule applies.

Subdivision (a) is further amended to provide that, unless the court orders otherwise, the notice obligations imposed by this rule cease on the effective date of an order granting relief from the automatic stay with regard to the debtor's principal residence. Debtors and trustees typically do not make payments on mortgages after the stay relief is granted, so there is generally no need for the holder of the claim to continue providing the notices required by this rule. Sometimes, however, there may be reasons for the debtor to continue receiving mortgage information after stay relief. For example, the debtor may intend to seek a mortgage modification or to cure the default. When the court determines that the debtor has a need for the information required by this rule, the court is authorized to order that the notice obligations remain in effect or be reinstated after the relief from the stay is granted.

Rule 9006. Computing and Extending Time; Time for Motion Papers

* * * * *

(f) ADDITIONAL TIME AFTER SERVICE BY MAIL OR UNDER RULE 5(b)(2)(D)~~, (E),~~ OR (F) F.R.CIV.P. When there is a right or requirement to act or undertake some proceedings within a prescribed period after ~~service~~being served and that service is by mail or under Rule 5(b)(2)(D) (leaving with the clerk)~~, (E),~~ or (F) (other means consented to) F.R.Civ.P., three days are added after the prescribed period would otherwise expire under Rule 9006(a).

* * * * *

Committee Note

Subdivision (f) is amended to remove service by electronic means under Civil Rule 5(b)(2)(E) from the modes of service that allow three added days to act after being served.

Rule 9006(f) and Civil Rule 6(d) contain similar provisions providing additional time for actions after being

served by mail or by certain modes of service that are identified by reference to Civil Rule 5(b)(2). Rule 9006(f)—like Civil Rule 6(d)—is amended to remove the reference to service by electronic means under Rule 5(b)(2)(E). The amendment also adds clarifying parentheticals identifying the forms of service under Rule 5(b)(2) for which three days will still be added.

Civil Rule 5(b)—made applicable in bankruptcy proceedings by Rules 7005 and 9014(b)—was amended in 2001 to allow service by electronic means with the consent of the person served. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow three added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the three added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the three added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the three added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day

periods that allow "day-of-the-week" counting. Adding three days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow three added days means that the three added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means" of delivery under subparagraph (F).

Subdivision (f) is also amended to conform to a corresponding amendment of Civil Rule 6(d). The amendment clarifies that only the party that is served by mail or under the specified provisions of Civil Rule 5—and not the party making service—is permitted to add three days to any prescribed period for taking action after service is made.

EXCERPT FROM THE SEPTEMBER 2015
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

* * * * *

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules * * * * * Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed new Rule 1012, proposed amendments to Rules 1010, 1011, 2002, 3002.1, and 9006(f) * * * * * with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and public for comment in August 2013 * * * * *, and were offered for approval as published except as noted below.

Rules 1010, 1011, and 2002, and New Rule 1012

The proposed amendments to Rules 1010, 1011, and 2002, and proposed new Rule 1012 are intended to improve procedures for international bankruptcy cases. Shortly after chapter 15 (Ancillary and Other Cross-Border Cases) was added to the Bankruptcy Code in 2005, the Bankruptcy Rules were amended to insert new provisions governing cross-border cases. Among the new provisions were changes to Rules 1010 and 1011, which previously governed only involuntary bankruptcy cases, and Rule 2002, which governs notice. The proposed new rule and amendments would: (1) remove the chapter 15-related provisions from Rules 1010 and 1011; (2) create a new Rule 1012 (Responsive Pleading in Cross-Border Cases) to govern responses to a chapter 15 petition; and (3) augment Rule 2002 to clarify the procedures for giving notice in cross-border proceedings. One comment received will be treated as a suggestion for later

consideration. The Advisory Committee determined to recommend approval of the amended rules as published.

Rule 3002.1

Rule 3002.1 applies only in chapter 13 cases and requires creditors whose claims are secured by a security interest in the debtor's principal residence to provide the debtor and the trustee notice of any changes in the periodic payment amount or the assessment of any fees or charges during the bankruptcy case. This rule intended to ensure that debtors who attempt to maintain their home mortgage payments while they are in chapter 13 will have the information they need to do so.

The proposed amendments seek to clarify three matters on which courts have disagreed: (1) the rule applies whenever a debtor will make ongoing mortgage payments during the chapter 13 case, whether or not a prepetition default is being cured; (2) the rule applies regardless of whether it is the debtor or the trustee who is making the payments to the mortgagee; and (3) the rule generally ceases to apply when an order granting relief from the stay becomes effective with respect to the debtor's residence.

Four comments were submitted on the proposed amendments. Two of them addressed the difficulty of applying the rule to home equity lines of credit, for which changes in payment amount are frequent and often de minimis. The other comments were supportive of the amendments. The Advisory Committee determined to recommend approval of the amended rule as published.

Rule 9006(f)

The amendment to Rule 9006(f) would eliminate the 3-day extension to time periods when service is made electronically. The amendment was initially proposed by the CM/ECF

Subcommittee and was published simultaneously with similar amendments to Civil Rule 6(d), Appellate Rule 26(c), and Criminal Rule 45(c) as part of the 3-day rule package. Five comments were submitted on the proposed bankruptcy rule amendment, including one by the Department of Justice similar to its comments on the other Advisory Committees' parallel amendments. To maintain uniformity with the Committee Notes of the other rules in the 3-day rule package, the Advisory Committee agreed to the addition of language to the Committee Note to address the concerns raised by the Department of Justice. The Standing Committee concurred with the minor modification.

* * * * *

The Standing Committee concurred with the Advisory Committee's recommendations above.

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 1010, 1011, 2002, 3002.1, 9006(f), and new Rule 1012, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law;

* * * * *

Respectfully submitted,

Jeffrey S. Sutton, Chair

Dean C. Colson
Brent E. Dickson
Roy T. Englert, Jr.
Gregory G. Garre
Neil M. Gorsuch
Susan P. Graber
David F. Levi
Patrick J. Schiltz
Amy J. St. Eve
Larry D. Thompson
Richard C. Wesley
Sally Yates
Jack Zouhary

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

JEFFREY S. SUTTON
CHAIR

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CIVIL RULES

REENA RAGGI
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

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: May 6, 2015

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on April 20, 2015, in Pasadena, California.

* * * * *

The Committee now seeks the Standing Committee's final approval of one proposed new rule and five rule amendments that were published in August 2014.

* * * * *

II. Action Items

A. <u>Items for Final Approval</u>

* * * * *

<u>Action Item 1</u>. Rules 1010, 1011, and 2002, and proposed new Rule 1012 (governing responses to, and notices of hearings on, chapter 15 petitions for recognition). These amendments and addition to the Bankruptcy Rules are intended to improve procedures for international bankruptcy cases. Shortly after chapter 15 (Ancillary and Other Cross-Border Cases) was added to the Bankruptcy Code in 2005, the Bankruptcy Rules were amended to insert new provisions governing cross-border cases. Among the new provisions were changes to Rules 1010 and 1011, which previously governed only involuntary bankruptcy cases, and Rule 2002, which governs notice. The currently proposed amendments to the Bankruptcy Rules would make three changes: (i) remove the chapter 15-related provisions from Rules 1010 and 1011; (ii) create a new Rule 1012 (Responsive Pleading in Cross-Border Cases) to govern responses to a chapter 15 petition; and (iii) augment Rule 2002 to clarify the procedures for giving notice in cross-border proceedings.

Only one comment was submitted regarding the proposed rule changes. The Pennsylvania Bar Association expressed general approval of the proposed amendments, but suggested that Rule 1012 (Responsive Pleading in Cross-Border Cases) contain a cross-reference to Rule 1004.2 (Petition in Chapter 15 Cases). The latter rule prescribes a procedure for challenging the designation in a chapter 15 petition of the debtor's center of main interests. The Bar Association explained that "Rule 1004.2(b) sets forth those parties that should be served in connection with challenges to a debtor's designation in a petition." It suggested that objections and responses to a petition under proposed Rule 1012(b) should be served in the same manner.

The Committee voted unanimously to approve the proposed rules as published. It concluded that the Bar Association's comment should be treated as a new suggestion that the notice provisions of Rule 1004.2(b) should be made applicable to all objections and responses to a chapter 15 petition rather than just to challenges to the designation of the debtor's center of main interests. The Committee has added this suggestion to its list of matters for future consideration.

<u>Action Item 2</u>. Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence). This rule, which applies only in chapter 13 cases, requires creditors whose claims are secured by a security interest in the debtor's principal residence to provide the debtor and the trustee notice of any changes in the periodic payment amount or the assessment of any fees or charges while the bankruptcy case is pending. The rule was promulgated in 2011 in order to ensure that debtors who attempt to maintain their home mortgage payments while they are in chapter 13 will have the information they need to do so.

The proposed amendments that were published last summer seek to clarify three matters on which courts have disagreed:

1) The rule applies whenever a debtor will make ongoing mortgage payments during the chapter 13 case, whether or not a prepetition default is being cured.
2) The rule applies regardless of whether it is the debtor or the trustee who is making the payments to the mortgagee.
3) The rule generally ceases to apply when an order granting relief from the stay becomes effective with respect to the debtor's residence.

Four comments were submitted on the proposed amendments. Two of them addressed the difficulty of applying the rule to home equity lines of credit, for which payment amount changes are frequent and often de minimis. The other comments were supportive of the amendments.

The Committee voted unanimously to approve the amendments to Rule 3002.1 as published. The issue of the rule's applicability to home equity lines of credit was considered by the Committee at the fall 2014 meeting, and publication of a proposed amendment to address that issue will be sought later as part of a larger package of related amendments.

Action Item 3. Rule 9006(f) (Computing and Extending Time). Among the proposed amendments published last summer was an amendment to Rule 9006(f) that would eliminate the 3-day extension to time periods when service is made electronically. The amendment was initially proposed by the Standing Committee's CM/ECF Subcommittee. It was published simultaneously with similar amendments to Civil Rule 6(d), Appellate Rule 26(c), and Criminal Rule 45(c).

Five comments were submitted on the proposed bankruptcy rule amendment. One expressed support for the amendment, and two raised questions about how this time computation change would apply to pending cases or would interact with other rules. A fourth comment, submitted by a bankruptcy clerk, expressed concern about having different deadlines for parties in response to service of a single document. The final comment was submitted by the Department of Justice and was similar to the comments it submitted on the other advisory committees' parallel amendments. The comment raised concerns about possible prejudice caused by end-of-day or beginning-of-weekend electronic service and suggested an addition to the Committee Note that would note the court's authority to grant extensions of time to prevent unfairness in such situations.

The Committee voted unanimously to approve the amendment as published. While the Committee preferred not to revise the Committee Note in response to the DOJ's comment, it agreed to the addition of the following language if needed to maintain uniformity with the Committee Notes of the other advisory committees: "The ease of making electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice."

* * * * *

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

October 29, 2015

MEMORANDUM

To: The Chief Justice of the United States
Associate Justices of the Supreme Court

From: James C. Duff

RE: SUPPLEMENTAL TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

By direction of the Judicial Conference of the United States (Judicial Conference), pursuant to the authority conferred by 28 U.S.C. § 331, I transmit for consideration of the Court a supplemental transmittal of proposed amendments to Rules 7008, 7012, 7016, 9027, and 9033 of the Federal Rules of Bankruptcy Procedure. This package, known as the "*Stern* Amendments," was previously approved by the Judicial Conference at its September 2013 session and submitted to the Court but withdrawn from consideration because of pending litigation on the Court's docket that implicated the subject matter of the *Stern* Amendments.

For reasons explained in the attached materials, the Judicial Conference now resubmits the *Stern* Amendments for the Court's consideration. This package supplements our transmittal dated October 9, 2015, of proposed amendments to Rules 1010, 1011, 2002, 3002.1, and 9006, and new Rule 1012. The Judicial Conference recommends that these supplemental amendments be approved by the Court and transmitted to Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) "clean" copies of the affected rules incorporating the proposed amendments and accompanying Committee Notes; (ii) a redline version of the same; (iii) a Memorandum of Action by the Executive Committee of the Judicial Conference explaining the timing of its approval of the *Stern* Amendments; (iv) the October 16, 2015, Committee on Rules of Practice and Procedure Memorandum to Chief Judge William B. Traxler, Jr., requesting expedited consideration of the *Stern* Amendments; (v) the October 14, 2015, Bankruptcy Rules Advisory Committee Memorandum regarding the *Stern* Amendments; (vi) an excerpt from the September 27, 2013, Committee on Rules of Practice and Procedure Summary of Proposed Amendments to the Federal Rules; and (vii) an excerpt from the May 8, 2013, Bankruptcy Rules Advisory Committee Report.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

1 **Rule 7008. General Rules of Pleading**

2 Rule 8 F.R.Civ.P. applies in adversary proceedings.
3 The allegation of jurisdiction required by Rule 8(a) shall
4 also contain a reference to the name, number, and chapter
5 of the case under the Code to which the adversary
6 proceeding relates and to the district and division where the
7 case under the Code is pending. In an adversary
8 proceeding before a bankruptcy ~~judge~~court, the complaint,
9 counterclaim, cross-claim, or third-party complaint shall
10 contain a statement ~~that the proceeding is core or non-core~~
11 ~~and, if non-core~~ that the pleader does or does not consent to
12 entry of final orders or judgment by the bankruptcy
13 ~~judge~~court.

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

Committee Note

The rule is amended to remove the requirement that the pleader state whether the proceeding is core or non-core and to require in all proceedings that the pleader state whether the party does or does not consent to the entry of final orders or judgment by the bankruptcy court. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. The amended rule calls for the pleader to make a statement regarding consent, whether or not a proceeding is termed non-core. Rule 7012(b) has been amended to require a similar statement in a responsive pleading. The bankruptcy judge will then determine the appropriate course of proceedings under Rule 7016.

1 **Rule 7012. Defenses and Objections—When and How**
2 **Presented—By Pleading or Motion—**
3 **Motion for Judgment on the Pleadings**

4 * * * * *

5 (b) APPLICABILITY OF RULE 12(b)-(i)
6 F.R.CIV.P. Rule 12(b)-(i) F.R.Civ.P. applies in adversary
7 proceedings. A responsive pleading ~~shall admit or deny an~~
8 ~~allegation that the proceeding is core or non-core. If the~~
9 ~~response is that the proceeding is non-core, it~~shall include a
10 statement that the party does or does not consent to entry of
11 final orders or judgment by the bankruptcy ~~judge~~court.~~In~~
12 ~~non-core proceedings final orders and judgments shall not~~
13 ~~be entered on the bankruptcy judge's order except with the~~
14 ~~express consent of the parties.~~

Committee Note

Subdivision (b) is amended to remove the requirement that the pleader state whether the proceeding is core or non-core and to require in all proceedings that the pleader state whether the party does or does not consent to the entry of final orders or judgment by the bankruptcy court. The

amended rule also removes the provision requiring express consent before the entry of final orders and judgments in non-core proceedings. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. The amended rule calls for the pleader to make a statement regarding consent, whether or not a proceeding is termed non-core. This amendment complements the requirements of amended Rule 7008(a). The bankruptcy judge's subsequent determination of the appropriate course of proceedings, including whether to enter final orders and judgments or to issue proposed findings of fact and conclusions of law, is a pretrial matter now provided for in amended Rule 7016.

1 **Rule 7016. Pre-~~T~~trial Procedures~~; Formulating Issues~~**

2 (a) PRETRIAL CONFERENCES; SCHEDULING;
3 MANAGEMENT. Rule 16 F.R.Civ.P. applies in adversary
4 proceedings.

5 (b) DETERMINING PROCEDURE. The bankruptcy
6 court shall decide, on its own motion or a party's timely
7 motion, whether:

8 (1) to hear and determine the proceeding;

9 (2) to hear the proceeding and issue proposed
10 findings of fact and conclusions of law; or

11 (3) to take some other action.

Committee Note

This rule is amended to create a new subdivision (b) that provides for the bankruptcy court to enter final orders and judgment, issue proposed findings and conclusions, or take some other action in a proceeding. The rule leaves the decision as to the appropriate course of proceedings to the bankruptcy court. The court's decision will be informed by the parties' statements, required under Rules 7008(a), 7012(b), and 9027(a) and (e), regarding consent to the entry of final orders and judgment. If the bankruptcy court

chooses to issue proposed findings of fact and conclusions of law, Rule 9033 applies.

1 **Rule 9027. Removal**

2 (a) NOTICE OF REMOVAL.

3 (1) *Where Filed; Form and Content.* A notice
4 of removal shall be filed with the clerk for the district
5 and division within which is located the state or
6 federal court where the civil action is pending. The
7 notice shall be signed pursuant to Rule 9011 and
8 contain a short and plain statement of the facts which
9 entitle the party filing the notice to remove, contain a
10 statement that upon removal of the claim or cause of
11 action ~~the proceeding is core or non-core and, if non-~~
12 ~~core~~, ~~that~~ the party filing the notice does or does not
13 consent to entry of final orders or judgment by the
14 bankruptcy ~~judge~~court, and be accompanied by a copy
15 of all process and pleadings.

16 * * * * *

17 (e) PROCEDURE AFTER REMOVAL.

18 * * * * *

19 (3) Any party who has filed a pleading in
20 connection with the removed claim or cause of action,
21 other than the party filing the notice of removal, shall
22 file a statement ~~admitting or denying any allegation in~~
23 ~~the notice of removal that upon removal of the claim~~
24 ~~or cause of action the proceeding is core or non-core.~~
25 ~~If the statement alleges that the proceeding is non-~~
26 ~~core, it shall state~~ that the party does or does not
27 consent to entry of final orders or judgment by the
28 bankruptcy ~~judge~~court. A statement required by this
29 paragraph shall be signed pursuant to Rule 9011 and
30 shall be filed not later than 14 days after the filing of
31 the notice of removal. Any party who files a
32 statement pursuant to this paragraph shall mail a copy

33 to every other party to the removed claim or cause of

34 action.

35 * * * * *

Committee Note

Subdivisions (a)(1) and (e)(3) are amended to delete the requirement for a statement that the proceeding is core or non-core and to require in all removed actions a statement that the party does or does not consent to the entry of final orders or judgment by the bankruptcy court. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. The amended rule calls for a statement regarding consent at the time of removal, whether or not a proceeding is termed non-core.

The party filing the notice of removal must include a statement regarding consent in the notice, and the other parties who have filed pleadings must respond in a separate statement filed within 14 days after removal. If a party to the removed claim or cause of action has not filed a pleading prior to removal, however, there is no need to file a separate statement under subdivision (e)(3), because a statement regarding consent must be included in a responsive pleading filed pursuant to Rule 7012(b). Rule 7016 governs the bankruptcy court's decision whether to hear and determine the proceeding, issue proposed findings of fact and conclusions of law, or take some other action in the proceeding.

1 **Rule 9033. ~~Review of~~ Proposed Findings of Fact and**
2 **Conclusions of Law ~~in Non-Core~~**
3 **~~Proceedings~~**

4 (a) SERVICE. ~~In non-core proceedings heard~~
5 ~~pursuant to 28 U.S.C. § 157(c)(1),~~In a proceeding in which
6 the bankruptcy court has issued ~~the bankruptcy judge shall~~
7 ~~file~~ proposed findings of fact and conclusions of law, ~~.~~ ~~T~~the
8 clerk shall serve forthwith copies on all parties by mail and
9 note the date of mailing on the docket.

10 * * * * *

Committee Note

Subdivision (a) is amended to delete language limiting this provision to non-core proceedings. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. If the bankruptcy court decides, pursuant to Rule 7016, that it is appropriate to issue proposed findings of fact and conclusions of law in a proceeding, this rule governs the subsequent procedures.

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

WILLIAM B. TRAXLER, JR.
CHAIRMAN, EXECUTIVE COMMITTEE

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Memorandum of Action

Executive Committee
Judicial Conference of the United States

October 20, 2015

The Executive Committee conducted a mail ballot, which concluded on October 20, 2015. All members participated.

The Executive Committee acted on the following matter:

Amendments to the Federal Rules of Bankruptcy Procedure

At its September 2013 session, the Judicial Conference approved and transmitted to the United States Supreme Court amendments to Rules 7008, 7012, 7016, 9027, and 9033 of the Federal Rules of Bankruptcy Procedure proposed by the Committee on Rules of Practice and Procedure in response to the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). In November 2013, at the request of the Rules Committee, the Executive Committee acting on behalf of the Judicial Conference, withdrew the amendments in light of pending Supreme Court litigation implicating the amendments and recommitted the amendments to the Rules Committee for further consideration following a decision in the litigation. Following a decision in *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015), the Rules Committee has determined that the proposed amendments should move forward as originally drafted. It recommended that the amendments be approved and resubmitted to the Supreme Court in sufficient time to be considered during this rulemaking cycle in order to put in place as soon as possible a process for allowing parties expressly to consent to bankruptcy-judge adjudication of claims otherwise requiring adjudication by an Article III judge. The Executive Committee agreed to act on behalf of the Judicial Conference, on an expedited basis, to approve the amendments and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

William B. Traxler, Jr.

Committee: Paul J. Barbadoro
James C. Duff
Merrick B. Garland
Federico A. Moreno
William Jay Riley

10/22/2015

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

JEFFREY S. SUTTON
CHAIR

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CRIMINAL RULES

WILLIAM K. SESSIONS, III
EVIDENCE RULES

October 16, 2015

The Honorable William B. Traxler, Jr.
Chief Judge
United States Court of Appeals
C.F. Haynsworth Federal Building and
United States Courthouse
300 East Washington Street, Room 222
Greenville, South Carolina 29601

Dear Chief Judge Traxler:

I write with a request. In 2013, the Executive Committee of the Judicial Conference withdrew from the Supreme Court's consideration a set of Amendments to the Bankruptcy Rules (the "*Stern* Amendments") that the Judicial Conference previously had approved and forwarded to the Court for approval. The reason for the withdrawal, as the attached memoranda from me and Judge Ikuta explain in more detail, was pending litigation at the Court that implicated the legal and constitutional premises of the *Stern* Amendments. The Supreme Court recently removed the legal cloud hanging over the *Stern* Amendments when it held that the Constitution permits a bankruptcy judge to adjudicate claims otherwise requiring Article III adjudication if the parties consent to determination by a bankruptcy judge. *See Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015).

That development leaves us with a choice. Namely, should we resubmit the *Stern* Amendments immediately to the Court to be considered during this rulemaking cycle or should we wait for the next rulemaking cycle? The choice affects whether the Amendments, if approved, go into effect on December 1, 2016 or December 1, 2017. The Bankruptcy Rules Committee and the Standing Committee recently each unanimously re-approved the *Stern* Amendments and unanimously agreed that we should resubmit them to the Court during this rulemaking cycle—in order to put in place as soon as possible a process for allowing parties expressly to consent to bankruptcy-judge adjudication if they wish. We now urge the Executive Committee to do the same on behalf of the Judicial Conference. Waiting until the March 2016 Judicial Conference to re-approve the Amendments, we fear, will not give the Supreme Court time to consider the package during this rulemaking cycle. On top of that, the Conference

previously approved the precise Amendments in 2013, and the Executive Committee previously authorized their withdrawal in 2013. It is my understanding that, if we re-submit the *Stern* Amendments by early November, the Supreme Court should be able to consider them during this rulemaking cycle.

Please let me know if you have any questions about this request, and thank you in advance for considering it.

Sincerely,

/s/

Jeffrey S. Sutton

JSS:jmf
Attachments

cc: James C. Duff
Jeffrey P. Minear
The Honorable Sandra S. Ikuta

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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WILLIAM K. SESSIONS, III
EVIDENCE RULES

October 14, 2015

MEMORANDUM

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: October 14, 2015

RE: Submission to the Supreme Court of Previously Approved *Stern* Amendments

I. Introduction

The purpose of this memorandum is to recommend that a set of Bankruptcy Rules amendments ("the *Stern* amendments"), which were previously approved by the Standing Committee and the Judicial Conference, be sent forward to the Supreme Court.

The memorandum provides background information about the *Stern* amendments, which the Committee originally proposed in response to *Stern v. Marshall*, 131 S. Ct. 2594 (2011), as well as providing information about the Court's subsequent decision in *Wellness International Network v. Sharif*, which held that the Constitution permits a bankruptcy judge to adjudicate claims otherwise requiring Article III adjudication if the parties knowingly and voluntarily consent (expressly or implicitly) to determination by the bankruptcy judge. 135 S. Ct. 1932 (2015). The memorandum also explains why the Committee recommends that the *Stern* amendments be submitted to the Supreme Court now rather than as part of the 2016 submission of amendments (which will take effect on December 1, 2017).

II. The *Stern* Amendments

In *Stern v. Marshall*, the Supreme Court held that the bankruptcy court lacked authority under Article III to hear and enter a final judgment on a state-law counterclaim by the estate against a creditor who had filed a claim against the estate. Such adjudication is expressly authorized by 28 U.S.C. § 157(b)(2), which classifies it as a core proceeding. Nevertheless, the Court concluded that the exercise of that authority in this case by the non-Article III bankruptcy judge was constitutionally impermissible because the proceeding did not fall within the "public rights" exception to Article III and the bankruptcy judge was not acting as a mere adjunct of the Article III courts. The Court further concluded that the objecting creditor had not consented to the bankruptcy court's adjudication of the counterclaim.

In 2011 the Committee began considering whether the Bankruptcy Rules needed to be amended in response to *Stern*. Existing Rules 7008 (General Rules of Pleading) and 7012 (Defenses and Objections) require parties to adversary proceedings to state in the complaint and the responsive pleading whether the proceeding is core or non-core and, if non-core, whether the pleader consents to entry of final judgment by the bankruptcy judge.[1] Rule 7012(b) further states that in "non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties."

The Committee concluded that *Stern* had created an ambiguity concerning the meaning of the terms core and non-core. The case demonstrated that a proceeding might be designated core by the statute but be beyond the constitutional authority of a bankruptcy court to hear and determine, at least without the parties' consent. Thus it would be constitutionally non-core. The Committee therefore decided to propose amendments to Bankruptcy Rules 7008(a) and 7012(b) that would eliminate the distinction between core and non-core proceedings and would require parties in all proceedings to state in their pleadings whether they do or do not consent to entry of a final judgment or order by the bankruptcy judge. A similar amendment was proposed to Rule 9027(a) and (e) (Removal). The sentence in Rule 7012(b) prohibiting a bankruptcy court from entering a final order or judgment in a non-core proceeding without the express consent of the parties was proposed to be deleted. The Committee also proposed amendments to Rule 7016 (Pre-Trial Procedures), which would direct the bankruptcy court to determine the authority it would exercise in a proceeding—whether it would hear and determine it, hear and issue proposed findings of fact and conclusions of law, or take some other action. The final revision included in the *Stern* amendments was to Rule 9033 (Proposed Findings of Fact and Conclusions of Law), which would omit the rule's limitation to non-core proceedings. These amendments, which are attached to this memorandum, were published for public comment in August 2012.

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[1] Rule 7008(a) provides in part: "In an adversary proceeding before a bankruptcy judge, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge." Rule 7012(b) provides in part: "A responsive pleading shall admit or deny an allegation that the proceeding is core or non-core. If the response is that the proceeding is non-core, it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge."

The *Stern* amendments were given final approval by the Standing Committee in June 2013 and by the Judicial Conference in September 2013. Later in the fall of 2013, the Judicial Conference withdrew the amendments from the Supreme Court due to the Court's decision to hear *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014). That case presented the issue, among others, of whether Article III permits a bankruptcy court, with the express or implied consent of the parties, to enter a final judgment on a *Stern* claim. Because the proposed *Stern* amendments rely on the validity of consent, it was determined that the Court should not be asked to approve them while that issue was pending before it.

The Supreme Court decided *Arkison* in June 2014 without reaching the consent issue.[2] But a few weeks later, the Court granted *certiorari* in *Wellness*, which also presented the issue of the constitutional validity of party consent to the adjudication by a bankruptcy judge of a *Stern* claim. As a result, the *Stern* amendments remained on hold awaiting a decision in *Wellness*.

III. The Supreme Court Upholds Consent in *Wellness*

In ruling on the constitutional validity of consent in *Wellness*, the Court looked to its decision in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), for guidance. There the Court held that Article III's "guarantee of an impartial and independent federal adjudication" serves two functions: (1) protection of the personal rights of litigants and (2) maintenance of the separation of powers of the branches of the federal government. *Id.* at 848. *Schor* held that, as a personal right, the protection is freely waivable. *Id.* But, as the Court explained in *Wellness*, *Schor* also held that "'[t]o the extent that this structural principle is implicated in a given case'—but only to that extent—'the parties cannot by consent cure the constitutional difficulty.'" 135 S. Ct. at 1943.

Wellness therefore examined "whether allowing bankruptcy courts to decide *Stern* claims by consent would 'impermissibly threate[n] the institutional integrity of the Judicial Branch.'" *Id.* at 1944. It concluded that there was no such threat, based on its examination of the degree of control Article III courts exercise over bankruptcy judges and the absence of evidence that Congress sought to "aggrandize itself or humble the Judiciary." *Id.* at 1945. As a result, the Court held that "Article III permits bankruptcy courts to decide *Stern* claims submitted to them by consent." *Id.* at 1949.

In Part III of the opinion, the Court examined the nature of the consent required. It concluded that neither the Constitution nor 28 U.S.C. § 157(c)(2) requires the parties to give their express consent to bankruptcy court adjudication. But whether such consent is express or implied, the Court stated, it must be knowing and voluntary. Thus the "key inquiry" in determining whether there is implied consent, said the Court, "is whether 'the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared

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[2] *Arkison* did, however, confirm that *Stern* claims could be treated as non-core under 28 U.S.C. § 157(c), as the rule amendments had assumed. *See* 134 S. Ct. at 2174 ("Accordingly, 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*.").

to try the case' before the non-Article III adjudicator." *Id.* at 1948. The Court emphasized that "'notification of the right to refuse' adjudication by a non-Article III court 'is a prerequisite to any inference of consent.'" *Id.*

Although the Court rejected the debtor's argument that consent to bankruptcy court adjudication must be express, it noted that Bankruptcy Rules 7008 and 7012 require parties to state in their pleadings whether or not they consent to bankruptcy court adjudication of non-core proceedings. The Court said that it is a "good practice" for courts to seek such express statements and that "[s]tatutes or judicial rules may require express consent where the Constitution does not." *Id.* at 1948 n.13.[3]

IV. The Committee's Analysis and Conclusion

At its fall meeting on October 1, the Committee voted unanimously to proceed with the *Stern* amendments as originally drafted and approved, rather than propose a set of rule amendments that would take a different approach to expressing party consent to bankruptcy court adjudication. As discussed above, the pending amendments are based on the constitutional validity of party consent to non-Article III adjudication of *Stern* and non-core claims, which *Wellness* upholds. They provide for express consent in the parties' pleadings. If all the parties to a proceeding consent to bankruptcy court adjudication, no court would have to determine whether the proceeding is one that the bankruptcy court could have heard and determined in the absence of consent. On the other hand, if all of the parties do not consent in their pleadings, the bankruptcy court would determine whether the proceeding is constitutionally and statutorily core—in which case it could enter a final judgment—or a *Stern* or non-core proceeding—in which case it could do no more than submit proposed findings of fact and conclusions of law to the district court.

Members of the Committee recognized that requiring express consent goes beyond the constitutional minimum announced in *Wellness* and that an express consent approach could result in more non-core and *Stern* claims being adjudicated in the district court. That is because parties who might decline to give express consent (if it is required) might otherwise be deemed to have implicitly consented to bankruptcy court adjudication of non-core and *Stern* claims under an implied consent approach. The express consent approach has the advantage, however, of clarity. A court can examine pleadings to determine if the parties in fact consented, thereby eliminating a more uncertain, retrospective determination of whether one or more parties voluntarily and knowingly gave implied consent. Furthermore, it is a procedure that the Court in *Wellness* declared to be a good practice even if implied consent otherwise suffices. *See id.* at

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[3] Justice Alito, in a separate opinion, concurred with the majority opinion in part and concurred in the judgment. 135 S. Ct. at 1949. He agreed that Article III permits a bankruptcy judge to adjudicate a *Stern* claim with the consent of the parties, but he thought that the majority should not have addressed implied consent. Instead, he concluded that "respondent forfeited any *Stern* objection by failing to present that argument properly in the courts below." *Id.* *Stern* claims, he wrote, are not "exempt from ordinary principles of appellate procedure." *Id.* Although the majority opinion did not discuss forfeiture, the Court did remand for the Seventh Circuit to decide "whether Sharif's actions evinced the requisite knowing and voluntary consent, and also whether, as Wellness contends, Sharif forfeited his *Stern* argument below." *Id.*

1948 n.13 (explaining that express statements of consent "ensure irrefutably that any waiver of the right to consent to Article III adjudication is knowing and voluntary and . . . limit subsequent litigation over the consent issue").

In deciding to recommend that the *Stern* amendments be resubmitted to the Supreme Court, the Committee considered but rejected two alternative approaches that had been suggested to the Committee. The first alternative was to adopt a procedure similar to the one used to obtain parties' consent to a magistrate judge's adjudication of civil actions. Under this approach, the parties would receive notice of their opportunity to consent to adjudication by a bankruptcy judge (instead of a district judge), but would also be reminded that the parties "are free to withhold consent without adverse substantive consequences." Fed. R. Civ. P. 73(b)(2). The Committee concluded that it would be difficult to implement this more conservative approach in the current bankruptcy context. District courts by standing orders have referred all bankruptcy cases and proceedings to the bankruptcy courts as an initial matter, and bankruptcy judges have authority to adjudicate proceedings that are constitutionally and statutorily core without party consent. Because the Supreme Court has not yet provided clear guidance regarding which claims are core and which are non-core *Stern* claims,[4] there is a great deal of uncertainty regarding when parties would have a right to withhold consent to bankruptcy court adjudication.

The other approach rejected by the Committee was a procedure similar to the rule preserving the right to a jury trial. Under Rule 38 of the Federal Rules of Civil Procedure, "[a] party waives a jury trial unless its demand is properly served and filed." Under this approach, a party's initial pleading would have to include a demand for adjudication before a district judge; otherwise the party would waive that right, and a bankruptcy judge would be authorized to hear the proceeding and enter a final judgment. Some members of the Committee questioned whether such a procedure would satisfy the Court's standard in *Wellness* for implied consent. Quoting from *Roell v. Withrow*, 538 U.S. 580, 590 n.5 (2003), *Wellness* said that "'notification of the right to refuse' adjudication by a non-Article III court 'is a prerequisite to any inference of consent.'" 135 S. Ct. at 1948. Moreover, *Wellness* itself indicated the Court's preference for express consent, stating that "it is a good practice for courts to seek express statements of consent or nonconsent" in order to "limit subsequent litigation over the consent issue." *Id.* at 1948 n.13. Other members were opposed to the affirmative-demand approach for the practical reason that the previously approved amendments could be promulgated sooner than a new set of proposed rules that would have to be published for public comment, and it was thought that bankruptcy judges wanted clarifying amendments as soon as possible.

V. The Committee's Recommendation

The Committee recommends that the Standing Committee ask the Judicial Conference to submit the *Stern* amendments to the Supreme Court this fall (which would be slightly after the

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[4] Because the Court in *Wellness* did not decide whether the claim in question was a *Stern* claim, it provided no further guidance about the scope of *Stern* or how to determine whether a claim listed as core under 28 U.S.C. § 157(b)(2) is beyond the bankruptcy court's authority to adjudicate without the consent of the parties. 135 S. Ct. at 1942 n.7 (noting that the opinion "does not address, and expresses no view on, . . . [whether] the Seventh Circuit erred in concluding the claim in count V of [the] complaint was a *Stern* claim").

submission of the amendments that the Judicial Conference approved in September). By submitting these *Stern* amendments to the Supreme Court now, rather than in the next cycle of submissions to the Court, the *Stern* amendments could take effect as early as December 2016, rather than a year later. The Committee believes it is important to provide needed clarity to the bankruptcy community as soon as possible regarding how bankruptcy courts can proceed on a consent basis to adjudicate *Stern* claims.

Attachment

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

September 27, 2013

MEMORANDUM

TO: Scott S. Harris, Clerk of the Supreme Court of the United States

FROM: Jeffrey S. Sutton

SUBJECT: Summary of Proposed Amendments to the Federal Rules

This memorandum summarizes the amendments to the Federal Rules of Practice and Procedure that will take effect on December 1, 2014, if (1) the Supreme Court adopts the proposed amendments and transmits them to Congress no later than May 1, 2014, and (2) Congress does not reject or defer the proposed amendments. Part I addresses the amendments of significant interest, including the arguments made for and against the amendments and the Rules Committees' reasons for proceeding with them. Part II addresses the proposals that generated little or no interest during the public comment period. A more comprehensive explanation of the Committees' deliberations with respect to each amendment was submitted to the Judicial Conference of the United States and is attached to this memorandum. In the last rulemaking cycle, the Standing Committee delivered the proposed amendments to the Court in January 2013. In delivering the amendments earlier to the Court this year, we hope to give the Court more time to consider them and, if the Court wishes, to resolve its work on the amendments earlier in the Term.

I. Proposed Amendments of Significant Interest

A. Federal Rules of Bankruptcy Procedure

1. Bankruptcy Rules 7008, 7012, 7016, 9027, and 9033

a. Brief Description

The proposed amendments to Bankruptcy Rules 7008, 7012, 7016, 9027, and 9033 respond to *Stern v. Marshall*, 131 S. Ct. 2594 (2011). Consistent with the United States Code, 28 U.S.C. § 157, the current Bankruptcy Rules distinguish between core and non-core bankruptcy proceedings

and contemplate that a bankruptcy judge has more limited authority to resolve non-core proceedings. *Stern* held that a bankruptcy judge lacked authority under Article III of the Constitution to enter a final judgment in a proceeding that qualified as "core" under the Code, thus establishing that a proceeding could be "core" as a statutory matter but "non-core" (and thus non-permissible) as a constitutional matter. In response to *Stern*, the amendments propose three key changes: (1) they remove the distinction between "core" and "non-core" proceedings in the Bankruptcy Rules, namely in Rules 7008, 7012, 9027, and 9033; (2) they require parties to state at the outset whether they consent to entry of final orders or judgment by a bankruptcy judge in all adversary proceedings, not just in "non-core" proceedings as the current rules provide; and (3) they direct bankruptcy courts under Rule 7016 to decide the proper treatment of all proceedings, including whether to handle the proceeding at all, whether to entertain the proceeding and offer proposed findings of fact and conclusions of law, or whether to take some other action.

b. Arguments in Favor

• Responds to *Stern v. Marshall* by removing the distinction between "core" and "non-core" proceedings and by requiring all pleadings to contain a statement as to whether the pleader consents to the entry of a final judgment by the bankruptcy court.

c. Objections/Comments

The Advisory Committee received eight comments, largely supportive of the proposed amendments, that raised five issues:

• whether to retain the terms "core" and "non-core";

• whether references to the "bankruptcy court" in the proposed amendments should revert to the "bankruptcy judge," the term currently used;

• whether to provide procedures for treating as proposed findings and conclusions a bankruptcy judge's decision entered as a final order or judgment when that decision is later determined to be beyond the bankruptcy judge's final adjudicatory power;

• whether to require a statement as to consent when a litigant proceeds by motion before filing a formal pleading; and

• whether to provide that a litigant may consent to final adjudication by a bankruptcy judge with respect to part, but not the whole, of a proceeding.

d. The Advisory Committee's Reasoning

Stern recognized the possibility that a "core" proceeding under the United States Code may lie beyond the constitutional power of a bankruptcy judge. The amendments seek to alleviate potential administrative confusion by eliminating the terms "core" and "non-core" from Rules 7008, 7012, 9027, and 9033, and by requiring a statement regarding consent in all proceedings.

In rejecting the first three concerns raised during the public comment period, the Committee reasoned that: (1) retaining the distinction between core and non-core pleadings was no longer useful and potentially confusing, because the status of a matter as "core" under 28 U.S.C. § 157 does not necessarily establish the bankruptcy court's authority to adjudicate the matter; (2) the term "bankruptcy court" is more useful than "bankruptcy judge," because it eliminates the possibility that a party's consent might be understood to apply only to adjudication by a particular bankruptcy judge; and (3) a rule providing for treatment of a bankruptcy judge's final order issued without authority as proposed findings of fact and conclusions of law would require extensive rule amendments to deal with the deadlines and the scope of objections to proposed findings and conclusions. The Committee concluded that the last two issues raised useful ideas for future rulemaking but did not warrant changes to the proposed amendments. The Advisory Committee and the Standing Committee unanimously supported the amendments.

e. *Arkison*

On June 24, 2013, the Court granted review in *Executive Benefits Insurance Agency v. Arkison*, No. 12-1200, adding a wrinkle to the Court's deliberations over the consent portion of the rules package. At issue in *Arkison* (among other things) is whether Article III permits bankruptcy courts to resolve a proceeding based on the express or implied consent of the parties. At the earliest, the Court will hear oral argument in the case in January 2014. To the extent the Court wishes to review the rules package earlier in the Term than it has in years past, it may wish to give preliminary approval (or disapproval) to the rest of the package while making its final decision on this amendment contingent on the *Arkison* ruling. If the Court later authorizes consent-based bankruptcy court decisions in *Arkison* before May 1, 2014, and if the Court otherwise agrees with the merits of this proposal, *Arkison* will not stand in the way of approving this part of the package during this rulemaking cycle. On the other hand, if the Court rejects consent-based bankruptcy court decisions in *Arkison* or is unable to decide *Arkison* before May 1, it may wish to send this part of the package back to the Advisory Committee or to hold onto this part of the package until potential approval in May 2015 along with the next package.

* * * * *

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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WASHINGTON, D.C. 20544

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SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

From: Honorable Eugene R. Wedoff, Chair
Advisory Committee on Federal Rules of Bankruptcy Procedure

Date: May 8, 2013

Re: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on April 2 and 3, 2013, in New York, New York, at the United States Bankruptcy Court. The draft minutes of that meeting accompany this report as Appendix C. The Committee's actions fall into three categories.

First, the Advisory Committee took action on the proposed rule and form amendments that were published for comment in August 2012. Forty-six comments were submitted in response to the publication, some of which addressed multiple rules and forms. The comments were considered in a series of subcommittee conference calls, at a meeting of the Forms Modernization Project, and in Committee discussions at the New York meeting. (The comments are summarized below, along with a discussion of the changes that the Committee made in response.) The Advisory Committee now seeks the Standing Committee's final approval and transmission to the Judicial Conference of most of the published items: the revision of the Part VIII rules and amendments to ten other rules and five official forms. Because the Committee

made significant changes after publication to one set of published forms—the means test forms—it requests that those forms be republished.

* * * * *

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

(A1) matters published in August 2012 for which the Advisory Committee seeks approval for transmission to the Judicial Conference—amendments to Rules 1014, 7004, 7008, 7012, 7016, 7054, 8001-8028, 9023, 9024, 9027, and 9033, and Official Forms 3A, 3B, 6I, and 6J;

* * * * *

II. Action Items

A. Items for Final Approval

A1. Amendments Published for Comment in August 2012. **The Advisory Committee recommends that the proposed rule and form amendments that are discussed below be approved and forwarded to the Judicial Conference. It recommends that the amended forms take effect on December 1, 2013.** The text of the amended rules and forms is set out in Appendix A.

Action Item 1. Rules 7008, 7012, 7016, 9027, and 9033 would be amended in response to *Stern v. Marshall*, 131 S. Ct. 2594 (2011). The Bankruptcy Rules follow the Judicial Code's division between core and non-core proceedings. The current rules contemplate that a bankruptcy judge's adjudicatory authority is more limited in non-core proceedings than in core proceedings. For example, parties are required to state whether they do or do not consent to final adjudication by the bankruptcy judge in non-core proceedings. There is no comparable requirement for core proceedings. *Stern*, which held that a bankruptcy judge did not have authority under Article III of the Constitution to enter final judgment in a proceeding deemed core under the Judicial Code, has introduced the possibility that such a proceeding may nevertheless lie beyond the power of a bankruptcy judge to adjudicate finally. In other words, a proceeding could be "core" as a statutory matter but "non-core" as a constitutional matter.

The Advisory Committee proposed to amend the Bankruptcy Rules in three respects. First, the terms core and non-core would be removed from Rules 7008, 7012, 9027, and 9033 to avoid possible confusion in light of *Stern*. Second, parties in all bankruptcy proceedings (including removed actions) would need to state whether they do or do not consent to entry of final orders or judgment by the bankruptcy judge. Third, Rule 7016, which governs pretrial procedures, would be amended to direct bankruptcy courts to decide the proper treatment of proceedings.

The Advisory Committee received eight comments on all or part of these proposed amendments. In the main, the comments expressed support for the amendments but raised five issues:

(1) whether to retain the terms "core" and "non-core";

(2) whether references to the "bankruptcy court" in the published amendments should revert to the "bankruptcy judge," the term that is currently used;

(3) whether to provide procedures for treating as proposed findings and conclusions a bankruptcy judge's decision entered as a final order or judgment when that decision is later determined to be beyond the bankruptcy judge's final adjudicatory power;

(4) whether to require a statement as to consent when a litigant proceeds by motion before filing a formal pleading; and

(5) whether to provide that a litigant may consent to final adjudication by a bankruptcy judge with respect to part, but not the whole, of a proceeding.

After reviewing the comments, the Advisory Committee voted unanimously to recommend final approval of the published amendments. With respect to the first three issues raised by the comments, these points were thoroughly considered before publication of the amendments. The Advisory Committee did not find the comments to raise new concerns that would justify revisiting those issues. Issues (4) and (5), on the other hand, had not been considered previously. The Advisory Committee nevertheless concluded that the comments raising those issues, although presenting possible suggestions for future rulemaking, did not require alteration of the published amendments. Similarly, the Advisory Committee concluded that a comment by the Bankruptcy Clerks Advisory Group regarding the requirement of service of notice by mail under current Rules 9027 and 9033 might be considered for future rulemaking but was beyond the scope of the *Stern*-related amendments. The comments are set out in more detail in Appendix A.

* * * * *

April 28, 2016

Honorable Paul D. Ryan
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are the following materials submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 9, 2015; a redline version of the rules with Committee Notes; an excerpt from the September 2015 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2, 2015 Report of the Advisory Committee on Civil Rules.

Sincerely,

/s/ John G. Roberts

April 28, 2016

Honorable Joseph R. Biden, Jr.
President, United States Senate
Washington, D.C. 20510

Dear Mr. President:

I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are the following materials submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 9, 2015; a redline version of the rules with Committee Notes; an excerpt from the September 2015 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2, 2015 Report of the Advisory Committee on Civil Rules.

Sincerely,

/s/ John G. Roberts

_____, 2016

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein amendments to Civil Rules 4, 6, and 82.

[*See infra* pp. __ __ __.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2016, and shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 4. Summons

* * * * *

(m) Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

* * * * *

Rule 6. Computing and Extending Time; Time for Motion Papers

* * * * *

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after being served and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

Rule 82. Jurisdiction and Venue Unaffected

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. § 1390.

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

October 9, 2015

MEMORANDUM

To: The Chief Justice of the United States and Associate Justices of the Supreme Court

From: James C. Duff

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 4, 6, and 82 of the Federal Rules of Civil Procedure, which were approved by the Judicial Conference at its September 2015 session. The Judicial Conference recommends that the amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) "clean" copies of the affected rules incorporating the proposed amendments and accompanying Committee Notes; (ii) a redline version of the same; (iii) an excerpt from the September 2015 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the May 2015 Report of the Advisory Committee on the Federal Rules of Civil Procedure.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 4. Summons

* * * * *

(m) Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

* * * * *

Committee Note

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

Rule 4(m) is amended to correct a possible ambiguity that appears to have generated some confusion in practice. Service in a foreign country often is accomplished by means that require more than the time set by Rule 4(m). This problem is recognized by the two clear exceptions for service on an individual in a foreign country under Rule 4(f) and for service on a foreign state under Rule 4(j)(1). The potential ambiguity arises from the lack of any explicit reference to service on a corporation, partnership, or other unincorporated association. Rule 4(h)(2) provides for service on such defendants at a place outside any judicial district of the United States "in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i)." Invoking service "in the manner prescribed by Rule 4(f)" could easily be read to mean that service under Rule 4(h)(2) is also service "under" Rule 4(f). That interpretation is in keeping with the purpose to recognize the delays that often occur in effecting service in a foreign country. But it also is possible to read the words for what they seem to say—service is under Rule 4(h)(2), albeit in a manner borrowed from almost all, but not quite all, of Rule 4(f).

The amendment resolves this possible ambiguity.

Rule 6. Computing and Extending Time; Time for Motion Papers

* * * * *

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after ~~service~~being served and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), ~~(E),~~ or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

Committee Note

Rule 6(d) is amended to remove service by electronic means under Rule 5(b)(2)(E) from the modes of service that allow 3 added days to act after being served.

Rule 5(b)(2) was amended in 2001 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems

might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3 added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not

count as consent to service "by any other means" of delivery under subparagraph (F).

What is now Rule 6(d) was amended in 2005 "to remove any doubt as to the method for calculating the time to respond after service by mail, leaving with the clerk of court, electronic means, or by other means consented to by the party served." A potential ambiguity was created by substituting "after service" for the earlier references to acting after service "upon the party" if a paper or notice "is served upon the party" by the specified means. "[A]fter service" could be read to refer not only to a party that has been served but also to a party that has made service. That reading would mean that a party who is allowed a specified time to act after making service can extend the time by choosing one of the means of service specified in the rule, something that was never intended by the original rule or the amendment. Rules setting a time to act after making service include Rules 14(a)(1), 15(a)(1)(A), and 38(b)(1). "[A]fter being served" is substituted for "after service" to dispel any possible misreading.

Rule 82. Jurisdiction and Venue Unaffected

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. § 1390 ~~not a civil action for purposes of 28 U.S.C. §§ 1391–1392~~.

Committee Note

Rule 82 is amended to reflect the enactment of 28 U.S.C. § 1390 and the repeal of § 1392.

EXCERPT FROM THE SEPTEMBER 2015
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

* * * * *

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rules 4, 6, and 82, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and public for comment in August 2014, and are proposed for approval as published with the minor exceptions noted below.

Rule 4(m)

The proposed amendment to Rule 4(m), the rule addressing time limits for service, corrects an ambiguity regarding service abroad on a corporation. Comments received on the amendment to Rule 4(m) that was published in 2013 as part of the Duke Conference Package[1] revealed that many practitioners believe the time for service set forth in Rule 4(m) applies to foreign corporations. This ambiguity arises because two exceptions for service on an individual in a foreign country under Rule 4(f) and for service on a foreign state under Rule 4(j)(1) are clearly referenced, while no such explicit reference is made to service on a corporation. Rule 4(h)(2) provides for service on a corporation at a place not within any judicial district of the United States in a "manner prescribed by Rule 4(f)." It is not clear whether this is service

[1]That amendment, which was approved by the Supreme Court and transmitted to Congress on April 29, 2015, shortens the time for service from 120 days to 90 days.

"under" Rule 4(f). The proposed amendment makes clear that the time limit set forth in Rule 4(m) does not include service under Rule 4(h)(2). Four comments were submitted, all of which supported the proposed amendment.

3-Day Rule

Rule 6(d). The proposed amendment to Rule 6(d) parallels the proposed amendments to Appellate Rule 26(c), Bankruptcy Rule 9006(f), and Criminal Rule 45(c), which are part of the 3-day rule package discussed *supra*. The proposed amendment eliminates the three additional days to respond when service is effected by electronic means, and adds parenthetical descriptions of the modes of service that continue to allow the three additional days.

Some commentators expressed concern that the time periods in the Civil Rules are too short and, therefore, any provision that provides some relief should be retained. The Advisory Committee carefully considered this concern as well as others, but approved the text of the rule as published. The Advisory Committee approved adding language to the Committee Note as a result of the concerns expressed by the Department of Justice (*see supra*, pp. 7-8); the Standing Committee concurred with minor modifications.

Another proposed amendment to Rule 6(d) is to substitute "after being served" for "after service." The purpose of the amendment is to correct a potential ambiguity that was created when the "after service" language was included in the rule when it was amended in 2005. "[A]fter service" could be read to refer not only to a party that has been served but also to a party that has made service. The purpose of the proposed amendment is to dispel any misreading. The proposed amendment was published in August 2013, and approved by the Committee in May 2014. It was held in abeyance for one year in order for it to be submitted to the Judicial Conference simultaneously with the proposed amendment to the 3-day rule.

Rule 82

Civil Rule 82 addresses venue for admiralty and maritime claims. The proposed amendment to Rule 82 arises from legislation that added a new § 1390 to the venue statutes in Title 28 and repealed former § 1392 (local actions). The proposed amendment deletes the reference to § 1391 and to repealed § 1392 and adds a reference to new § 1390 in order to carry forward the purpose of integrating Rule 9(h)[2] with the venue statutes through Rule 82.

The Standing Committee concurred with the Advisory Committee's recommendations above.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Civil Rules 4, 6, and 82, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,

Jeffrey S. Sutton, Chair

Dean C. Colson	Patrick J. Schiltz
Brent E. Dickson	Amy J. St. Eve
Roy T. Englert, Jr.	Larry D. Thompson
Gregory G. Garre	Richard C. Wesley
Neil M. Gorsuch	Sally Yates
Susan P. Graber	Jack Zouhary
David F. Levi	

[2]Rule 82 invokes Rule 9(h) to ensure that the Civil Rules do not seem to modify the venue rules for admiralty or maritime actions. Rule 9(h) provides that an action cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for purposes of Rule 82. It further provides that if a claim for relief is within the admiralty or maritime jurisdiction but also is within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim.

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

JEFFREY S. SUTTON
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

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

FROM: Honorable David G. Campbell, Chair
Advisory Committee on Civil Rules

DATE: May 2, 2015

RE: Report of the Advisory Committee on Civil Rules

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* * * * *

I. RECOMMENDATIONS TO APPROVE FOR ADOPTION

I.A. RULE 4(m) - RULE 4(h)(2)

The Standing Committee approved the August, 2014 publication of a proposed amendment of Rule 4(m). The amendment adds service on an entity in a foreign country to the list in the last sentence that exempts service in a foreign country from the presumptive time limit set by Rule 4(m) for serving the summons and complaint. It is recommended that the proposed amendment be recommended for adoption. The reasons are described in the Committee Note.

Rule 4. Summons

* * * * *

(m) Time Limit for Service. If a defendant is not served within 90[1] days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

* * * * *

COMMITTEE NOTE

Rule 4(m) is amended to correct a possible ambiguity that appears to have generated some confusion in practice. Service in a foreign country often is accomplished by means that require more than the 120 days originally set by Rule 4(m)[, or than the 90 days set by amended Rule 4(m)]. This problem is recognized by the two clear exceptions for service on an individual in a foreign country under Rule 4(f) and for service on a foreign state under Rule 4(j)(1). The potential ambiguity arises from the lack of any explicit reference to service on a corporation, partnership, or other unincorporated association. Rule 4(h)(2) provides for service on such defendants at a place outside any judicial district of the United States "in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i)." Invoking service "in the manner prescribed by Rule 4(f)" could easily be read to mean that service under Rule 4(h)(2) is also service "under" Rule 4(f). That interpretation is in keeping with the purpose to recognize the delays that often occur in effecting service in a foreign country. But it also is possible to read the words for what they seem to say—service is under Rule 4(h)(2), albeit in a manner borrowed from almost all, but not quite all, of Rule 4(f).

The amendment resolves this possible ambiguity.

Gap Report

No changes were made in the published rule text or Committee Note.

I.B. RULE 6(d)

The Standing Committee approved the August, 2014 publication of a proposed amendment of Rule 6(d). Present Rule 6(d) provides 3 added days to respond after service "made under Rule 5(b)(2)(C), (D), (E), or (F)." The amendment deletes (E), service by electronic means consented to by the person served. It also adds parenthetical descriptions of the modes of service that continue to allow the 3 added days: "(C)(mail), (D)(leaving with the clerk), or (F)(other means consented to)." Parallel proposals to delete electronic service from the 3-added days

[1] This anticipates adoption of the proposed amendment transmitted to Congress on April 29, 2015.

provision were published for the other sets of rules that included it. It is recommended that the proposed amendment be recommended for adoption as published. It is further recommended that a new paragraph be added to the Committee Note to reflect concerns raised by the Department of Justice and several other public comments. This brief new paragraph is discussed below.

A variety of concerns were raised by the public comments. One theme is that the time periods allowed by the Civil Rules are too short as they are. Any provision that allows even some relief should be retained. A related theme focuses on strategic opportunities to manipulate the amount of time practically available to respond after electronic service. This concern is illustrated by electronic filings made just before midnight on a Friday or the eve of a holiday. "No one goes home until after midnight." Suggested remedies include either a rule barring electronic filing after 5:00 or 6:00 p.m., or treating any later filing as made the next day (or on the next day that is not a weekend or legal holiday).

The Federal Magistrate Judges Association expressed a different concern — that some hasty readers would conclude that because Rule 5(b)(2)(E) currently requires consent for electronic service, electronic service is an "other means consented to" under Rule 5(b)(2)(F), restoring the 3 added days after all. Magistrate Judges are all too familiar with the ways in which rule text can be misread. But the Committee decided not to revise the recommended rule text. Apart from the hope that few will fall into this patent misreading, it is unlikely that a court would visit any serious consequences for a filing made 3 days late. The occasion for misreading, moreover, will be reduced when the proposed amendment of Rule 5(b)(2)(E) described below is approved for publication, and if it survives the public comment process. Consent would no longer be required for service on a registered user through the court's transmission facilities. That is likely to govern an ever-growing swath of civil litigation.

The Department of Justice, after expressing concerns with failed electronic transmission, late-night filing in general, and strategic use of late-night filing in particular, recommended that language be added to the Committee Note to remind courts of the reasons to allow extensions of time when appropriate to respond to such problems. Adding anything to the Committee Note on this account could be resisted as unnecessary. Judges do not need to be told to make reasonable adjustments for these or any of the other myriad circumstances that may counsel that a time limit be extended. Brevity, moreover, is increasingly emphasized in framing Committee Notes. The Department's extensive experience with these and similar problems throughout the country, however, deserves some deference. The several advisory committees have agreed to add the new paragraph underlined in the Committee Note set out below. Considering the question independently, the Committees took different positions. The Civil, Appellate, and Bankruptcy Rules Committees preferred not to add any new language. But the Criminal Rules Committee strongly favored adding some language, moved in part by concern that many criminal defense lawyers are occupied in court or otherwise away from their small offices and may not actually view e-service for some time after it arrives. Each Committee authorized its chair to agree to a common solution. Given the strength of the Criminal Rules Committee's position, and the value of uniformity, the joint recommendation is to adopt a much-shortened version proposed by the Department of Justice in the Committee Notes to each set of rules.

Rule 6. Computing and Extending Time; Time for Motion Papers

* * * * *

(d) ADDITIONAL TIME AFTER CERTAIN KINDS OF SERVICE. When a party may or must act within a specified time after ~~service~~ being served[2] and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), ~~(E),~~ or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

COMMITTEE NOTE

Rule 6(d) is amended to remove service by electronic means under Rule 5(b)(2)(E) from the modes of service that allow 3 added days to act after being served.

Rule 5(b)(2) was amended in 2001 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

The ease of making electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3 added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means" of delivery under subparagraph (F).

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[2] This wording reflects the proposed amendment approved by the Standing Committee in May 2014, but held in abeyance.

Gap Report

No changes are made in the rule text as published. A new paragraph in the Committee Note is underlined.

I.C. RULE 82

The Standing Committee approved the August, 2014 publication of a proposed amendment of Rule 82. It is recommended that the proposed amendment be recommended for adoption.

Rule 82. Jurisdiction and Venue Unaffected

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. § 1390 ~~not a civil action for purposes of 28 U.S.C. §§ 1391-1392~~.

COMMITTEE NOTE

Rule 82 is amended to reflect the enactment of 28 U.S.C. § 1390 and the repeal of § 1392.

Gap Report

No changes are made in the rule text or Committee Note as published.

* * * * *

April 28, 2016

Honorable Paul D. Ryan
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are the following materials submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 9, 2015; a redline version of the rules with Committee Notes; an excerpt from the September 2015 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 6, 2015 Report of the Advisory Committee on Criminal Rules.

Sincerely,

/s/ John G. Roberts

April 28, 2016

Honorable Joseph R. Biden, Jr.
President, United States Senate
Washington, D.C. 20510

Dear Mr. President:

I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are the following materials submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 9, 2015; a redline version of the rules with Committee Notes; an excerpt from the September 2015 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 6, 2015 Report of the Advisory Committee on Criminal Rules.

Sincerely,

/s/ John G. Roberts

Corrected April 28, 2016

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 4, 41, and 45.

[*See infra* pp. __ __ __.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2016, and shall govern in all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 4. Arrest Warrant or Summons on a Complaint

(a) Issuance. If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it. At the request of an attorney for the government, the judge must issue a summons, instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If an individual defendant fails to appear in response to a summons, a judge may, and upon request of an attorney for the government must, issue a warrant. If an organizational defendant fails to appear in response to a summons, a judge may take any action authorized by United States law.

* * * * *

(c) Execution or Service, and Return.

(1) ***By Whom.*** Only a marshal or other authorized officer may execute a warrant. Any person authorized to serve a summons in a federal civil action may serve a summons.

(2) ***Location.*** A warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest. A summons to an organization under Rule 4(c)(3)(D) may also be served at a place not within a judicial district of the United States.

(3) ***Manner.***

(A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the original or a duplicate

original warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the original or a duplicate original warrant to the defendant as soon as possible.

(B) A summons is served on an individual defendant:

(i) by delivering a copy to the defendant personally; or

(ii) by leaving a copy at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location and by

mailing a copy to the defendant's last known address.

(C) A summons is served on an organization in a judicial district of the United States by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. If the agent is one authorized by statute and the statute so requires, a copy must also be mailed to the organization.

(D) A summons is served on an organization not within a judicial district of the United States:

(i) by delivering a copy, in a manner authorized by the foreign jurisdiction's law, to an officer, to a

managing or general agent, or to an agent appointed or legally authorized to receive service of process; or

(ii) by any other means that gives notice, including one that is:

(a) stipulated by the parties;

(b) undertaken by a foreign authority in response to a letter rogatory, a letter of request, or a request submitted under an applicable international agreement; or

(c) permitted by an applicable international agreement.

* * * * *

Rule 41. Search and Seizure

* * * * *

(b) Venue for a Warrant Application. At the request of a federal law enforcement officer or an attorney for the government:

* * * * *

(6) a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district if:

(A) the district where the media or information is located has been concealed through technological means; or

(B) in an investigation of a violation of 18 U.S.C. § 1030(a)(5), the media are protected computers that have been damaged without authorization and are located in five or more districts.

* * * * *

(f) Executing and Returning the Warrant.

(1) ***Warrant to Search for and Seize a Person or Property.***

* * * * *

(C) *Receipt.* The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property. For a warrant to

use remote access to search electronic storage media and seize or copy electronically stored information, the officer must make reasonable efforts to serve a copy of the warrant and receipt on the person whose property was searched or who possessed the information that was seized or copied. Service may be accomplished by any means, including electronic means, reasonably calculated to reach that person.

* * * * *

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 Procedure 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).

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

October 9, 2015

MEMORANDUM

To: The Chief Justice of the United States and
Associate Justices of the Supreme Court

From: James C. Duff

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 4, 41, and 45 of the Federal Rules of Criminal Procedure, which were approved by the Judicial Conference at its September 2015 session. The Judicial Conference recommends that the amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) "clean" copies of the affected rules incorporating the proposed amendments and accompanying Committee Notes; (ii) a redline version of the same; (iii) an excerpt from the September 2015 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the May 2015 Report of the Advisory Committee on the Federal Rules of Criminal Procedure.

Attachments

PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 4. Arrest Warrant or Summons on a Complaint

(a) Issuance. If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it. At the request of an attorney for the government, the judge must issue a summons, instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If a<u>n individual</u> defendant fails to appear in response to a summons, a judge may, and upon request of an attorney for the government must, issue a warrant.<u> If an organizational defendant fails to appear in response</u>

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

15 to a summons, a judge may take any action authorized
16 by United States law.
17 * * * * *
18 **(c) Execution or Service, and Return.**
19 **(1)** ***By Whom.*** Only a marshal or other authorized
20 officer may execute a warrant. Any person
21 authorized to serve a summons in a federal civil
22 action may serve a summons.
23 **(2)** ***Location.*** A warrant may be executed, or a
24 summons served, within the jurisdiction of the
25 United States or anywhere else a federal statute
26 authorizes an arrest. A summons to an
27 organization under Rule 4(c)(3)(D) may also be
28 served at a place not within a judicial district of
29 the United States.
30 **(3)** ***Manner.***
31 (A) A warrant is executed by arresting the

defendant. Upon arrest, an officer possessing the original or a duplicate original warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the original or a duplicate original warrant to the defendant as soon as possible.

(B) A summons is served on an individual defendant:

(i) by delivering a copy to the defendant personally; or

(ii) by leaving a copy at the defendant's residence or usual place of abode with a person of suitable age and discretion

residing at that location and by mailing a copy to the defendant's last known address.

(C) A summons is served on an organization in a judicial district of the United States by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. ~~A copy~~If the agent is one authorized by statute and the statute so requires, a copy must also be mailed to the organization~~organization's last known address within the district or to its principal place of business elsewhere in the United States~~.

64 (D) A summons is served on an organization
65 not within a judicial district of the United
66 States:
67 (i) by delivering a copy, in a manner
68 authorized by the foreign
69 jurisdiction's law, to an officer, to a
70 managing or general agent, or to an
71 agent appointed or legally authorized
72 to receive service of process; or
73 (ii) by any other means that gives notice,
74 including one that is:
75 (a) stipulated by the parties;
76 (b) undertaken by a foreign authority
77 in response to a letter rogatory, a
78 letter of request, or a request
79 submitted under an applicable
80 international agreement; or

81 (c) permitted by an applicable

82 international agreement.

83 * * * * *

Committee Note

Subdivision (a). The amendment addresses a gap in the current rule, which makes no provision for organizational defendants who fail to appear in response to a criminal summons. The amendment explicitly limits the issuance of a warrant to individual defendants who fail to appear, and provides that the judge may take whatever action is authorized by law when an organizational defendant fails to appear. The rule does not attempt to specify the remedial actions a court may take when an organizational defendant fails to appear.

Subdivision (c)(2). The amendment authorizes service of a criminal summons on an organization outside a judicial district of the United States.

Subdivision (c)(3)(C). The amendment makes two changes to subdivision (c)(3)(C) governing service of a summons on an organization. First, like Civil Rule 4(h), the amended provision does not require a separate mailing to the organization when delivery has been made in the United States to an officer or to a managing or general agent. Service of process on an officer or a managing or general agent is in effect service on the principal. Mailing is required when delivery has been made on an agent authorized by statute, if the statute itself requires mailing to the entity.

Second, also like Civil Rule 4(h), the amendment recognizes that service outside the United States requires separate consideration, and it restricts Rule 4(c)(3)(C) and its modified mailing requirement to service on organizations within the United States. Service upon organizations outside the United States is governed by new subdivision (c)(3)(D).

These two modifications of the mailing requirement remove an unnecessary impediment to the initiation of criminal proceedings against organizations that commit domestic offenses but have no place of business or mailing address within the United States. Given the realities of today's global economy, electronic communication, and federal criminal practice, the mailing requirement should not shield a defendant organization when the Rule's core objective—notice of pending criminal proceedings—is accomplished.

Subdivision (c)(3)(D). This new subdivision states that a criminal summons may be served on an organizational defendant outside the United States and enumerates a non-exhaustive list of permissible means of service that provide notice to that defendant.

Although it is presumed that the enumerated means will provide notice, whether actual notice has been provided may be challenged in an individual case.

Subdivision (c)(3)(D)(i). Subdivision (i) notes that a foreign jurisdiction's law may authorize delivery of a copy of the criminal summons to an officer, or to a

managing or general agent. This is a permissible means for serving an organization outside of the United States, just as it is for organizations within the United States. The subdivision also recognizes that a foreign jurisdiction's law may provide for service of a criminal summons by delivery to an appointed or legally authorized agent in a manner that provides notice to the entity, and states that this is an acceptable means of service.

Subdivision (c)(3)(D)(ii). Subdivision (ii) provides a non-exhaustive list illustrating other permissible means of giving service on organizations outside the United States, all of which must be carried out in a manner that "gives notice."

Paragraph (a) recognizes that service may be made by a means stipulated by the parties.

Paragraph (b) recognizes that service may be made by the diplomatic methods of letters rogatory and letters of request, and the last clause of the paragraph provides for service under international agreements that obligate the parties to provide broad measures of assistance, including the service of judicial documents. These include crime-specific multilateral agreements (e.g., the United Nations Convention Against Corruption (UNCAC), S. Treaty Doc. No. 109-6 (2003)), regional agreements (e.g., the Inter-American Convention on Mutual Assistance in Criminal Matters (OAS MLAT), S. Treaty Doc. No. 105-25 (1995)), and bilateral agreements.

Paragraph (c) recognizes that other means of service that provide notice and are permitted by an applicable

international agreement are also acceptable when serving organizations outside the United States.

As used in this rule, the phrase "applicable international agreement" refers to an agreement that has been ratified by the United States and the foreign jurisdiction and is in force.

Rule 41. Search and Seizure

* * * * *

(b) ~~**Authority to Issue a Warrant**~~**Venue for a Warrant Application.** At the request of a federal law enforcement officer or an attorney for the government:

* * * * *

(6) a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district if:

(A) the district where the media or information is located has been concealed through technological means; or

18 (B) in an investigation of a violation of
19 18 U.S.C. § 1030(a)(5), the media are
20 protected computers that have been
21 damaged without authorization and are
22 located in five or more districts.
23 * * * * *
24 **(f) Executing and Returning the Warrant.**
25 **(1)** ***Warrant to Search for and Seize a Person or***
26 ***Property.***
27 * * * * *
28 (C) *Receipt.* The officer executing the warrant
29 must give a copy of the warrant and a
30 receipt for the property taken to the person
31 from whom, or from whose premises, the
32 property was taken or leave a copy of the
33 warrant and receipt at the place where the
34 officer took the property. For a warrant to

35 use remote access to search electronic
36 storage media and seize or copy
37 electronically stored information, the
38 officer must make reasonable efforts to
39 serve a copy of the warrant and receipt on
40 the person whose property was searched or
41 who possessed the information that was
42 seized or copied. Service may be
43 accomplished by any means, including
44 electronic means, reasonably calculated to
45 reach that person.
46 * * * * *

Committee Note

Subdivision (b). The revision to the caption is not substantive. Adding the word "venue" makes clear that Rule 41(b) identifies the courts that may consider an application for a warrant, not the constitutional requirements for the issuance of a warrant, which must still be met.

Subdivision (b)(6). The amendment provides that in two specific circumstances a magistrate judge in a district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when that media or information is or may be located outside of the district.

First, subparagraph (b)(6)(A) provides authority to issue a warrant to use remote access within or outside that district when the district in which the media or information is located is not known because of the use of technology such as anonymizing software.

Second, (b)(6)(B) allows a warrant to use remote access within or outside the district in an investigation of a violation of 18 U.S.C. § 1030(a)(5) if the media to be searched are protected computers that have been damaged without authorization, and they are located in many districts. Criminal activity under 18 U.S.C. § 1030(a)(5) (such as the creation and control of "botnets") may target multiple computers in several districts. In investigations of this nature, the amendment would eliminate the burden of attempting to secure multiple warrants in numerous districts, and allow a single judge to oversee the investigation.

As used in this rule, the terms "protected computer" and "damage" have the meaning provided in 18 U.S.C. §1030(e)(2) & (8).

The amendment does not address constitutional questions, such as the specificity of description that the

Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing or copying electronically stored information, leaving the application of this and other constitutional standards to ongoing case law development.

Subdivision (f)(1)(C). The amendment is intended to ensure that reasonable efforts are made to provide notice of the search, seizure, or copying, as well as a receipt for any information that was seized or copied, to the person whose property was searched or who possessed the information that was seized or copied. Rule 41(f)(3) allows delayed notice only "if the delay is authorized by statute." See 18 U.S.C. § 3103a (authorizing delayed notice in limited circumstances).

Rule 45. Computing and Extending Time

* * * * *

(c) Additional Time After Certain Kinds of Service. Whenever a party must or may act within a specified ~~period~~ time after ~~service~~ being served and service is made ~~in the manner provided~~ under Federal Rule of Civil Procedure 5(b)(2)(C) (mailing), (D) (leaving with the clerk), ~~(E),~~ or (F) (other means consented to), 3 days are added after the period would otherwise expire under subdivision (a).

Committee Note

Subdivision (c). Rule 45(c) and Rule 6(d) of the Federal Rules of Civil Procedure contain parallel provisions providing additional time for actions after certain modes of service, identifying those modes by reference to Civil Rule 5(b)(2). Rule 45(c)—like Civil Rule 6(d)—is amended to remove service by electronic means under Rule 5(b)(2)(E) from the forms of service that allow 3 added days to act after being served. The amendment also adds clarifying parentheticals identifying the forms of service for which 3 days will still be added.

Civil Rule 5 was amended in 2001 to allow service by electronic means with the consent of the person served, and a parallel amendment to Rule 45(c) was adopted in 2002. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3

added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means of delivery" under subparagraph (F).

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

EXCERPT FROM THE SEPTEMBER 2015
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

* * * * *

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Rules 4, 41, and 45, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and published for public comment in August 2014, and are recommended for approval as published, with the revisions noted below.

Rule 4

The proposed amendment to Rule 4 addresses service of summons on organizational defendants that have no agent or principal place of business within the United States. The current rule provides for service of an arrest warrant or summons within a judicial district of the United States. The Department of Justice advised that current Rule 4 poses an obstacle to the prosecution of foreign corporations that have committed offenses punishable in the United States. Often, such corporations cannot be served because they have no last known address or principal place of business in the United States. Given the increasing number of criminal prosecutions involving foreign entities, the Advisory Committee agreed that the Criminal Rules should provide a mechanism for foreign service on an organization.

The proposed amendment makes several changes to Rule 4. First, it fills a gap in the current rule (without expanding judicial authority) by specifying that the court may take any action authorized by law if an organizational defendant fails to appear in response to a summons. Second, the amendment changes the mailing requirement for service of a summons on an organization within the United States by eliminating the requirement of a separate mailing to an organizational defendant when delivery has been made to an officer or to a managing or general agent, but requires mailing when delivery has been made to an agent authorized by statute, if the statute itself requires mailing to the organization. Third, the amendment authorizes service on an organizational defendant outside of the United States by prescribing a non-exclusive list of methods for service, including service in a manner authorized by the applicable foreign jurisdiction's law, stipulated by the parties, undertaken by foreign authority in response to a letter rogatory or similar request, or pursuant to an international agreement. In addition to these specifically enumerated means of service, the proposal contains an open-ended provision that allows service "by any other means that gives notice." This provision provides flexibility for cases in which the Department of Justice concludes that service cannot be made (or made without undue difficulty) by the other means enumerated in the rule.

The Advisory Committee considered at length whether to require prior judicial approval before service of a criminal summons could be made in a foreign country by other unspecified means. The Advisory Committee concluded that the Criminal Rules should not adopt such a requirement. In its view, requiring prior judicial approval might raise difficult questions regarding the appropriate institutional roles of the courts and the executive branch, as well as unripe questions of international law.

Six comments were received and one witness testified about the proposed amendment at a public hearing in Washington, D.C. In addition, the Department of Justice provided written responses to the issues raised by the comments. The commentators generally agreed the proposal: addresses a gap in the current rules that poses an obstacle to the prosecution of foreign corporations that have committed crimes in the United States; provides methods of service that are reasonably calculated to provide notice and comply with applicable laws; and gives courts appropriate discretion to fashion remedies. The Advisory Committee carefully considered the comments and suggested revisions received, and unanimously approved the proposed amendment as published.

Rule 41

The proposed amendment to Rule 41 addresses venue for obtaining warrants for certain remote electronic searches. At present, the rule generally limits searches to locations within a district, with a few specified exceptions. The proposal to amend Rule 41 is narrowly tailored to address two increasingly common situations in which the existing territorial or venue requirements may hamper the investigation of serious federal crimes: (1) where the warrant sufficiently describes the computer to be searched but the district within which that computer is located is unknown, and (2) where the investigation requires law enforcement to coordinate searches of numerous computers in numerous districts.

The proposal would address this issue by amending Rule 41(b) to include two additional exceptions to the list of out-of-district searches permitted under that subsection.[1] Language in a

[1]At present, Rule 41(b) authorizes search warrants for property located outside the judge's district in only four situations: (1) for property in the district that might be removed before execution of the warrant; (2) for tracking devices installed in the district, which may be monitored outside the district; (3) for investigations of domestic or international terrorism; and (4) for property located in a U.S. territory or a U.S. diplomatic or consular mission.

new subsection 41(b)(6) would authorize a court to issue a warrant to use remote access to search electronic storage media and seize electronically stored information inside or outside of the district: (1) when a suspect has used technology to conceal the location of the media to be searched; or (2) in an investigation into a violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(5), when the media to be searched include damaged computers located in five or more districts. The proposal also amends Rule 41(f)(1)(C) to specify the process for providing notice of a remote access search.

As expected, the proposed amendment generated significant response; the Advisory Committee received 44 written comments, and 8 witnesses testified at a public hearing in Washington, D.C. In addition, the Department of Justice submitted written responses to the issues raised by the comments and testimony. Many commentators raised concerns regarding the substantive limits on government searches, which are not affected by the proposal. In fact, much of the opposition reflected a misunderstanding of the scope of the proposal. The proposal addresses venue; it does not itself create authority for electronic searches or alter applicable constitutional requirements.

The Advisory Committee approved revisions to the published proposal aimed at clarifying the procedural nature of the proposed amendment. It changed the published caption from "Authority to Issue a Warrant" to "Venue for a Warrant Application" and revised the Committee Note to state that the constitutional requirements for the issuance of a warrant are not altered by the amendment. The Advisory Committee also approved revisions to the notice provision and accompanying Committee Note that directly respond to points raised by commentators.

3-Day Rule

Rule 45(c). The proposed amendment to Rule 45(c) parallels the proposed amendments to Appellate Rule 26(c), Bankruptcy Rule 9006(f), and Civil Rule 6(d). It eliminates the 3-day extension of time periods when service is effected electronically.

As discussed *supra*, pp. 7-8, the Department of Justice expressed concerns about potential hardship from elimination of electronic service from the 3-day rule. The Advisory Committee on Criminal Rules was sympathetic to these concerns, recognizing that the three additional days are particularly important for criminal practitioners who often must speak directly with their clients and, therefore, frequently need additional time. The Advisory Committee approved the addition of language to the published Committee Note to address the concerns raised by the Department of Justice; the Standing Committee concurred with minor modifications.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rules 4, 41, and 45, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,

Jeffrey S. Sutton, Chair

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

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

FROM: Honorable Reena Raggi, Chair
Advisory Committee on Criminal Rules

DATE: May 6, 2015

RE: Report of the Advisory Committee on Criminal Rules

I. INTRODUCTION

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Advisory Committee") met on March 16-17, 2015, in Orlando, Florida, and took action on a number of proposals.

* * * * *

This report presents three action items for Standing Committee consideration. The Advisory Committee recommends that:

(1) a proposed amendment to Rule 4 (service of summons on organizational defendants), previously published for public comment, be approved as published and transmitted to the Judicial Conference; and

(2) a proposed amendment to Rule 41 (venue for approval of warrant for certain remote electronic searches), previously published for public comment, be approved as amended and transmitted to the Judicial Conference; and

(3) a proposed amendment to Rule 45 (additional time after certain kinds of service), previously published for public comment, be approved as amended and transmitted to the Judicial Conference.

* * * * *

II. ACTION ITEMS

A. ACTION ITEM—Rule 4 (service of summons on organizational defendants)

After review of the public comments, the Advisory Committee voted unanimously to recommend that the Standing Committee approve the proposed amendment as published and transmit it to the Judicial Conference. The amendment is at Tab C.

1. Reasons for the proposal

The proposed amendment originated in an October 2012 letter from Assistant Attorney General Lanny Breuer, who advised the Committee that Rule 4 now poses an obstacle to the prosecution of foreign corporations that have committed offenses that may be punished in the United States. In some cases, such corporations cannot be served because they have no last known address or principal place of business in the United States. General Breuer emphasized the "new reality": a truly global economy reliant on electronic communications, in which organizations without an office or agent in the United States can readily conduct both real and virtual activities here. He argued that this new reality has created a "growing class of organizations, particularly foreign corporations" that have gained "'an undue advantage' over the government relating to the initiation of criminal proceedings."

At present, the Federal Rules of Criminal Procedure provide for service of an arrest warrant or summons only within a judicial district of the United States. Fed. R. Crim. P. 4(c)(2), which governs the location of service, states that an arrest warrant or summons may be served "within the jurisdiction of the United States."[1] In contrast, Fed. R. Civ. P. 4(f) authorizes service on individual defendants in a foreign country, and Fed. R. Civ. P. 4(h)(2) allows service on organizational defendants as provided by Rule 4(f).

2. The proposed amendment

Given the increasing number of criminal prosecutions involving foreign entities, the Advisory Committee agreed that it would be appropriate for the Federal Rules of Criminal Procedure to provide a mechanism for foreign service on an organization. The Advisory Committee recognized that the government may not be able to prosecute foreign entities that fail to respond to service. Nevertheless, it is expected that entities subject to collateral consequences (forfeiture, debarment, etc.) will appear. The proposed amendment makes the following changes in Rule 4:

[1] Fed. R. Crim. P. 4(c)(2) does provide, however, that service may also be made "anywhere else a federal statute authorizes an arrest."

(1) It specifies that the court may take any action authorized by law if an organizational defendant fails to appear in response to a summons. This fills a gap in the current rule, without any expansion of judicial authority.

(2) For service of a summons on an organization within the United States, it:

- eliminates the requirement of a separate mailing to an organizational defendant when delivery has been made to an officer or to a managing or general agent, but

- requires mailing when delivery has been made on an agent authorized by statute, if the statute itself requires mailing to the organization.

(3) It also authorizes service on an organization at a place not within a judicial district of the United States, prescribing a non-exclusive list of methods for service.

In addition to the enumerated means of service, the proposal contains an open-ended provision in (c)(3)(D)(ii) that allows service "by any other means that gives notice." This provision provides flexibility for cases in which the Department of Justice concludes that service cannot be made (or made without undue difficulty) by the enumerated means. One of the principal issues considered by the Advisory Committee was whether to require prior judicial approval of other means of service. Civil Rule 4(f)(3) provides for foreign service on an organization "by other means not prohibited by international agreement, as the court orders."(emphasis added). The Committee concluded the Criminal Rules should not require prior judicial approval before service of a criminal summons could be made in a foreign country by other unspecified means. In its view, a requirement of prior judicial approval might raise difficult questions of international law and the institutional roles of the courts and the executive branch.[2]

The Committee considered the possibility that in rare cases the Department of Justice might seek to make service under (c)(3)(D)(ii) in a foreign nation without its cooperation or consent. Representatives of the Department stated that such service would be made only as a last resort, and only after the Criminal Division's Office of International Affairs and representatives of the Department of State had considered the foreign policy and reciprocity implications of such an action. The Department also stressed the Executive Branch's primacy in foreign relations and its obligation to ensure that the laws are faithfully executed. Finally, the Department noted that the federal courts are not deprived of jurisdiction to try a defendant whose presence before the court was procured by illegal means. This principle was reaffirmed in United States v. Alvarez-

[2] These issues would be raised most starkly by a request for judicial approval of service of criminal process in a foreign country without its consent or cooperation, and in violation of its laws, or even in violation of international agreement. Fed. R. Civ. P. 4(f)(3) may permit such a request. Where there is no internationally agreed means of service prescribed, Fed. R. Civ. P. 4(f)(2) then authorizes service by various means, and Fed. R. Civ. P. 4(f)(3) provides for service by "any other means not prohibited by international agreement, as the court orders." Although Fed. R. Civ. P. 4(f)(2)(C) precludes service "prohibited by the foreign country's law," that restriction is absent from Fed. R. Civ. P. 4(f)(3). The proposed amendment to Criminal Rule 4 authorizes service "permitted by an applicable international agreement," but does not prohibit service that is not so permitted, as long as service "gives notice."

Machain, 504 U.S. 655 (1992) (holding that abduction of defendant in Mexico in violation of extradition treaty did not deprive court of jurisdiction). Similarly, if service were made on an organizational defendant in a foreign nation without its consent, or in violation of international agreement, the court would not be deprived of jurisdiction. Under the Committee's proposal–which does not require prior judicial approval of the means of service–a court would never be asked to give advance approval of service contrary to the law of another state or in violation of international law. Rather, a court would consider any legal challenges to such service only when raised in a proceeding before it.

3. Public Comments and Subcommittee Review

a. Public comments

Six written comments on the proposed amendment were received, and one speaker (from the Federal Bar Council for the Second Circuit) testified about the proposed amendment. The Federal Bar Council, the Federal Magistrate Judges Association (FMJA), Mr. Kyle Druding, and the National Association of Criminal Defense Lawyers (NACDL) all supported the proposed amendment, though the FMJA and NACDL suggested revisions. Robert Feldman, Esq. of Quinn Emanuel Urquart & Sullivan opposed the amendment and urged that it be withdrawn. Additionally, the Department of Justice provided written responses. Each comment is summarized at Tab C.

With the exception of Quinn Emanuel, the commenters generally agreed that the amendment (1) addresses a gap in the current rules that may hinder the prosecution of foreign corporations that commit crimes in the United States but have no physical presence here, (2) provides methods of service that are reasonably calculated to provide notice and comply with applicable laws, and (3) gives courts appropriate discretion to fashion remedies.

b. The Subcommittee's review and recommendations

The Rule 4 Subcommittee, chaired by Judge David Lawson, received both summaries and the full text of the comments, and it held a teleconference to review the comments. The Subcommittee unanimously recommended that the Advisory Committee approve the proposed amendment as published and transmit it to the Standing Committee.

4. Recommended action

After a full discussion, the Advisory Committee concurred in the recommendation that the proposed amendment as published should be approved for transmission to the Standing Committee.

a. Opposition to the proposed amendment

Only one comment opposed the amendment and recommended that it be withdrawn. The law firm of Quinn Emanuel Urquart & Sullivan represents the Pangang Group Company and affiliated entities, a state-owned Chinese corporation. The Department of Justice has been

unable to serve process on Pangang under current Rule 4.[3] The proposal to amend the rule would provide a mechanism for effecting service on foreign corporations that commit serious crimes in the United States without having any physical presence here. The amendment is intended to allow reliable service with adequate notice on these organizations so that U.S. courts can adjudicate the merits of criminal allegations and ensure appropriate accountability.

The Committee carefully considered Quinn Emanuel's arguments, and found them unpersuasive. Quinn Emanuel argued that the proposed amendment would essentially foreclose judicial review of the adequacy of notice to foreign corporations, because "the very act of challenging service might be said to conclusively establish the notice that would make service complete." Corporate defendants who wish to contest service, they argued, would face "a Hobson's choice." The Committee agreed that if a lawyer for a corporation appears in a criminal case it may be difficult to convince the court that the corporation did not receive notice. But this is appropriate. A court should be able to take into account the appearance of counsel when evaluating a corporation's claim that it did not receive notice. Moreover, nothing in the proposed amendment addresses or limits any authority of the court to allow a special appearance to contest service on other grounds, nor does it address the ability of a corporate defendant to contest notice in a collateral proceeding. Quoting *Omni Capital Int'l v. Wolff & Co.*, 484 U.S. 97, 104 (1987), Quinn Emanuel also argued that in suggesting notice was the sole criterion for service, the Rule would "eliminate a historical function of service." The Committee concluded that the *Omni Capital* decision is fully consistent with the proposed amendment. In the sentence following the language quoted by Quinn Emanuel the Court made it clear that service in compliance with the Civil Rules provided the additional element of "amenability to service." The Court explained, "Absent consent, this means there must be authorization for service of summons on the defendant." Here, the purpose of the proposed amendment is to provide the necessary "authorization for service" (as well as notice to the defendant).

The lawyers from Quinn Emanuel raised another argument that the Committee had considered as it was formulating the proposal, namely, that "other governments may reciprocate by adopting a similar regime" to "ensnare U.S. corporations in criminal prosecutions around the globe." In a related objection, Quinn Emanuel noted that a court might interpret the amendment to permit "a manner of service prohibited by international agreement . . . , so long as it appears to

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[3] On July 10, 2014, after a two month jury trial, Walter Liew, the owner and president of a California-based engineering consulting company, was sentenced to 15 years in prison for conspiring to steal trade secrets from E.I. du Pont de Nemours & Company ("DuPont") related to the manufacture of titanium dioxide and for the benefit of Pangang. *See, Walter Liew Sentenced to Fifteen Years in Prison for Economic Espionage,* justice.gov (Jul. 11, 2014), www.justice.(_2,ov/usao-ndca/pr/walter-liew-sentenced-fifteen-years-prison-economic-espiona2,e. Liew was aware that DuPont had developed industry-leading titanium dioxide technology over many years of research and development and assembled a team of former DuPont employees to assist him in his efforts to convey DuPont's titanium dioxide technology to entities in the People's Republic of China, including Pangang. At Liew's sentencing; the Honorable Jeffrey S. White, U.S. District Court Judge, stated that the 15-year sentence was intended, in part, to send a message that the theft and sale of trade secrets for the benefit of a foreign government is a serious crime that threatens our national economic security. *Id.* Despite the fact that Pangang was indicted years ago along with Liew, and has actual notice of the indictment, to date, the United States has been unable to effectively serve Pangang pursuant to the current Rule 4. *See, e.g., United States v. Pangang Group Co., Ltd,* 879 F. Supp. 2d 1052 (N.D. Cal. 2012).

have provided notice to the accused," an interpretation it found objectionable. Both of these concerns were anticipated by the Committee well before the proposal was approved for publication. In response to a specific request from a Committee member, the Department of Justice provided written assurance that it had consulted with appropriate authorities in the Executive Branch about the potential international relations ramifications of the proposed amendment. The Committee agreed that in light of this assurance, concerns about any impact on diplomatic relations were not a basis for rejecting the proposed amendment.

b. Suggested revisions

The FMJA, Quinn Emanuel, and NACDL suggested revisions that the Advisory Committee declined to adopt. The FMJA suggested that an addition to the Committee Note stating that the means of service must satisfy constitutional due process. Quinn Emanuel's attorneys also argued if a corporate defendant did not receive notice and failed to appear, the court might impose sanctions, or appoint counsel and conduct trial in absentia. Similarly, NACDL requested that the amendment be revised to include in the rule's text that actions by a judge upon a corporation's failure to appear must be "consistent with Rule 43(a)," or, in the alternative that this requirement be stated in the Note. The Advisory Committee considered and rejected these suggestions. It is always assumed that a rule will be interpreted against the backdrop of existing rules, statutes, and constitutional doctrine. Absent some compelling reason to believe this point will be misunderstood, adding such a command to a rule's text or Note is unnecessary. Indeed, doing so might have the undesirable effect of suggesting that in the absence of such a cross reference, other statutes and rules are not applicable.

The Advisory Committee also rejected proposed revisions that would add procedural hurdles and might invite extended litigation. NACDL suggested that the proposed amendment be modified to allow service by alternative means only if it was not possible to deliver a copy in a manner authorized by the foreign jurisdiction's law, to a officer, manager or other general agent, or an agent appointed to receive process. The Advisory Committee chose neither to add such a condition nor to prioritize the means of service, as that would invite unnecessary litigation over whether the triggering condition had been met. Similarly, the Committee rejected the further suggestion of NACDL that the new provisions be limited to cases in which "the organization does not have a place of business or mailing address within the United States at or through which actual notice to a principal of the organization can likely be given." As noted by the Department of Justice, litigation in a recent case on the question whether a subsidiary of a foreign corporation could be served took eight months. Finally, the Committee rejected Quinn Emanuel's argument that "any other means that gives notice" renders superfluous the other sections of the proposed amendment. Similarly, the Committee considered and rejected a suggestion that the government be required to show other options were not feasible or had been exhausted before resorting to certain options for service as unnecessarily burdensome and time consuming.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 4 be approved as published and transmitted to the Judicial Conference.

B. ACTION ITEM—Rule 41 (venue for approval of warrant for certain remote electronic searches)

After review of the public comments, the Advisory Committee voted with one dissent to recommend that Standing Committee approve the proposed amendment as revised after publication and transmit it to the Judicial Conference.

The proposed amendment (Tab D) provides that in two specific circumstances a magistrate judge in a district where the activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when that media or information is or may be located outside of the district.

The proposal has two parts. The first change is an amendment to Rule 41(b), which generally limits warrant authority to searches within a district,[4] but permits out-of-district searches in specified circumstances.[5] The amendment would add specified remote access searches for electronic information to the list of other extraterritorial searches permitted under Rule 41(b). Language in a new subsection 41(b)(6) would authorize a court to issue a warrant to use remote access to search electronic storage media and seize electronically stored information inside *or outside* of the district in two specific circumstances.

The second part of the proposal is a change to Rule 41(f)(1)(C), regulating notice that a search has been conducted. New language would be added at the end of that provision indicating the process for providing notice of a remote access search.

1. Reasons for the proposed amendment

Rule 41's territorial venue provisions–which generally limit searches to locations within a district–create special difficulties for the Government when it is investigating crimes involving electronic information. The proposal speaks to two increasingly common situations affected by the territorial restriction, each involving remote access searches, in which the government seeks to obtain access to electronic information or an electronic storage device by sending surveillance software over the Internet.

In the first situation, the warrant sufficiently describes the computer to be searched, but the district within which the computer is located is unknown. This situation is occurring with increasing frequency because persons who commit crimes using the Internet are using sophisticated anonymizing technologies. For example, persons sending fraudulent

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[4] Rule 41(b)(1) ("a magistrate judge with authority in the district – or if none is reasonably available, a judge of a state court of record in the district – has authority to issue a warrant to search for and seize a person or property located within the district").

[5] Currently, Rule 41(b) (2) – (5) authorize out-of-district or extra-territorial warrants for: (1) property in the district when the warrant is issued that might be moved outside the district before the warrant is executed; (2) tracking devices, which may be monitored outside the district if installed within the district; (3) investigations of domestic or international terrorism; and (4) property located in a United States territory or a United States diplomatic or consular mission.

communications to victims and child abusers sharing child pornography may use proxy services designed to hide their true IP addresses. Proxy services function as intermediaries for Internet communications: when one communicates through an anonymizing proxy service, the communication passes through the proxy, and the recipient of the communication receives the proxy's IP address, not the originator's true IP address. Accordingly, agents are unable to identify the physical location and judicial district of the originating computer.

A warrant for a remote access search when a computer's location is not known would enable investigators to send an email, remotely install software on the device receiving the email, and determine the true IP address or identifying information for that device. The Department of Justice provided the Committee with several examples of affidavits seeking a warrant to conduct such a search. Although some judges have reportedly approved such searches, one judge recently concluded that the territorial requirement in Rule 41(b) precluded a warrant for a remote search when the location of the computer was not known, and he suggested that the Committee consider updating the territorial limitation to accommodate advancements in technology. *In re Warrant to Search a Target Computer at Premises Unknown*, 958 F. Supp. 2d 753 (S.D. Tex. 2013) (noting that "there may well be a good reason to update the territorial limits of that rule in light of advancing computer search technology").

The second situation involves the use of multiple computers in many districts simultaneously as part of complex criminal schemes. An increasingly common form of online crime involves the surreptitious infection of multiple computers with malicious software that makes them part of a "botnet," which is a collection of compromised computers that operate under the remote command and control of an individual or group. Botnets may range in size from hundreds to millions of compromised computers, including computers in homes, businesses, and government systems. Botnets are used to steal personal and financial data, conduct large-scale denial of service attacks, and distribute malware designed to invade the privacy of users of the host computers.

Effective investigation of these crimes often requires law enforcement to act in many judicial districts simultaneously. Under the current Rule 41, however, except in cases of domestic or international terrorism, investigators may need to coordinate with agents, prosecutors, and magistrate judges in every judicial district in which the computers are known to be located to obtain warrants authorizing the remote access of those computers. Coordinating simultaneous warrant applications in many districts–or perhaps all 94 districts–requires a tremendous commitment of resources by investigators, and it also imposes substantial demands on many magistrate judges. Moreover, because these cases concern a common scheme to infect the victim computers with malware, the warrant applications in each district will be virtually identical.

2. <u>The proposed amendment</u>

The Committee's proposed amendment is narrowly tailored to address these two increasingly common situations in which the territorial or venue requirements now imposed by Rule 41(b) may hamper the investigation of serious federal crimes. The Committee considered, but declined to adopt, broader language relaxing these territorial restrictions. It is important to

note that the proposed amendment changes only the territorial limitation that is presently imposed by Rule 41(b). Using language drawn from Rule 41(b)(3) and (5), the proposed amendment states that a magistrate judge "with authority in any district where activities related to a crime may have occurred" (normally the district most concerned with the investigation) may issue a warrant that meets the criteria in new paragraph (b)(6). The proposed amendment does not address constitutional questions that may be raised by warrants for remote electronic searches, such as the specificity of description that the Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing or copying electronically stored information. The amendment leaves the application of this and other constitutional standards to ongoing case law development.

In a very limited class of investigations the Committee's proposed amendment would also eliminate the burden of attempting to secure multiple warrants in numerous districts. The proposed amendment is limited to investigations of violations of 18 U.S.C. § 1030(a)(5),[6] where the media to be searched are "protected computers" that have been "damaged without authorization." The definition of a protected computer includes any computer "which is used in or affecting interstate or foreign commerce or communication." 18 U.S.C. § 1030(e)(2). The statute defines "damage" as "any impairment to the integrity or availability of data, a program, a system, or information." 18 U.S.C. § 1030(e)(8). In cases involving an investigation of this nature, the amendment allows a single magistrate judge with authority in any district where activities related to a violation of 18 U.S.C. § 1030(a)(5) may have occurred to oversee the investigation and issue a warrant for a remote electronic search if the media to be searched are protected computers located in five or more districts. The proposed amendment would enable investigators to conduct a search and seize electronically stored information by remotely installing software on a large number of affected victim computers pursuant to one warrant issued by a single judge. The current rule, in contrast, requires obtaining multiple warrants to do so, in each of the many districts in which an affected computer may be located.

Finally, the proposed amendment includes a change to Rule 41(f)(1)(C), which requires notice that a search has been conducted. New language would be added at the end of that provision indicating the process for providing notice of a remote access search. The rule now requires that notice of a physical search be provided "to the person from whom, or from whose premises, the property was taken" or left "at the place where the officer took the property." The Committee recognized that when an electronic search is conducted remotely, it is not feasible to provide notice in precisely the same manner as when tangible property has been removed from physical premises. The proposal requires that when the search is by remote access, reasonable efforts be made to provide notice to the person whose information was seized or whose property was searched.

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[6] 18 U.S.C. § 1030(5) provides that criminal penalties shall be imposed on whoever:

(A) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;
(B) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or
(C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage and loss.

3. Public Comments and Subcommittee Review

a. The public comments

During the public comment period the Committee received 44 written comments from individuals and organizations, and eight witnesses testified at the Committee's hearing in November:

> The Federal Bar Council, the Federal Magistrate Judges' Association, the National Association of Assistant United States Attorneys, and former advocate for missing and exploited children Carolyn Atwell-Davis all supported the amendment without change.
>
> The amendment was opposed by the American Civil Liberties Union (ACLU), the National Association of Criminal Defense Attorneys (NACDL), the Pennsylvania Bar Association, the Reporters Committee on the Freedom of the Press, the Clandestine Reporters Working Group, and several foundations and centers that focus on privacy and/or technology. Twenty-eight unaffiliated individuals wrote to oppose the amendment.

The Department of Justice submitted several written responses to issues raised in the public comments.

A summary of the comments is provided at Tab D. The main themes in the comments opposing the amendment are summarized below.

(i) Fourth Amendment concerns

The most common theme in the comments opposing the amendment was a concern that it relaxed or undercut the protections for personal privacy guaranteed by the Fourth Amendment. These comments focused principally on proposed (b)(6)(A), which allows the court in a district in which activities related to a crime may have occurred to grant a warrant for remote access when anonymizing technology has been employed to conceal the location of the target device or information.

Multiple comments argued that remote searches could not meet the Fourth Amendment's particularity requirement, and others emphasized that they would constitute surreptitious entries and invasive or destructive searches requiring a heightened showing of reasonableness. Many of these comments also challenged the constitutional adequacy of the notice provisions. Finally, several comments urged that the serious constitutional issues raised by remote searches would be insulated from judicial review.

A particular concern raised in many comments was that the use of anonymizing technology, such as Virtual Private Networks (VPNs), would subject law abiding citizens to remote electronic searches.

(ii) Title III

Multiple comments urged that warrant applications for remote electronic searches should be subject to requirements like those under the Wiretap Act, 18 U.S.C. § 2518 (Title III), or a surveillance warrant containing equivalent protections.

(iii) Extraterritoriality and international law concerns

Some comments focused on the possibility that the devices to be searched–whose location was by definition unknown–might be located outside the United States. They urged that the courts should not authorize searches outside the United States that would violate international law and the sovereignty of other nations, as well as any applicable mutual legal assistance treaties.

(iv) The role of Congress

An additional theme running through many of these comments was that the proposed amendment raised policy issues that should be resolved by Congress, not through procedural rulemaking. Some comments argued that only Congress could balance the competing policies and adopt appropriate safeguards. Others urged that the proposed amendment exceeded the authority granted by the Rules Enabling Act.

(v) Notice concerns

Finally, multiple comments expressed concern that the notice provisions were insufficiently protective, because they required only that reasonable efforts be made to provide notice. This, commenters argued, might lead to no notice being given to parties who were subject to remote electronic searches, or to long delays in giving notice. Some commenters also argued that all parties whose rights were affected by a search must be given notice, not either the person whose property was searched or whose information was seized or copied.

b. The Subcommittee's review and recommendation

The Rule 41 Subcommittee, chaired by Judge Raymond Kethledge, received both summaries and the full text of all comments, and it held multiple teleconferences to review the comments. The Subcommittee unanimously recommended that, with several minor revisions, the Advisory Committee should approve the proposed amendment and transmit it to the Judicial Conference.

4. Recommended action

After extended discussion, the Advisory Committee concurred in the recommendation that the proposed amendment, with minor revisions proposed by the Subcommittee, should be approved for transmission to the Standing Committee.

a. Opposition to the proposed amendment

In general the Committee concluded that the concerns of those opposing the amendment were about the substantive limits on government searches, which are not affected by the proposed amendment. Opposition comments did not address the procedure for designating the district in which a court will initially decide whether substantive requirements have been satisfied in the two circumstances prompting the amendment. Thus they furnished no basis for withdrawing the proposed amendment. The Committee is confident that judges will address Fourth Amendment requirements on a case-by-case basis both in issuing warrants under these amendments and in reviewing them when challenges are made thereafter.

Much of the opposition to the amendment reflected a misunderstanding of current law, the scope of the amendment, and the serious problems that it addresses. First, many commenters who opposed the rule did not recognize that the government must demonstrate probable cause to obtain a warrant. As noted below, the Committee recommends a revision to the caption of the relevant section referring to "venue" in order to draw attention to the limited scope of the amendment. Second, many commenters incorrectly assumed that the amendment created the authority for remote electronic searches. To the contrary, remote electronic searches are currently taking place when the government can identify the district in which an application should be made and satisfy the probable cause requirements for a warrant. Third, the opposing comments do not take account of the real need for amendment to allow the government to respond effectively to the threats posed by technology. Technology now provides the means for identity theft, corporate espionage, terrorism, child pornography, and other serious offenses to jeopardize the economy, national security, and individual privacy. The government can itself use technology to identify the perpetrators of such crimes but needs a rule clarifying the venue where it should make the Fourth Amendment showing necessary for a warrant. At the hearings, those who opposed the amendment were candid in admitting that they could offer no alternative to the proposed amendment (other than the hope that Congress might study the general issues and respond).

The Committee concluded that it was important to provide venue, thus allowing the case law on potential constitutional issues to develop in an orderly process as courts review warrant applications. This is far preferable than after-the-fact rulings on the legality of warrantless searches for which the government claims exigent circumstances. If the New York Stock Exchange were to be hacked tomorrow using anonymizing software, under current Rule 41 there is no district in which the government could seek a warrant. It would be preferable, the Committee concluded, to allow the government to seek a warrant from the court where the investigation is taking place, rather than conducting a warrantless search. Judicial review of warrant applications better ensures Fourth Amendment rights and enhances privacy. Any concern that judges may be uninformed about the technology to be used in the searches could be addressed by judicial education. The Federal Judicial Center has recently prepared some information materials about topics such as cloud computing, and additional materials could be developed to help judges review applications for remote electronic searches.

In botnet investigations, the amendment provides venue in one district for the warrant applications, eliminating the burden of attempting to secure multiple warrants in numerous

districts and allowing a single judge to oversee the investigation. In prior botnet investigations, the burden of seeking warrants in multiple districts played a role in the government's strategy, providing a strong incentive to rely on civil processes. Again, the amendment addresses only a procedural issue, not the underlying substantive law regulating these searches. Allowing venue in a single district in no way alters the constitutional requirements that must be met before search warrants can be issued.

The Committee declined to make any major changes in the provisions governing notice. However, as noted below, it adopted several small changes recommended by the Subcommittee and also revised the Committee Note to address concerns made in the public comments.

Finally, the Committee concluded that arguments urging that the matter be left to Congress are not persuasive. Venue is not substance. Venue is process, and Rules Enabling Act tells the judiciary to promulgate rules of practice and procedure, not to wait for Congress to act. Instead, Congress responds to proposed rules. The Department came to the Committee with two procedural problems, created by the language of the existing Rule, not by the Constitution or other statute, that are impairing its ability to investigate ongoing, serious computer crimes. The Advisory Committee's role under the Rules Enabling Act is to propose amendments that address these problems and provide a forum for the government to determine the lawfulness of these searches.

One member dissented from the Committee's conclusions on these points and voted against forwarding the amendment to the Standing Committee. The dissenting member thought that the amendment is substantive, not procedural, because it has such important substantive effects, allowing judges to make ex parte determinations about core privacy concerns. The amendment, this member argued, would not permit adversarial testing of the underlying substantive law because defense counsel would not participate until too late in the process, in back-end litigation. For many people, computers are their lives, and the member concluded that these privacy concerns should be considered in the first instance by Congress. The remainder of the Committee was not persuaded; computers are no more sacrosanct than homes, and search warrants for homes have long been issued ex parte and reviewed in back-end litigation.

b. Proposed revisions

The Committee unanimously accepted the Subcommittee's recommendations for several revisions in the rule as published, none of which require republication.

(i) The caption

The Committee accepted the Subcommittee's recommendation for a change in the caption of the affected subdivision of Rule 41, substituting "Venue for a Warrant Application" for the current caption "Authority to Issue a Warrant." This change responds to the many comments that assumed the amendment would allow a remote search in any case falling within the proposed amendment (for example, any case in which an individual had used anonymizing technology such as a VPN). The current caption seems to state an unqualified "authority" to issue warrants meeting the criteria of any of the subsections. Many commenters mistakenly

interpreted the rule in this fashion, and strongly opposed it on this ground. The Committee considered and declined to adopt alternative language suggested by our style consultant, Professor Kimble, because it would less clearly indicate the limited purpose and effect of the amendment.

The Committee also adopted the Subcommittee's proposed addition to the Committee Note explaining the change in the caption. The new Note explicitly addresses the common misunderstanding in the public comments, stating what the amendment does (and does not) do: "the word 'venue' makes clear that Rule 41(b) identifies the courts that may consider an application for a warrant, not the constitutional requirements for the issuance of a warrant, which must still be met."

(ii) Notice

The Committee adopted the Subcommittee's two proposed revisions to the notice provisions for remote electronic searches and the accompanying Committee Note. The purpose of both revisions to the text is to parallel, as closely as possible, the requirements for physical searches. The addition to the Committee Note explains the changes to the text, and also responds to a common misunderstanding that underpinned multiple comments criticizing the proposed notice provisions.

The Committee added a requirement that the government provide a "receipt" for any property taken or copied (as well as a copy of the warrant authorizing the search). This parallels the current requirement that a receipt be provided for any property taken in a physical search. The Committee agreed that the omission of this requirement in the published rule was an oversight that should be remedied.

The Committee also rephrased the obligation to provide notice to "the person whose property was searched or <u>who possessed the information that was seized or copied</u>." Again, the purpose was to parallel the requirement for physical searches.

On the other hand, the Committee rejected the suggestion in some public comments that the government should be required to provide notice to both "the person whose property was searched" <u>and</u> whoever "possessed the information that was seized or copied, since that is not required in the case of physical searches. For example, if the Chicago Board of Trade is served with a warrant and files containing information regarding many customers are seized, the government may give notice of the search only to the Board of Trade, and not to each of the customers whose information may be included in one or more files. The same should be true in the case of remote electronic searches.

Finally, the Committee endorsed the Subcommittee's proposed addition to the Committee Note explaining the changes made in the notice provisions after publication, and also responding to the many comments that criticized the proposed notice provisions as insufficiently protective. The addition to the Note draws attention to the other provisions of Rule 41 that preclude delayed notice except when authorized by statute and provides a citation to the relevant statute. Professor Coquillette commented that because of the widespread confusion on this point in the public

comments, the proposed addition was an appropriate exception to the general rule that committee notes should not be used to help practitioner.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 41 be approved as amended and transmitted to the Judicial Conference.

C. ACTION ITEM—Rule 45 (additional time after certain kinds of service)

After review of the public comments, the Advisory Committee voted unanimously to recommend that the Standing Committee approve the proposed amendment to Rule 45(c), with three revisions from the published version and transmit it to the Judicial Conference. The proposed amendment is at Tab E.

1. Reasons for the proposal

The proposed amendment to Rule 45(c) is a product of the Standing Committee's CM/ECF Subcommittee; parallel amendments to the civil, criminal, bankruptcy and appellate rules were published for comment. The proposed amendment would abrogate the rule providing for an additional three days whenever service is made by electronic means. It reflects the CM/ECF Subcommittee's conclusion that the reasons for allowing extra time to respond in this situation no longer exist. Concerns about delayed transmission, inaccessible attachments, and consent to service have been alleviated by advances in technology and extensive experience with electronic transmission. In addition, eliminating the extra three days would also simplify time computation. The proposed amendment, as well as the parallel amendments to the other Rules, includes new parenthetical descriptions of the forms of service for which three days will still be added.

2. Public Comments

The public comments are summarized at Tab E.

The Pennsylvania Bar Association and the National Association of Criminal Defense Lawyers (NACDL) opposed the amendment. Each noted that the three added days are particularly valuable when a filing is electronically served at inconvenient times. NACDL emphasized that many criminal defense counsel are solo practitioners or in very small firms, where they have little clerical help, and often do not see their ECF notices the day they are received. The Department of Justice expressed a similar concern about situations in which service after business hours, from a location in a different time zone, or during a weekend or holiday may significantly reduce the time available to prepare a response. The Department did not oppose the amendment, however, and instead suggested language be added to the Committee Note to address this issue.

NACDL also questioned the addition of the phrase "Time for Motion Papers" to the caption to Rule 45(c), suggesting that it may lead to confusion.

Ms. Cheryl Siler suggested that as part of the revision the existing language of Rule 45(c) should be amended to parallel Fed. R. Civ. P. 6(d), FRAP 26(c) and Fed. R. Bank. P. 9006(f). In contrast to Rule 45(c), which requires action "within a specified time *after service*," the parallel Civil and Bankruptcy Rules require action "within a specified [or prescribed] time *after being served*." Siler expressed concern that practitioners may interpret the current rule to mean the party serving a document (as well as the party being served) is entitled to 3 extra days.

The Federal Magistrate Judges Association (FMJA) expressed concern that readers of the amended rule might think that three days are still added after electronic service because of the cross reference to Civil Rule 5(b)(2)(F) "(other means consented to)." It suggested either eliminating all of the parentheticals in the proposed rule or revising the rule to refer to "(F) (other means consented to except electronic service)."

The Advisory Committee's CM/ECF Subcommittee, chaired by Judge David Lawson, held a telephone conference to consider the comments. After discussing the FMJA's concerns it decided not to recommend a change in the published rule. The likelihood of confusion did not seem significant, and any confusion that might arise would be short lived because of the efforts underway to eliminate the requirement for consent to electronic service. The parentheticals will be helpful to practitioners, and any revision to the parenthetical reference would require further amendment in the near future. Language in the proposed Committee Note directly addresses this issue. The Subcommittee recommended to the Criminal Advisory Committee that no change be made in the published rule on this issue, and the Advisory Committee agreed with that recommendation at its March meeting.

The Advisory Committee did approve three other revisions to the proposal, each recommended by its Subcommittee.

3. Suggested Revisions

a. Addition to Committee Note.

The first change is a proposed addition to the Committee Note that addresses the potential need to grant an extension to the time allowed for responding after electronic service. At the Advisory Committee's March meeting, two members initially opposed forwarding the published amendment to the Standing Committee, finding that the concerns voiced by the Pennsylvania Bar Association, NACDL, and the Department of Justice counseled against an amendment that would eliminate the three added days after electronic service. These members noted that the three added days are important for criminal practitioners because it is often necessary to speak directly with clients before filing responses, but speaking with incarcerated clients takes more time, particularly when clients are incarcerated in distant locations. However, the Committee eventually achieved unanimity on a compromise approach: adding language to the Committee Note. The Committee approved an addition to the Note drafted by the Department of Justice and recommended by the Advisory Committee's CM/ECF Subcommittee. The Committee decided that adding language to the Committee Note that mentioned the potential need for extensions was important not only for the reasons voiced by defense attorneys and the Department of Justice, but also because district court discretion to adjust deadlines in criminal cases is essential in order to

address matters on the merits when appropriate. Such flexibility is particularly important when a person's liberty is at stake. Granting extensions in some circumstances may also be more efficient because of collateral challenges that frequently follow missed deadlines. This principal was among those that guided the Committee's recent work on Rule 12. The amendments to Rule 12 emphasized the district court's discretion to extend or modify motion deadlines so that issues can be most efficiently resolved on their merits before trial, avoiding litigation under Section 2255.

To facilitate uniformity in the Committee Note that would accompany the parallel rules making their way through the various Advisory Committees, the Criminal Advisory Committee approved the revised Note language with the understanding that modifications may be required. Indeed, subsequent to the March meeting, a much shorter version of the addition was approved by the Criminal Advisory Committee's Subcommittee on CM-ECF, and then by the Chairs of each Advisory Committee. That new language has been added to the published Committee Note in each Committees' parallel proposal. It reads: "Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice."

b. Change to the Caption

The Advisory Committee also agreed to amend the caption of the Rule published for comment to eliminate the additional words "Time for Motion Papers." These words do not appear in the caption of the existing Rule 45, and were included in the proposed amendment in order to parallel the current caption of Civil Rule 6, on which Rule 45 was patterned, as well as the caption to Bankruptcy Rule 9006. However, the added words do not describe the text of Rule 45. Instead, Rule 12 deals extensively with the time for motions.

c. Substituting "being served" for "service"

Finally, the Advisory Committee agreed to amend the proposed text of the amendment to Rule 45 as published so that it is parallel to the language of the other rules, referring to action "within a specified time after *being served*" instead of "time after *service*." The Committee is unaware of any substantive reason for the slightly different wording of Rule 45 as compared to the Civil and Bankruptcy Rules. The Committee believes it is prudent to revise the language of Rule 45(c) to eliminate the discrepancy while other changes are being made in Rule 45(c).

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 45 be approved as amended and transmitted to the Judicial Conference.

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