

April 26, 2018

Honorable Paul D. Ryan  
Speaker of the House of Representatives  
Washington, DC 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 that were 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 4, 2017; a redline version of the rules with committee notes; an excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2017 Report of the Advisory Committee on Appellate Rules.

Sincerely,

April 26, 2018

Honorable Michael R. Pence  
President, United States Senate  
Washington, DC 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 that were 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 4, 2017; a redline version of the rules with committee notes; an excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2017 Report of the Advisory Committee on Appellate Rules.

Sincerely,

April 26, 2018

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 8, 11, 25, 26, 28.1, 29, 31, 39, and 41, and Forms 4 and 7.

[*See infra* pp. \_\_ \_\_ \_\_.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2018, 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 2074 of Title 28, United States Code.

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF APPELLATE PROCEDURE**

**Rule 8. Stay or Injunction Pending Appeal**

**(a) Motion for Stay.**

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

\* \* \* \* \*

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

\* \* \* \* \*

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

\* \* \* \* \*

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

**(b) Proceeding Against a Security Provider.** If a party gives security with one or more security providers, each provider submits to the jurisdiction of the district court and irrevocably appoints the district clerk as its agent on whom any papers affecting its liability on the security may be served. On motion, a security provider's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly send a copy to each security provider whose address is known.

\* \* \* \* \*

**Rule 11. Forwarding the Record**

\* \* \* \* \*

**(g) Record for a Preliminary Motion in the Court of**

**Appeals.** If, before the record is forwarded, a party makes any of the following motions in the court of appeals:

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

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

**Rule 25. Filing and Service**

**(a) Filing.**

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

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

**(A) Nonelectronic Filing.**

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

(ii) **A Brief or Appendix.** A brief or appendix not filed electronically is timely filed, however, if on or before the last day for filing, it is:

- mailed to the clerk by first-class mail, or other class of mail that is at least as expeditious, postage prepaid; or
- dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

(iii) **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)(A)(iii). A paper not filed electronically 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:



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

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

**(i) By a Represented Person—**

**Generally Required; Exceptions.**

A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

**(ii) By an Unrepresented Person—**

**When Allowed or Required.**

A person not represented by an attorney:

- may file electronically only if allowed by court order or by local rule; and
- may be required to file electronically only by court

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order, or by a local rule that includes reasonable exceptions.

(iii) **Signing.** A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

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

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

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

(5) **Privacy Protection.** An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

(b) **Service of All Papers Required.** Unless a rule requires service by the clerk, a party must, at or before

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the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

**(c) Manner of Service.**

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

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

(B) by mail; or

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

(2) Electronic service of a paper may be made (A) by sending it to a registered user by filing it with the court's electronic-filing system or (B) by sending it by other electronic means that the person to be served consented to in writing.

- (3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.
- (4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on filing or sending, unless the party making service is notified that the paper was not received by the party served.

**(d) Proof of Service.**

- (1) A paper presented for filing must contain either of the following:
  - (A) an acknowledgment of service by the person served; or

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

- (i) the date and manner of service;
- (ii) the names of the persons served; and
- (iii) their mail or electronic addresses,  
facsimile numbers, or the addresses of  
the places of delivery, as appropriate  
for the manner of service.

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

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

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

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



**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)(A)(ii), and 25(a)(2)(A)(iii)—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.

\* \* \* \* \*

**Rule 28.1. Cross-Appeals**

\* \* \* \* \*

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

- (1) the appellant's principal brief, within 40 days after the record is filed;
- (2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;
- (3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and
- (4) the appellee's reply brief, within 21 days after the appellant's response and reply brief is served, but at least 7 days before argument unless the court, for good cause, allows a later filing.

**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 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, but a court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification.

\* \* \* \* \*

**(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 brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court.

\* \* \* \* \*

**Rule 31. Serving and Filing Briefs**

**(a) Time to Serve and File a Brief.**

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

\* \* \* \* \*

**Rule 39. Costs**

\* \* \* \* \*

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

- (1) the preparation and transmission of the record;
- (2) the reporter's transcript, if needed to determine the appeal;
- (3) premiums paid for a bond or other security to preserve rights pending appeal; and
- (4) the fee for filing the notice of appeal.

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

- (a) **Contents.** Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.
- (b) **When Issued.** The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time by order.
- (c) **Effective Date.** The mandate is effective when issued.
- (d) **Staying the Mandate Pending a Petition for Certiorari.**



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- (1) **Motion to Stay.** A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the petition would present a substantial question and that there is good cause for a stay.
- (2) **Duration of Stay; Extensions.** The stay must not exceed 90 days, unless:
  - (A) the period is extended for good cause; or
  - (B) the party who obtained the stay notifies the circuit clerk in writing within the period of the stay:
    - (i) that the time for filing a petition has been extended, in which case the stay continues for the extended period; or

- (ii) that the petition has been filed, in which case the stay continues until the Supreme Court's final disposition.
- (3) **Security.** The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.
- (4) **Issuance of Mandate.** The court of appeals must issue the mandate immediately on receiving a copy of a Supreme Court order denying the petition, unless extraordinary circumstances exist.

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

\* \* \* \* \*

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

Your daytime phone number: (\_\_\_\_) \_\_\_\_\_

Your age: \_\_\_\_\_ Your years of schooling: \_\_\_\_\_

**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)(A)(iii).]*



# JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

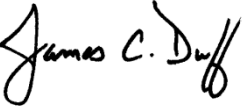
THE CHIEF JUSTICE  
OF THE UNITED STATES  
*Presiding*

JAMES C. DUFF  
*Secretary*

October 4, 2017

## MEMORANDUM

To: Chief Justice of the United States  
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 8, 11, 25, 26, 28.1, 29, 31, 39, and 41 of the Federal Rules of Appellate Procedure, along with Forms 4 and 7, which were approved by the Judicial Conference at its September 2017 session. The Judicial Conference recommends that the amendments be adopted by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) a copy 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 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the May 2017 Report of the Advisory Committee on Appellate Rules.

Attachments

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF APPELLATE PROCEDURE<sup>1</sup>**

1   **Rule 8. Stay or Injunction Pending Appeal**

2   **(a) Motion for Stay.**

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

6                                   \* \* \* \* \*

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

10                                   \* \* \* \* \*

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

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<sup>1</sup> New material is underlined; matter to be omitted is lined through.

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\* \* \* \* \*

16

(E) The court may condition relief on a party's

17

filing a bond or other ~~appropriate~~ security in

18

the district court.

19

**(b) Proceeding Against a ~~Surety~~ Security Provider.** If a

20

party gives security ~~in the form of a bond or~~

21

~~stipulation or other undertaking~~ with one or more

22

~~sureties~~ security providers, each ~~surety~~ provider

23

submits to the jurisdiction of the district court and

24

irrevocably appoints the district clerk as ~~the surety's~~

25

its agent on whom any papers affecting ~~the surety's~~ sits

26

liability on the ~~security bond or undertaking~~ may be

27

served. On motion, a ~~surety's~~ security provider's

28

liability may be enforced in the district court without

29

the necessity of an independent action. The motion

30

and any notice that the district court prescribes may be

31

served on the district clerk, who must promptly ~~mail~~

32 send a copy to each ~~surety~~security

33 provider whose address is known.

34 \* \* \* \* \*

**Committee Note**

The amendments to subdivisions (a) and (b) conform this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a “supersedeas bond” to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b) allows a party to obtain a stay by providing a “bond or other security.” The word “mail” is changed to “send” to avoid restricting the method of serving security providers. Other rules specify the permissible manners of service.



1 **Rule 11. Forwarding the Record**

2 \* \* \* \* \*

3 **(g) Record for a Preliminary Motion in the Court of**

4 **Appeals.** If, before the record is forwarded, a party  
5 makes any of the following motions in the court of  
6 appeals:

- 7 • for dismissal;
- 8 • for release;
- 9 • for a stay pending appeal;
- 10 • for additional security on the bond on appeal or
- 11 on a supersedeas bond or other security provided
- 12 to obtain a stay of judgment; or
- 13 • for any other intermediate order—

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

**Committee Note**

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

**Rule 25. Filing and Service<sup>2</sup>**

**(a) Filing.**

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

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

**(A) Nonelectronic Filing.**

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

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<sup>2</sup> Revised on March 14, 2018 to reflect request by the Standing Committee and the Advisory Committee on Appellate Rules to withdraw a proposed amendment to Appellate Rule 25(d)(1).

- ~~(B)~~(ii) **A Brief or Appendix.** A brief or appendix not filed electronically is timely filed, however, if on or before the last day for filing, it is:
- ~~(i)~~• mailed to the clerk by ~~First-Class Mail~~first-class mail, or other class of mail that is at least as expeditious, postage prepaid; or
  - ~~(ii)~~• dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

- ~~(C)~~(iii) **Inmate Filing.** If an institution has a system designed for legal mail, an inmate confined there must use that system to receive

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the benefit of this Rule 25(a)(2)~~(C)~~(A)(iii). A paper ~~filed~~not filed electronically 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~~ 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 ~~a~~ 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)(A)(iii).

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

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~~in compliance with a local rule constitutes a written paper for the purpose of applying these rules.~~

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

**(i) By a Represented Person—**

**Generally Required;**

**Exceptions.** A person

represented by an attorney must

file electronically, unless

nonelectronic filing is allowed by

the court for good cause or is

allowed or required by local rule.

**(ii) By an Unrepresented Person—**

**When Allowed or Required.** A

person not represented by an

attorney:

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

(iii) **Signing.** A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

(iv) **Same as a Written Paper.** A paper filed electronically is a



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written paper for purposes of  
these rules.

- (3) **Filing a Motion with a Judge.** If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and give it to the clerk.
- (4) **Clerk's Refusal of Documents.** The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.
- (5) **Privacy Protection.** An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on

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

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

**(c) Manner of Service.**

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

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

(B) by mail;or

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

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

(2) ~~If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(e)(1)(D)~~  
Electronic service of a paper may be made (A) by sending it to a registered user by filing it with the court's electronic-filing system or (B) by sending it by other electronic means that the person to be served consented to in writing.

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

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

**(d) Proof of Service.**

- (1) A paper presented for filing must contain either of the following:
- (A) an acknowledgment of service by the person served; or
  - (B) proof of service consisting of a statement by the person who made service certifying:
    - (i) the date and manner of service;
    - (ii) the names of the persons served; and
    - (iii) their mail or electronic addresses, facsimile numbers, or the addresses of

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the places of delivery, as appropriate  
for the manner of service.

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

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

(e) **Number of Copies.** When these rules require the  
filing or furnishing of a number of copies, a court may  
require a different number by local rule or by order in  
a particular case.

**Committee Note**

The amendments conform Rule 25 to the amendments  
to Federal Rule of Civil Procedure 5 on electronic filing,  
signature, and service. They establish, in Rule 25(a)(2)(B),  
a new national rule that generally makes electronic filing  
mandatory. The rule recognizes exceptions for persons

proceeding without an attorney, exceptions for good cause, and variations established by local rule. The amendments establish national rules regarding the methods of signing and serving electronic documents in Rule 25(a)(2)(B)(iii) and (c)(2).

1 **Rule 26. Computing and Extending Time**

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

6 \* \* \* \* \*

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

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

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

15 (C) for filing under Rules 4(c)(1),  
16 25(a)(2)~~(B)~~(A)(ii), and  
17 25(a)(2)~~(C)~~(A)(iii)—and filing by mail

18                   under Rule 13(a)(2)—at the latest time for  
19                   the method chosen for delivery to the post  
20                   office, third-party commercial carrier, or  
21                   prison mailing system; and  
22                   (D) for filing by other means, when the clerk’s  
23                   office is scheduled to close.

24                   \* \* \* \* \*

**Committee Note**

The amendments adjust references to subdivisions of Rule 25 that have been renumbered.



1 **Rule 28.1. Cross-Appeals**

2 \* \* \* \* \*

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

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

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

10 (3) the appellant's response and reply brief, within  
11 30 days after the appellee's principal and  
12 response brief is served; and

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

**Committee Note**

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

1 **Rule 29. Brief of an Amicus Curiae**

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

4 (1) **Applicability.** This Rule 29(a) governs amicus  
5 filings during a court's initial consideration of a  
6 case on the merits.

7 (2) **When Permitted.** The United States or its  
8 officer or agency or a state may file an amicus-  
9 ~~curiae~~ brief without the consent of the parties or  
10 leave of court. Any other amicus curiae may file  
11 a brief only by leave of court or if the brief states  
12 that all parties have consented to its filing, but a  
13 court of appeals may prohibit the filing of or  
14 may strike an amicus brief that would result in a  
15 judge's disqualification.

16 \* \* \* \* \*

17 **(b) During Consideration of Whether to Grant**  
18 **Rehearing.**

19 (1) **Applicability.** This Rule 29(b) governs amicus  
20 filings during a court's consideration of whether  
21 to grant panel rehearing or rehearing en banc,  
22 unless a local rule or order in a case provides  
23 otherwise.

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

29 \* \* \* \* \*

**Committee Note**

The amendment to subdivision (a)(2) authorizes orders or local rules that prohibit the filing of or permit the striking of an amicus brief if the brief would result in a judge's disqualification. The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification. A comparable amendment to

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subdivision (b) is not necessary. Subdivision (b)(1) currently authorizes local rules and orders governing filings during a court's consideration of whether to grant panel rehearing or rehearing en banc. These local rules or orders may prohibit the filing of or permit the striking of an amicus brief that would result in a judge's disqualification. In addition, under subdivision (b)(2), a court may deny leave to file an amicus brief that would result in a judge's disqualification.

1 **Rule 31. Serving and Filing Briefs**

2 **(a) Time to Serve and File a Brief.**

3 (1) The appellant must serve and file a brief within  
 4 40 days after the record is filed. The appellee  
 5 must serve and file a brief within 30 days after  
 6 the appellant’s brief is served. The appellant  
 7 may serve and file a reply brief within ~~14~~21 days  
 8 after service of the appellee’s brief but a reply  
 9 brief must be filed at least 7 days before  
 10 argument, unless the court, for good cause,  
 11 allows a later filing.

12 \* \* \* \* \*

**Committee Note**

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

26 FEDERAL RULES OF APPELLATE PROCEDURE

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

1 **Rule 39. Costs**

2 \* \* \* \* \*

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

- 7 (1) the preparation and transmission of the record;  
8 (2) the reporter's transcript, if needed to determine  
9 the appeal;  
10 (3) premiums paid for a ~~supersedeas~~ bond or other  
11 ~~bond~~ security to preserve rights pending appeal;  
12 and  
13 (4) the fee for filing the notice of appeal.



**Committee Note**

The amendment of subdivision (e)(3) conforms this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a “supersedeas bond” to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b) allows a party to obtain a stay by providing a “bond or other security.”

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

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

7 **(b) When Issued.** The court's mandate must issue 7 days  
8 after the time to file a petition for rehearing expires, or  
9 7 days after entry of an order denying a timely petition  
10 for panel rehearing, petition for rehearing en banc, or  
11 motion for stay of mandate, whichever is later. The  
12 court may shorten or extend the time by order.

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

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

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

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

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

30 ~~(B)~~ ~~(2)~~ **Duration of Stay; Extensions.** The stay must  
31 not exceed 90 days, unless:

32 (A) the period is extended for good cause; or

33            ~~(B) unless~~ the party who obtained the stay files  
34            a petition for the writ and so notifies the  
35            circuit clerk in writing within the period of  
36            the stay:

37            (i) that the time for filing a petition has  
38            been extended, in which case the stay  
39            continues for the extended period; or

40            (ii) that the petition has been filed. ~~In that~~  
41            case, in which case the stay continues  
42            until the Supreme Court's final  
43            disposition.

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

47    ~~(D)~~ (4)    **Issuance of Mandate.** The court of appeals must  
48            issue the mandate immediately ~~when~~ on receiving  
49            a copy of a Supreme Court order denying the

50                    ~~petition for writ of certiorari is filed, unless~~  
51                    extraordinary circumstances exist.

**Committee Note**

**Subdivision (b).** Subdivision (b) is revised to clarify that an order is required for a stay of the mandate.

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

**Subdivision (d).** Three changes are made in subdivision (d).

Subdivision (d)(1)—which formerly addressed stays of the mandate upon the timely filing of a motion to stay

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

Under the new subdivision (d)(2)(B), if the court of appeals issues a stay of the mandate for a party to file a petition for certiorari, and a Justice of the Supreme Court subsequently extends the time for filing the petition, the stay automatically continues for the extended period.

Subdivision (d)(4)—i.e., former subdivision (d)(2)(D)—is amended to specify that a mandate stayed pending a petition for certiorari must issue immediately once the court of appeals receives a copy of the Supreme Court’s order denying certiorari, unless the court of appeals finds that extraordinary circumstances justify a further stay. Without deciding whether the prior version of Rule 41 provided authority for a further stay of the mandate after denial of certiorari, the Supreme Court ruled that any such authority could be exercised only in “extraordinary circumstances.” *Ryan v. Schad*, 570 U.S. 521, 525 (2013) (per curiam). The amendment to subdivision (d)(4) makes explicit that the court may stay the mandate after the denial of certiorari, and also makes explicit that such a stay is permissible only

in extraordinary circumstances. Such a stay cannot occur through mere inaction but rather requires an order.

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

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

3 \* \* \* \* \*

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

5 Your daytime phone number: (\_\_\_\_) \_\_\_\_\_

6 Your age: \_\_\_\_\_ Your years of schooling: \_\_\_\_\_

7 ~~Last four digits of your social security number: \_\_\_\_\_~~



**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~~)(A)(iii).]

**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 8, 11, 25, 26, 28.1, 29, 31, 39, and 41, and Forms 4 and 7, with a recommendation that they be approved and transmitted to the Judicial Conference.

Proposed amendments to these rules were circulated to the bench, bar, and public for comment in August 2016. The Standing Committee recommended the proposed amendments for final approval at its June 2017 meeting.

Rules 8 (Stay or Injunction Pending Appeal), 11 (Forwarding the Record), and 39 (Costs)

The proposed amendments to Rules 8(a) and (b), 11(g), and 39(e) conform the Appellate Rules to a proposed change to Civil Rule 62(b) that eliminates the antiquated term “supersedeas bond” and makes plain an appellant may provide either “a bond or other security.” One comment was filed in support of the proposed amendment.

The advisory committee recommended no changes to the published proposals to amend Rules 8(a), 11(g), and 39(e), but recommended minor revisions to Rule 8(b). First, to conform proposed amendments with Civil Rule 65.1, the advisory committee recommended rephrasing the heading and the first sentence of Rule 8(b) to refer only to “security” and “security provider” (and not to mention specific types of security, such as a bond, stipulation, or other undertaking). Second, the advisory committee changed the word “mail” to “send” in Rule 8(b) to conform Rule 8(b) to the proposed amendments to Rule 25. The advisory committee modified the

**Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure**

Committee Note to explain these revisions. The Standing Committee approved the proposed amendments to Rules 8(a) and (b), 11(g), and 39(e).

Rule 25 (Filing and Service)

The proposed amendments to Rule 25 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. The proposed amendment to Rule 25(a)(2)(B)(i) requires a person represented by counsel to file papers electronically, but allows exceptions for good cause and by local rule.

The proposed amendment to subdivision (a)(2)(B)(iii) addresses electronic signatures and, in consultation with other advisory committees, establishes a uniform national signature provision. The proposed amendment to subdivision (c)(2) addresses electronic service through the court's electronic filing system or by using other electronic means that the person to be served consented to in writing.

\* \* \* \* \*

After receiving public comments and conferring with the other advisory committees, the advisory committee recommended several minor revisions to the proposed amendments as published. First, minor changes were needed to take into consideration amendments to subdivision (a)(2)(C) that became effective in December 2016 and altered the text of that section. Second, public comments criticized the signature provision in the proposed new subdivision (a)(2)(B)(iii). The advisory committee recommended replacing the language published for public comment with a new provision drafted jointly with the other advisory committees. Third, another comment revealed an ambiguity in the clause structure of the proposed Rule 25(c)(2), which was addressed by separating the two methods of service using “(A)” and “(B).”

The advisory committee received several comments arguing that unrepresented parties should have the same right to file electronically as represented parties. These comments noted

### **Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure**

that electronic filing is easier and less expensive than filing non-electronically. The advisory committee considered these arguments at its October 2016 and May 2017 meetings, but decided against allowing unrepresented parties the same access as represented parties given potential difficulties caused by inexperienced filers and possible abuses of the filing system. Under the proposed amendment, unrepresented parties have access to electronic filing by local rule or court order.

The Standing Committee approved the proposed amendments to Rule 25, as well as the electronic filing rules proposed by the other advisory committees, after making minor stylistic changes.

#### Rule 26 (Computing and Extending Time)

In light of the proposed changes to Rule 25 approved at the Standing Committee meeting, the advisory committee recognized the need for technical, conforming changes to Rule 26. Rule 26(a)(4)(C) refers to Rules 25(a)(2)(B) and 25(a)(2)(C). The recent amendments to Rule 25 have renumbered these subdivisions to be Rule 25(a)(2)(A)(ii) and 25(a)(2)(A)(iii). Therefore, the references in Rule 26 should be changed accordingly. Upon the recommendation of the advisory committee, the Standing Committee approved the proposed amendments to Rule 26.

#### Rules 28.1 (Cross-Appeals) and 31 (Serving and Filing Briefs)

The proposed amendments to Rules 28.1(f)(4) and 31(a)(1) respond to the shortened time to file a reply brief effectuated by the elimination of the “three day rule” (JCUS-SEP 15, pp. 28-30). These rules currently provide only 14 days after service of the response brief to file a reply brief. Previously, parties effectively had 17 days because Rule 26(c) formerly gave them three additional days in addition to the 14 days in Rules 28.1(f)(4) and 31(a)(1). The advisory committee concluded that effectively shortening the period for filing from 17 days to 14 days could adversely affect the preparation of useful reply briefs. To maintain consistency in

## **Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure**

measuring time periods in increments of seven days when possible, the advisory committee proposed that the time period to file a reply should be extended to 21 days.

The advisory committee received two comments in support of the published proposal. The advisory committee recommended approval of the proposed amendments without further changes. The Standing Committee approved the proposed amendments to Rules 28.1(f)(4) and 31(a)(1).

### Rule 29 (Brief of an Amicus Curiae)

Rule 29(a) specifies that an amicus curiae may file a brief with leave of the court or without leave of the court “if the brief states that all parties have consented to its filing.” Several courts of appeals, however, have adopted local rules that forbid the filing of a brief by an amicus curiae when the filing could cause the recusal of one or more judges. Given the arguable merit of these local rules, the advisory committee proposed to add an exception to Rule 29(a) providing “that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge’s disqualification.”

At its May 2017 meeting, the advisory committee revised its proposed amendment to Rule 29 in two ways. First, amendments that went into effect in December 2016 renumbered Rule 29’s subdivisions and provided new rules for amicus briefs during consideration of whether to grant rehearing. To match the renumbering, the advisory committee moved the exception from the former subdivision (a) to the new subdivision (a)(2) and copied the exception into the new subdivision (b)(2). Second, the advisory committee rephrased the exception authorizing a court of appeals to “prohibit the filing of or strike” an amicus brief (rather than “strike or prohibit the filing of” the brief), making the exception more chronological without changing the meaning or function of the proposed amendment.

## **Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure**

The advisory committee received six comments in opposition to the proposed amendment. These commenters asserted that the proposed amendment is unnecessary because amicus briefs that require the recusal of a judge are rare. They further asserted that the amendment could prove wasteful if an amicus curiae pays an attorney to write a brief which the court then strikes. The amicus curiae likely would not know the identity of the judges on the appellate panel when filing the brief and would have no options once the court strikes the brief. The advisory committee considered these comments, but concluded that the necessity of the amendment was demonstrated by local rules carving out the exception and that the merits of the amendment outweigh the concerns.

One commenter observed that the proposed amendment should not change “amicus-curiae brief” to “amicus brief.” The advisory committee understands the criticism but recommended the change for consistency with the rest of Rule 29.

The Standing Committee approved the proposed amendment to Rule 29, after making minor revisions to the proposed rule and committee note.

### Rule 41 (Mandate; Contents; Issuance and Effective Date; Stay)

In August 2016, the Standing Committee published proposed amendments to Rule 41. Five public comments were received, which prompted the advisory committee to recommend several revisions.

First, in response to commenters’ observations that a court might wish to extend the time for good cause even if exceptional circumstances do not exist, the advisory committee deleted the following sentence: “The court may extend the time only in extraordinary circumstances or under Rule 41(d).” Second, the advisory committee recommended renumbering subdivision (d)(2)(B) to subdivision (d)(2). In response to a comment regarding a potential gap in the rule,

## **Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure**

the advisory committee added a proposed new clause that will extend a stay automatically if a Justice of the Supreme Court extends the time for filing a petition for certiorari.

The Standing Committee approved the proposed amendments to Rule 41, after making minor revisions to the proposed rule and committee note.

### Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis)

In August 2016, the Standing Committee published for public comment a proposed amendment to Appellate Form 4. Litigants seeking permission to proceed *in forma pauperis* must complete Form 4, question 12 of which currently asks litigants to provide the last four digits of their social security numbers. The advisory committee undertook an investigation and determined that no current need exists for this information. Accordingly, the advisory committee recommended deleting this question.

The advisory committee received two comments in support of the proposal and recommended no changes to the proposed amendment. The Standing Committee approved the proposed amendments to Form 4.

### Form 7 (Declaration of Inmate Filing)

In light of the proposed changes to Rule 25 approved at the Standing Committee meeting, the advisory committee recognized the need for a technical, conforming change to Form 7. Form 7 contains a note that refers to Rule 25(a)(2)(C). The recent amendments to Rule 25 have renumbered this subdivision as Rule 25(a)(2)(A)(iii). The reference in the note on Form 7 should be changed accordingly. Upon the recommendation of the advisory committee, the Standing Committee approved the proposed amendments to Form 7.

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

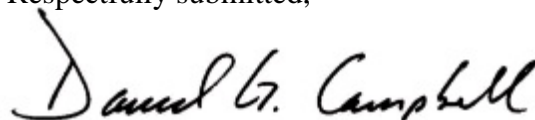
**Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 8, 11, 25, 26, 28.1, 29, 31, 39, and 41, and

**Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure**

Forms 4 and 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,

A handwritten signature in black ink that reads "David G. Campbell". The signature is written in a cursive style with a large initial 'D'.

David G. Campbell, Chair

Jesse M. Furman  
Gregory G. Garre  
Daniel C. Girard  
Susan P. Graber  
Frank M. Hull  
Peter D. Keisler

William K. Kelley  
Rod J. Rosenstein  
Amy J. St. Eve  
Larry D. Thompson  
Richard C. Wesley  
Jack Zouhary



Excerpt from the Report of the Advisory Committee on Appellate Rules

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

CHAIRS OF ADVISORY COMMITTEES

DAVID G. CAMPBELL  
CHAIR

REBECCA A. WOMELDORF  
SECRETARY

MICHAEL A. CHAGARES  
APPELLATE RULES

SANDRA SEGAL IKUTA  
BANKRUPTCY RULES

JOHN D. BATES  
CIVIL RULES

DONALD W. MOLLOY  
CRIMINAL RULES

WILLIAM K. SESSIONS III  
EVIDENCE RULES

MEMORANDUM

**TO:** Hon. David G. Campbell, Chair  
Committee on Rules of Practice and Procedure

**FROM:** Hon. Michael A. Chagares, Chair  
Advisory Committee on Appellate Rules

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

**DATE:** May 22, 2017 (revised March 14, 2018)

---

**I. Introduction**

The Advisory Committee on the Appellate Rules met on May 2, 2017, in Washington, D.C. At this meeting, the Advisory Committee considered six sets of proposed amendments that the Standing Committee published for public comment in August 2016, decided to propose two new sets of amendments for publication, and considered several additional items on its agenda.

Part II of this memorandum concerns the six sets of proposed amendments published for public comment.

\*\*\*\*\*

As described below, in light of public comments, the Advisory Committee recommends no changes to the first two of these published proposals and recommends minor revisions of the other proposals.

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\*\*\*\*\*

**II. Action Items: Amendments Previously Published for Public Comment**

In August 2016, the Standing Committee published six sets of proposed amendments for public comment. Based on the comments received, the Advisory Committee now makes the following recommendations for amendments to the Appellate Rules.

**A. Rules 31(a)(1) & 28.1(f)(4)—Extension of time to file reply briefs**

In August 2016, the Standing Committee published proposed amendments to Appellate Rules 31(a)(1) and 28.1(f)(4). These rules currently provide only 14 days after service of the response to file a reply brief in appeals and cross-appeals. Previously, parties effectively had 17 days because Rule 26(c) formerly gave them three additional days in addition to the 14 days in Rules 31(a)(1) and 28.1(f)(4). The Advisory Committee concluded that effectively shortening the period for filing from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods are best measured in increments of 7 days, the Committee concluded the period should be extended to 21 days.

The Advisory Committee received comments on the published proposal from the Pennsylvania Bar Association and the National Association of Criminal Defense Lawyers. These comments both supported the proposal. The Advisory Committee therefore recommends no changes to the proposed amendments. The proposed amendments (with changes shown in lines 9 and 25) are as follows:

1 **Rule 28.1. Cross-Appeals**

2 \* \* \* \* \*

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

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- 4 (1) the appellant’s principal brief, within 40 days after the record is filed;  
5 (2) the appellee’s principal and response brief, within 30 days after the  
6 appellant’s principal brief is served;  
7 (3) the appellant’s response and reply brief, within 30 days after the  
8 appellee’s principal and response brief is served; and  
9 (4) the appellee’s reply brief, within ~~14~~21 days after the appellant’s  
10 response and reply brief is served, but at least 7 days before argument unless  
11 the court, for good cause, allows a later filing.

12 **Committee Note**

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

20 \_\_\_\_\_  
21 **Rule 31. Serving and Filing Briefs**

22 **(a) Time to Serve and File a Brief.**

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

29 \* \* \* \* \*

30 **Committee Note**

31 Subdivision (a)(1) is revised to extend the period for filing a reply brief from

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32 14 days to 21 days. Before the elimination of the “three-day rule” in Rule 26(c),  
33 attorneys were accustomed to a period of 17 days within which to file a reply  
34 brief, and the committee concluded that shortening the period from 17 days to 14  
35 days could adversely affect the preparation of useful reply briefs. Because time  
36 periods are best measured in increments of 7 days, the period is extended to 21  
37 days.

**B. Form 4—Removal of request for Social Security number digits**

In August 2016, the Standing Committee published for public comment a proposed amendment to Appellate Form 4. Litigants seeking permission to proceed in forma pauperis must complete this Form. Question 12 of the Form currently asks litigants to provide the last four digits of their social security numbers. The clerk representative to the Advisory Committee investigated the matter and reported that the general consensus of the clerks of court is that the last four digits of a social security number are not needed for any purpose and that the question can be eliminated. Given the potential security and privacy concerns associated with social security numbers, and the lack of need for obtaining the last four digits of social security numbers, the Advisory Committee recommended deleting this question.

Following publication of the proposal, the Advisory Committee received comments on the proposal from The World Privacy Forum and the National Association of Criminal Defense Lawyers. Both comments supported the proposal. The Advisory Committee therefore recommends no changes to the proposed amendment. The proposed amendment is as follows:

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

3 \* \* \* \* \*

4 12. State the city and state of your legal residence.  
5 Your daytime phone number: ( ) \_\_\_\_\_  
6 Your age: \_\_\_\_\_ Your years of schooling: \_\_\_\_\_  
7 ~~Last four digits of your social-security number: \_\_\_\_\_~~

**C. Rules 8(a) & (b), 11(g), & 39(e)—References to Supersedeas Bonds**

In August 2016, the Standing Committee published for public comment proposed

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amendments to Rules 8(a) & (b), 11(g), and 39(e). These amendments conform the Appellate Rules to a proposed change to Civil Rule 62(b). Civil Rule 62(b) currently provides: “If an appeal is taken, the appellant may obtain a stay by supersedeas bond . . . .” The proposed amendments will eliminate the antiquated term “supersedeas” and allow an appellant to provide “a bond or other security.”

The Pennsylvania Bar Association submitted the only public comment on the proposal. It supported the proposed amendments without change “because they bring the [Appellate] rules into conformity with current practice.”

The Advisory Committee recommends no changes to the proposals to amend Rules 8(a), 11(g), and 39(e), but recommends revising the proposed amendments to Rule 8(b) in two ways. First, to make Rule 8(b) conform to proposed amendments with Civil Rule 65.1, the Advisory Committee recommends rephrasing the heading and the first sentence to refer only to “security” and “security provider” (and not mention specific types of security, such as a bond, stipulation, or other undertaking). The Advisory Committee agrees with the Civil Rules Advisory Committee that this phrasing is simpler and less limiting. Second, the Advisory Committee recommends revising the third sentence of Rule 8(b) by changing the word “mail” to “send.” This change will conform Rule 8(b) to the proposed amendments to Rule 25 that permit electronic filing and service. In addition, the Advisory Committee recommends modifying the Committee Note to explain these two revisions.

The proposed amendments (with revisions indicated by footnotes) are as follows:

**Rule 8. Stay or Injunction Pending Appeal**

**(a) Motion for Stay.**

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

\* \* \* \* \*

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

\* \* \* \* \*

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

\* \* \* \* \*

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

15 **(b) Proceeding Against a Surety Security Provider.** If a party gives security  
16 ~~in the form of a bond, a stipulation, or other undertaking~~ with one or more sureties  
17 security providers, each surety provider submits to the jurisdiction of the district  
18 court and irrevocably appoints the district clerk as ~~the surety's~~ its agent on whom  
19 any papers affecting ~~the surety's~~ its liability on the security bond or undertaking  
20 may be served.<sup>1</sup> On motion, a surety's security provider's liability may be  
21 enforced in the district court without the necessity of an independent action. The  
22 motion and any notice that the district court prescribes may be served on the  
23 district clerk, who must promptly ~~mail~~ send<sup>2</sup> a copy to each surety security  
24 provider whose address is known.

### Committee Note<sup>3</sup>

26 The amendments to subdivisions (a)(1)(B) and (b) conform this rule with the  
27 amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a  
28 party to provide a "supersedeas bond" to obtain a stay of the judgment and  
29 proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party  
30 to obtain a stay by providing a "bond or other security." The term "security" in  
31 the amended subdivision (b) includes but is not limited to the examples of

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<sup>1</sup> In the proposed amendments published for public comment, the first sentence of Rule 8(b) said: "If a party gives security in the form of a bond, a stipulation, an undertaking, or other security, a stipulation, or other undertaking with one or more sureties or other security providers, each surety provider submits to the jurisdiction of the district court and irrevocably appoints the district clerk as ~~the surety's~~ its agent on whom any papers affecting ~~the surety's~~ its liability on the security bond or undertaking may be served."

<sup>2</sup> The proposed amendment published for public comment did not change the word "mail."

<sup>3</sup> The Committee Note published for public comment included only the first two sentences. The last two sentences are new.

32 security (i.e., “a bond, a stipulation, or other undertaking”) formerly listed in  
33 subdivision (b). The word “mail” is changed to “send” to avoid restricting the  
34 method of serving security providers. Other Rules specify the permissible  
35 manners of service.

36

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37 **Rule 11. Forwarding the Record**

38

\* \* \* \* \*

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

- 42 • for dismissal;
- 43 • for release;
- 44 • for a stay pending appeal;
- 45 • for additional security on the bond on appeal or on a ~~supersedeas bond~~ or  
46 other security provided to obtain a stay of judgment; or
- 47 • for any other intermediate order—

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

50

**Committee Note**

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

56

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57 **Rule 39. Costs**

58

\* \* \* \* \*

59 **(e) Costs on Appeal Taxable in the District Court.** The following costs on

60 appeal are taxable in the district court for the benefit of the party entitled to costs

61 under this rule:

62 (1) the preparation and transmission of the record;

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

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

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

67 **Committee Note**

68 The amendment of subdivisions (e)(3) conforms this rule with the amendment  
69 of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to  
70 provide a “supersedeas bond” to obtain a stay of the judgment and proceedings to  
71 enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay  
72 by providing a “bond or other security.”

**D. Rule 29(a)—Limitations on Amicus Briefs filed by Party Consent**

In August 2016, the Standing Committee published for public comment proposed amendments to Appellate Rule 29(a). Rule 29(a) specifies that an amicus curiae may file a brief with leave of the court or without leave of the court “if the brief states that all parties have consented to its filing.” Several courts of appeals, however, have adopted local rules that forbid the filing of a brief by an amicus curiae when the filing could cause the recusal of one or more judges. These local rules conflict with Rule 29(a) because Rule 29(a) imposes no limit on the filing of a brief with party consent. The Advisory Committee decided that Rule 29(a) should be amended to allow courts to prohibit or strike the filing of an amicus brief. The proposed amendment accomplishes this result by adding an exception providing “that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge’s disqualification.”

At its May 2017 meeting, the Advisory Committee decided to revise its proposed amendment to Rule 29 for two reasons. First, other amendments to Rule 29 took effect in December 2016. These other amendments renumbered Rule 29’s subdivisions and provided new rules for amicus briefs during consideration of whether to grant rehearing. As a result, the Advisory Committee now recommends moving the exception from the former subdivision (a) to the new subdivision (a)(2) and copying this exception into the new subdivision (b)(2). These changes do not alter the meaning or function of the exception. Second, the Advisory Committee



recommends rephrasing the exception to improve its clarity. As revised, the exception would authorize a court of appeals to “prohibit the filing of or strike” an amicus brief (rather than “strike or prohibit the filing of” the brief). The new word order makes the exception more chronological without changing the meaning or function of the proposed amendment. The revised proposal is as follows:

1                   **Rule 29. Brief of an Amicus Curiae**

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

3                   **(1) Applicability.** This Rule 29(a) governs amicus filings during a court’s  
4                   initial consideration of a case on the merits.

5                   **(2) When Permitted.** The United States or its officer or agency or a state  
6                   may file an amicus-~~curiae~~ brief without the consent of the parties or leave of  
7                   court. Any other amicus curiae may file a brief only by leave of court or if the  
8                   brief states that all parties have consented to its filing, except that a court of  
9                   appeals may prohibit the filing of or strike an amicus brief that would result in  
10                  a judge’s disqualification.<sup>4</sup>

11   \* \* \* \* \*

12                  **(b) During Consideration of Whether to Grant Rehearing.**

13                  **(1) Applicability.** This Rule 29(b) governs amicus filings during a court’s  
14                  consideration of whether to grant panel rehearing or rehearing en banc, unless  
15                  a local rule or order in a case provides otherwise.

16                  **(2) When Permitted.** The United States or its officer or agency or a state  
17                  may file an amicus-~~curiae~~ brief without the consent of the parties or leave of  
18                  court. Any other amicus curiae may file a brief only by leave of court, except  
19                  that a court of appeals may prohibit the filing of or strike an amicus brief that

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<sup>4</sup> The proposed amendment published for public comment said “strike or prohibit the filing of” instead of “prohibit the filing of or strike.”

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20 would result in a judge’s disqualification.<sup>5</sup>

21 \* \* \* \* \*

### 22 **Committee Note**

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

The Advisory Committee received six comments on the proposed amendment. Five of these comments oppose creating an exception that would allow a court of appeals to prohibit the filing of or strike an amicus brief filed by party consent. Associate Dean Alan B. Morrison of the George Washington University Law School, the Pennsylvania Bar Association, the Federal Bar Council, and Heather Dixon, Esq., assert in their comments that the proposed amendment is unnecessary because amicus briefs that require the recusal of a judge are rare. They further assert that the exception could be wasteful. An amicus curiae may pay an attorney to write a brief and a court then might strike the brief. The amicus curiae likely would not know the identity of the judges on the appellate panel when filing the brief and would have no options once the court strikes the brief. The Advisory Committee understands these considerations but has concluded that the exception is necessary given the existence of local rules that currently contradict Rule 29. The Committee has no information suggesting the local rules actually have caused any problems.

Second, Judge Jon O. Newman of the U.S. Court of Appeals for the Second Circuit comments that the proposed amendment should not change “amicus-curiae brief” to “amicus brief.” He explains: “It’s a ‘friend of the court brief,’ not a ‘friend brief.’” The Committee understands the criticism but recommends the change for consistency. Rule 29, as revised in December 2016, now uses the term “amicus-curiae brief” in two instances and the term “amicus brief” in six instances. The Committee believes that changing the two instances of “amicus-curiae brief” to “amicus brief” is the most straightforward solution to this problem.

### **E. Rule 25—Electronic Filing, Signatures, Service, and Proof of Service**

In August 2016, the Standing Committee published proposed amendments to Appellate Rule 25. The proposed amendment to subdivision (a)(2)(B)(i) addresses electronic filing by

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<sup>5</sup> The proposal published for public comment did not include the amendments to this subdivision because the subdivision did not go into effect until December 2016.

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generally requiring a person represented by counsel to file papers electronically. This provision, however, allows everyone else to file papers non-electronically and also provides for exceptions for good cause and by local rule. The proposed amendment to subdivision (a)(2)(B)(iii) addresses electronic signatures. The proposed amendment to subdivision (c)(2) addresses electronic service through the court's electronic-filing system or by using other electronic means that the person to be served consented to in writing. The proposed amendment to subdivision (d)(1) requires proof of service of process only for papers that are not served electronically.

After receiving public comments and conferring with the other Advisory Committees, the Appellate Rules Advisory Committee recommends minor revisions of the proposed amendments for three reasons. First, amendments that became effective in December 2016 altered the text of subdivision (a)(2)(C), which addresses inmate filings. This change requires a slight relocation of the proposed amendment as shown below.

Second, public comments criticized the signature provision in the proposed new subdivision (a)(2)(B)(iii). Reporter Ed Cooper of the Civil Rules Advisory Committee has summarized the three primary concerns as follows:

First, [the provision] might be misread to require that the user name and password appear on the signature block. . . . Second, the ever-changing world of security for electronic communications may mean that courts will move toward means of authentication more advanced than user names and logins. . . . Third, concerns were expressed about the means of becoming an attorney of record before, or with, filing the initial complaint.

The Advisory Committee recommends replacing the language published for public comment with a new provision drafted jointly with the other Advisory Committees. This new provision would provide: "An authorized filing made through a person's electronic-filing account, together with the person's name on a signature block, constitutes the person's signature."

Third, a comment regarding punctuation revealed an ambiguity in the clause-structure of the proposed Appellate Rule 25(c)(2). The intent was to indicate two methods of serving a paper, not three or four. But the language is ambiguous because the proposals use the word "by" four times.

The Advisory Committee recommends addressing this ambiguity by separating the two methods of service using "(A)" and "(B)." The revised provision would provide: "Electronic service of a paper may be made (A) by sending it to a registered user by filing it with the court's electronic-filing system or (B) by sending it by other electronic means that the person to be served consented to in writing.

As revised in these three ways, the proposal to amend Rule 25 is now as follows:

1           **Appellate Rule 25. Filing and Service**

2           **(a) Filing.**

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

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

6           **(A) Nonelectronic Filing.**

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

10           ~~(B)(ii)~~ **A brief or appendix.** A brief or appendix not filed  
11 electronically is timely filed, however, if on or before the last day for filing,  
12 it is:

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

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

17           ~~(C)(iii)~~ **Inmate Filing.**<sup>6</sup> If an institution has a system designed for legal  
18 mail, an inmate confined there must use that system to receive the benefit  
19 of this Rule 25(a)(2)~~(C)(A)(iii)~~. A paper ~~filed~~ not filed electronically by an  
20 inmate is timely if it is deposited in the institution's internal mail system on  
21 or before the last day for filing and:

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<sup>6</sup> The amendment to subdivision (a)(2)(C) as proposed for public comment said: "A paper ~~filed~~ not filed electronically by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid." The revision reflects the amendment to subdivision (a)(2)(C) that became effective in December 2016.

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22                    (i) it is accompanied by: a declaration in compliance with 28  
23                    U.S.C. § 1746—or a notarized statement—setting out the date of  
24                    deposit and stating that first-class postage is being prepaid; or  
25                    evidence (such as a postmark or date stamp) showing that the  
26                    paper was so deposited and that postage was prepaid; or  
27                    (ii) the court of appeals exercises its discretion to permit the later  
28                    filing of a declaration or notarized statement that satisfies Rule  
29                    25(a)(2)(C)(i)(A)(iii).

30                    ~~(D) **Electronic filing.** A court of appeals may by local rule permit or~~  
31                    ~~require papers to be filed, signed, or verified by electronic means that are~~  
32                    ~~consistent with technical standards, if any, that the Judicial Conference of~~  
33                    ~~the United States establishes. A local rule may require filing by electronic~~  
34                    ~~means only if reasonable exceptions are allowed. A paper filed by~~  
35                    ~~electronic means in compliance with a local rule constitutes a written paper~~  
36                    ~~for the purpose of applying these rules.~~

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

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

42                    **(ii) Unrepresented Person—When Allowed or Required.** A person  
43                    not represented by an attorney:

44                    • may file electronically only if allowed by court order or by local  
45                    rule; and

46                    • may be required to file electronically only by court order, or by  
47                    a local rule that includes reasonable exceptions.

48                    **(iii) Signing.** An authorized filing made through a person's  
49                    electronic-filing account, together with the person's name on a signature

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50 block, constitutes the person’s signature.<sup>7</sup>

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

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

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

59 (5) **Privacy Protection.** An appeal in a case whose privacy protection was  
60 governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of  
61 Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed  
62 by the same rule on appeal. In all other proceedings, privacy protection is  
63 governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of  
64 Criminal Procedure 49.1 governs when an extraordinary writ is sought in a  
65 criminal case.

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

70 (c) **Manner of Service.**

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

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

74 (B) by mail; or

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<sup>7</sup> The proposed amendment published for public comment said: “The user name and password of an attorney of record, together with the attorney’s name on a signature block, serves as the attorney’s signature.”

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75 (C) by third-party commercial carrier for delivery within 3 days;~~or,~~  
76 ~~(D) by electronic means, if the party being served consents in writing.~~  
77 (2) ~~If authorized by local rule, a party may use the court's transmission~~  
78 ~~equipment to make electronic service under Rule 25(c)(1)(D)~~ Electronic  
79 service of a paper may be made (A) by sending it to a registered user by filing  
80 it with the court's electronic-filing system or (B) by sending it by other  
81 electronic means that the person to be served consented to in writing.<sup>8</sup>  
82 (3) When reasonable considering such factors as the immediacy of the relief  
83 sought, distance, and cost, service on a ~~party~~person must be by a manner at  
84 least as expeditious as the manner used to file the paper with the court.  
85 (4) Service by mail or by commercial carrier is complete on mailing or  
86 delivery to the carrier. Service by electronic means is complete on  
87 transmission filing or sending, unless the ~~party~~person making service is  
88 notified that the paper was not received by the ~~party~~person served.  
89 **(d) Proof of Service.**

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<sup>8</sup> The proposed amendment published for public comment said: “Electronic service may be made by sending a paper to a registered user by filing it with the court's electronic-filing system or by using other electronic means that the person consented to in writing.”

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

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

104 (e) **Number of Copies.** When these rules require the filing or furnishing of a  
105 number of copies, a court may require a different number by local rule or by order  
106 in a particular case.

### 107 **Committee Note**

108 The amendments conform Rule 25 to the amendments to Federal Rule of Civil  
109 Procedure 5 on electronic filing, and signature. They establish, in Rule 25(a)(2)  
110 (B), a new national rule that generally makes electronic filing mandatory. The rule  
111 recognizes exceptions for persons proceeding without an attorney, exceptions for  
112 good cause, and variations established by local rule. The amendments establish  
113 national rules regarding the methods of signing and serving electronic documents  
114 in Rule 25(a)(2)(B)(iii) and 25(c)(2).

115  
116

The Advisory Committee received public comments that criticized the published version of Rule 25(a)(2)(B)(ii), which concerns filing by unrepresented parties. These comments argued that unrepresented parties generally should have the right to file electronically, which is much less expensive than filing non-electronically. The Advisory Committee considered these arguments at its October 2016 and Spring 2017 meetings but decided not to change the proposed amendment. The Advisory Committee remains concerned about possible difficulties that unrepresented parties might have in using electronic filing and about the difficulty of holding them accountable for abusing the filing system.

One public comment recommended adding a provision to Rule 25 that is similar to Criminal Rule 49(d), which addresses filings by non-parties. The Advisory Committee decided that this proposal went beyond the scope of the amendments to Rule 25 published for public comment. The Committee will study the proposal as a new matter.

### **F. Rule 41—Stays of the mandate**

In August 2016, the Standing Committee published proposed amendments to



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Appellate Rule 41, which concerns the content, issuance, effective date, and stays of the mandate. The Standing Committee received five public comments about the proposed amendments to Rule 41. In light of these comments, the Advisory Committee recommends two revisions.

First, the Advisory Committee recommends revising subdivision (b) by deleting the previously proposed sentence: “The court may extend the time only in extraordinary circumstances or under Rule 41(d).” Comments submitted by Judge Jon O. Newman and Chief Judge Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit argue that the sentence is problematic because courts might wish to extend the time for good cause even if exceptional circumstances do not exist. For example, a court might wish to poll members about rehearing a case en banc. The Advisory Committee agrees with these comments. The Advisory Committee believes that the new requirement that a court can extend a stay only “by order” provides sufficient protection against improper extensions.

Second, the Advisory Committee recommends revising subdivision (d)(2)(B), which will become subdivision (d)(2) under the proposed amendment. The National Association of Criminal Defense Lawyers (NACDL) has argued that the proposed amendments do not address a gap in the current rules. The comment explains: “Where a Justice [of the Supreme Court] has deemed an extension of the certiorari period to be appropriate, it should not be necessary also to move the Court of Appeals for an extension of the stay of mandate. Rather, the stay should automatically continue for the same period for which the time to file a timely cert. petition has been extended.” The Advisory Committee agrees with this suggestion and has added new clause in subdivision (d)(2) that will extend a stay automatically if a Justice of the Supreme Court extends the time for filing a petition for certiorari.

As revised in these two ways, the proposal to amend Rule 41 is now as follows:

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

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

5           (b) **When Issued.** The court’s mandate must issue 7 days after the time to file a  
6 petition for rehearing expires, or 7 days after entry of an order denying a timely  
7 petition for panel rehearing, petition for rehearing en banc, or motion for stay of

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8 mandate, whichever is later. The court may shorten or extend the time by order.<sup>9</sup>

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

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

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

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

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

20 ~~(B) (2)~~ The stay must not exceed 90 days, unless

21 ~~(i)~~ the period is extended for good cause;

22 ~~(ii) the period for filing a timely petition is extended, in which case the~~  
23 ~~stay will continue for the extended period;<sup>10</sup> or~~

24 ~~(iii) unless~~ the party who obtained the stay files a petition for the writ  
25 and so notifies the circuit clerk in writing within the period of the stay. ~~In~~  
26 ~~that case,~~ in which case the stay continues until the Supreme Court's final  
27 disposition.

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

30 ~~(D) (4)~~ The court of appeals must issue the mandate immediately on

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<sup>9</sup> The amendment published for public comment contained this additional sentence: "The court may extend the time only in extraordinary circumstances or under Rule 41(d)."

<sup>10</sup> This clause is new. It was not part of the proposed amendments published for public comment.

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31 receiving when a copy of a Supreme Court order denying the petition for writ  
32 of certiorari is filed, unless extraordinary circumstances exist.

### Committee Note

34 **Subdivision (b).**<sup>11</sup> Subdivision (b) is revised to clarify that an order is required  
35 for a stay of the mandate and to specify the standard for such stays.

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

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

50 Subdivision (d)(1)—which formerly addressed stays of the mandate upon the  
51 timely filing of a motion to stay the mandate or a petition for panel or en banc  
52 rehearing—has been deleted and the rest of subdivision (d) has been renumbered  
53 accordingly. In instances where such a petition or motion is timely filed, subdivision  
54 (b) sets the presumptive date for issuance of the mandate at 7 days after entry of an  
55 order denying the petition or motion. Thus, it seems redundant to state (as

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<sup>11</sup> This portion of the Committee Note has been revised to remove discussion of the formerly proposed sentence allowing a court to delay issuance of the mandate only in exceptional circumstances.

## Excerpt from the Report of the Advisory Committee on Appellate Rules

Report to the Standing Committee  
Advisory Committee on Appellate Rules  
May 22, 2017 (revised March 14, 2018)

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56 subdivision (d)(1) did) that timely filing of such a petition or motion stays the  
57 mandate until disposition of the petition or motion. The deletion of subdivision  
58 (d)(1) is intended to streamline the Rule; no substantive change is intended.

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

71 The reference in prior subdivision (d)(2)(D) to the *filing* of a copy of the Supreme  
72 Court’s order is replaced by a reference to the court of appeals’ *receipt* of a copy of  
73 the Supreme Court’s order. The filing of the copy and its receipt by the court of  
74 appeals amount to the same thing (*cf.* Rule 25(a)(2), setting a general rule that “filing  
75 is not timely unless the clerk receives the papers within the time fixed for filing”),  
76 but “upon receiving a copy” is more specific and, hence, clearer.

77 Under subdivision (d)(2)(ii), if the court of appeals issues a stay of the mandate  
78 for a party to file a petition for certiorari, and a Justice of the Supreme Court  
79 subsequently extends the time for filing the petition, the stay automatically continues

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80           for the extended period.<sup>12</sup>

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<sup>12</sup> This sentence is new. It was not included Committee Note published for public comments in August 2016.

April 26, 2018

Honorable Paul D. Ryan  
Speaker of the House of Representatives  
Washington, DC 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 that were 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 4, 2017; a redline version of the rules with committee notes; an excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and excerpts from the December 2016 and May 2017 Reports of the Advisory Committee on Bankruptcy Rules.

Sincerely,

April 26, 2018

Honorable Michael R. Pence  
President, United States Senate  
Washington, DC 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 that were 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 4, 2017; a redline version of the rules with committee notes; an excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and excerpts from the December 2016 and May 2017 Reports of the Advisory Committee on Bankruptcy Rules.

Sincerely,

April 26, 2018

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 3002.1, 5005, 7004, 7062, 8002, 8006, 8007, 8010, 8011, 8013, 8015, 8016, 8017, 8021, 8022, 9025, and new Rule 8018.1, and new Part VIII Appendix.

[*See infra* pp. \_\_ \_\_ \_\_.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2018, 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 3002.1 Notice Relating to Claims Secured by  
Security Interest in the Debtor's Principal  
Residence**

\* \* \* \* \*

(b) NOTICE OF PAYMENT CHANGES;  
OBJECTION.

(1) *Notice.* The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest-rate or escrow-account adjustment, no later than 21 days before a payment in the new amount is due. If the claim arises from a home-equity line of credit, this requirement may be modified by court order.

(2) *Objection.* A party in interest who objects to the payment change may file a motion to determine

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whether the change is required to maintain payments in accordance with § 1322(b)(5) of the Code. If no motion is filed by the day before the new amount is due, the change goes into effect, unless the court orders otherwise.

\* \* \* \* \*

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

\* \* \* \* \*

**Rule 5005. Filing and Transmittal of Papers**

(a) FILING.

\* \* \* \* \*

(2) *Electronic Filing and Signing.*

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

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

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

(ii) may be required to file electronically only by court order, or by a

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local rule that includes reasonable exceptions.

(C) *Signing.* A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

(D) *Same as a Written Paper.* A paper filed electronically is a written paper for purposes of these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.

\* \* \* \* \*

**Rule 7004. Process; Service of Summons,  
Complaint**

(a) SUMMONS; SERVICE; PROOF OF SERVICE.

(1) Except as provided in Rule 7004(a)(2), Rule 4(a), (b), (c)(1), (d)(5), (e)–(j), (l), and (m) F.R.Civ.P. applies in adversary proceedings. Personal service under Rule 4(e)–(j) F.R.Civ.P. may be made by any person at least 18 years of age who is not a party, and the summons may be delivered by the clerk to any such person.

\* \* \* \* \*

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**Rule 7062. Stay of Proceedings to Enforce a Judgment**

Rule 62 F.R.Civ.P. applies in adversary proceedings, except that proceedings to enforce a judgment are stayed for 14 days after its entry.

**Rule 8002. Time for Filing Notice of Appeal**

(a) IN GENERAL.

\* \* \* \* \*

(5) *Entry Defined.*

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

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

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

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

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

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

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

(1) *In General.* If a party files in the bankruptcy court any of the following motions and does so within the time allowed by these rules, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:



\* \* \* \* \*

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

(1) *In General.* If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 8002(c)(1). If an inmate files a notice of appeal from a judgment, order, or decree of a bankruptcy court, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing 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

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

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

\* \* \* \* \*

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

\* \* \* \* \*

(c) JOINT CERTIFICATION BY ALL APPELLANTS AND APPELLEES.

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

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

\* \* \* \* \*

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**Rule 8007. Stay Pending Appeal; Bonds; Suspension of Proceedings**

(a) INITIAL MOTION IN THE BANKRUPTCY COURT.

(1) *In General.* Ordinarily, a party must move first in the bankruptcy court for the following relief:

(A) a stay of a judgment, order, or decree of the bankruptcy court pending appeal;

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

\* \* \* \* \*

(c) FILING A BOND OR OTHER SECURITY.

The district court, BAP, or court of appeals may condition relief on filing a bond or other security with the bankruptcy court.

(d) BOND OR OTHER SECURITY FOR A TRUSTEE OR THE UNITED STATES. The court may require a trustee to file a bond or other security when the

trustee appeals. A bond or other security is not required when an appeal is taken by the United States, its officer, or its agency or by direction of any department of the federal government.

\* \* \* \* \*

**Rule 8010. Completing and Transmitting the Record**

\* \* \* \* \*

(c) RECORD FOR A PRELIMINARY MOTION IN THE DISTRICT COURT, BAP, OR COURT OF APPEALS. This subdivision (c) applies if, before the record is transmitted, a party moves in the district court, BAP, or court of appeals for any of the following relief:

- leave to appeal;
- dismissal;
- a stay pending appeal;
- approval of a bond or other security provided to obtain a stay of judgment; or
- any other intermediate order.

The bankruptcy clerk must then transmit to the clerk of the court where the relief is sought any parts of the record designated by a party to the appeal or a notice that those parts are available electronically.

**Rule 8011. Filing and Service; Signature**

(a) FILING.

\* \* \* \* \*

(2) *Method and Timeliness.*

(A) *Nonelectronic Filing.*

(i) *In General.* For a document not filed electronically, filing may be accomplished by mail addressed to the clerk of the district court or BAP. Except as provided in subdivision (a)(2)(A)(ii) and (iii), filing is timely only if the clerk receives the document within the time fixed for filing.

(ii) *Brief or Appendix.* A brief or appendix not filed electronically is also timely filed if, on or before the last day for filing, it is:

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- mailed to the clerk by first-class mail—or other class of mail that is at least as expeditious—postage prepaid; or

- dispatched to a third-party commercial carrier for delivery within 3 days to the clerk.

(iii) *Inmate Filing.* If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 8011(a)(2)(A)(iii). A document not filed electronically by an inmate confined in an institution is timely if it is deposited in the institution’s internal mailing system on or before the last day for filing and:



- it is accompanied by a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

- the appellate court exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies this Rule 8011(a)(2)(A)(iii).

(B) *Electronic Filing.*

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

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

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

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

(C) *Copies.* If a document is filed electronically, no paper copy is required. If a document is filed by mail or delivery to the district court or BAP, no additional copies are required. But the district court or BAP may require by local rule or by order in a particular case the filing or furnishing of a specified number of paper copies.

\* \* \* \* \*

(c) MANNER OF SERVICE.

(1) *Nonelectronic Service.* Nonelectronic service may be by any of the following:

- (A) personal delivery;
- (B) mail; or

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

(2) *Electronic Service.* Electronic service may be made by sending a document to a registered user by filing it with the court's electronic-filing system or by using other electronic means that the person served consented to in writing.

(3) *When Service Is Complete.* Service by electronic means is complete on filing or sending, unless the person making service receives notice that the document was not received by the person served. Service by mail or by commercial carrier is complete on mailing or delivery to the carrier.

(d) PROOF OF SERVICE.

(1) *What Is Required.* A document presented for filing must contain either of the following if it was

served other than through the court's electronic-filing system:

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

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

(i) the date and manner of service;

(ii) the names of the persons served;

and

(iii) the mail or electronic address, the fax number, or the address of the place of delivery, as appropriate for the manner of service, for each person served.

\* \* \* \* \*

(e) SIGNATURE. Every document filed electronically must include the electronic signature of the

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person filing it or, if the person is represented, the electronic signature of counsel. A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature. Every document filed in paper form must be signed by the person filing the document or, if the person is represented, by counsel.

**Rule 8013. Motions; Intervention**

\* \* \* \* \*

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

\* \* \* \* \*

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

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

(A) a motion or a response to a motion produced using a computer must include a

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certificate under Rule 8015(h) and not exceed 5,200 words;

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

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

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

\* \* \* \* \*



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

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

\* \* \* \* \*

(7) *Length.*

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

(B) *Type-volume Limitation.*

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

- contains no more than 13,000 words; or

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

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

\* \* \* \* \*

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

(g) ITEMS EXCLUDED FROM LENGTH. In computing any length limit, headings, footnotes, and

quotations count toward the limit, but the following items do not:

- the cover page;
- a corporate disclosure statement;
- a table of contents;
- a table of citations;
- a statement regarding oral argument;
- an addendum containing statutes, rules, or regulations;
- certificates of counsel;
- the signature block;
- the proof of service; and
- any item specifically excluded by these rules or by local rule.

(h) CERTIFICATE OF COMPLIANCE.

(1) *Briefs and Documents That Require a Certificate.* A brief submitted under

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Rule 8015(a)(7)(B), 8016(d)(2), or 8017(b)(4)—and a document submitted under Rule 8013(f)(3)(A), 8013(f)(3)(C), or 8022(b)(1)—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation. The individual preparing the certificate may rely on the word or line count of the word-processing system used to prepare the document. The certificate must state the number of words—or the number of lines of monospaced type—in the document.

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

**Rule 8016. Cross-Appeals**

\* \* \* \* \*

(d) LENGTH.

(1) *Page Limitation.* Unless it complies with paragraph (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 includes a certificate under Rule 8015(h) and:

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

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(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 includes a certificate under Rule 8015(h) and:

(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 includes a certificate under Rule 8015(h) and contains no more than half of the type volume specified in subparagraph (A).

\* \* \* \* \*

**Rule 8017. Brief of an Amicus Curiae**

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

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

(2) *When Permitted.* The United States or its officer or agency or a state may file an amicus 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, but a district court or BAP may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification. On its own motion, and with notice to all parties to an appeal, the district court or BAP may request a brief by an amicus curiae.

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(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 appeal.

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

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



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

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

(D) unless the amicus curiae is one listed in the first sentence of subdivision (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—

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

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

(F) a certificate of compliance, if required by Rule 8015(h).

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

(6) *Time for Filing.* An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief

of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's principal brief is filed. The district court or BAP may grant leave for later filing, specifying the time within which an opposing party may answer.

(7) *Reply Brief.* Except by the district court's or BAP'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 district court's or BAP's permission.

(b) DURING CONSIDERATION OF WHETHER  
TO GRANT REHEARING.

(1) *Applicability.* This Rule 8017(b) governs amicus filings during a district court's or BAP's

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consideration of whether to grant rehearing, unless a local rule or order in a case provides otherwise.

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

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

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

(5) *Time for Filing.* An amicus curiae supporting the motion for rehearing or supporting neither party must file its brief, accompanied by a motion for filing when necessary, no later than 7 days

after the motion is filed. An amicus curiae opposing the motion for rehearing must file its brief, accompanied by a motion for filing when necessary, no later than the date set by the court for the response.

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

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

**Rule 8021. Costs**

\* \* \* \* \*

(c) COSTS ON APPEAL TAXABLE IN THE BANKRUPTCY COURT. The following costs on appeal are taxable in the bankruptcy court for the benefit of the party entitled to costs under this rule:

- (1) the production of any required copies of a brief, appendix, exhibit, or the record;
- (2) the preparation and transmission of the record;
- (3) the reporter's transcript, if needed to determine the appeal;
- (4) premiums paid for a bond or other security to preserve rights pending appeal; and
- (5) the fee for filing the notice of appeal.

\* \* \* \* \*

**Rule 8022. Motion for Rehearing**

\* \* \* \* \*

(b) FORM OF THE MOTION; LENGTH. The motion must comply in form with Rule 8013(f)(1) and (2). Copies must be served and filed as provided by Rule 8011. Except by the district court's or BAP's permission:

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

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



**Rule 9025. Security: Proceedings Against Security Providers**

Whenever the Code or these rules require or permit a party to give security, and security is given with one or more security providers, each provider submits to the jurisdiction of the court, and liability may be determined in an adversary proceeding governed by the rules in Part VII.

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

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

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

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

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	<b>Rule</b>	<b>Document Type</b>	<b>Word Limit</b>	<b>Page Limit</b>	<b>Line Limit</b>
<b>Parties' briefs (where cross-appeal)</b>	8016(d)	<ul style="list-style-type: none"> <li>• Appellant's principal brief</li> <li>• Appellant's response and reply brief</li> </ul>	13,000	30	1,300
	8016(d)	<ul style="list-style-type: none"> <li>• Appellee's principal and response brief</li> </ul>	15,300	35	1,500
	8016(d)	<ul style="list-style-type: none"> <li>• Appellee's reply brief</li> </ul>	6,500	15	650
<b>Party's supplemental letter</b>	8014(f)	<ul style="list-style-type: none"> <li>• Letter citing supplemental authorities</li> </ul>	350	Not applicable	Not applicable
<b>Amicus briefs</b>	8017(a)(5)	<ul style="list-style-type: none"> <li>• Amicus brief during initial consideration of case on merits</li> </ul>	One-half the length set by the Part VIII Rules for a party's principal brief	One-half the length set by the Part VIII Rules for a party's principal brief	One-half the length set by the Part VIII Rules for a party's principal brief
	8017(b)(4)	<ul style="list-style-type: none"> <li>• Amicus brief during consideration of whether to grant rehearing</li> </ul>	2,600	Not applicable	Not applicable
<b>Motion for rehearing</b>	8022(b)	<ul style="list-style-type: none"> <li>• Motion for rehearing</li> </ul>	3,900	15	Not applicable



# JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

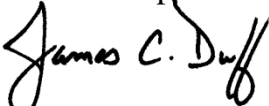
THE CHIEF JUSTICE  
OF THE UNITED STATES  
*Presiding*

JAMES C. DUFF  
*Secretary*

October 4, 2017

## MEMORANDUM

To: Chief Justice of the United States  
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 3002.1, 5005, 7004, 7062, 8002, 8006, 8007, 8010, 8011, 8013, 8015, 8016, 8017, 8021, 8022, 9025, and new Rule 8018.1 of the Federal Rules of Bankruptcy Procedure, along with proposed new Part VIII Appendix, which were approved by the Judicial Conference at its September 2017 session. The Judicial Conference recommends that the amendments be adopted by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) a copy 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 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) excerpts from the December 2016 and May 2017 Reports of the Advisory Committee on Bankruptcy Rules.

Attachments

**PROPOSED AMENDMENTS TO THE FEDERAL  
RULES OF BANKRUPTCY PROCEDURE<sup>1</sup>**

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

4 \* \* \* \* \*

5 (b) NOTICE OF PAYMENT CHANGES;  
6 OBJECTION.

7 (1) Notice. The holder of the claim shall file  
8 and serve on the debtor, debtor's counsel, and the  
9 trustee a notice of any change in the payment amount,  
10 including any change that results from an interest\_rate  
11 or escrow\_account adjustment, no later than 21 days  
12 before a payment in the new amount is due. If the  
13 claim arises from a home-equity line of credit, this  
14 requirement may be modified by court order.

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<sup>1</sup> New material is underlined; matter to be omitted is lined through.

2 FEDERAL RULES OF BANKRUPTCY PROCEDURE

15           (2) Objection. A party in interest who objects  
16           to the payment change may file a motion to determine  
17           whether the change is required to maintain payments  
18           in accordance with § 1322(b)(5) of the Code. If no  
19           motion is filed by the day before the new amount is  
20           due, the change goes into effect, unless the court  
21           orders otherwise.

22   \* \* \* \* \*

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

**Committee Note**

Subdivision (b) is subdivided and amended in two respects. First, it is amended in what is now subdivision (b)(1) to authorize courts to modify its requirements for claims arising from home equity lines of credit (HELOCs). Because payments on HELOCs may adjust frequently and in small amounts, the rule provides flexibility for courts to specify alternative procedures for keeping the person who is maintaining payments on the loan apprised of the current payment amount. Courts may specify alternative requirements for providing notice of changes in HELOC payment amounts by local rules or orders in individual cases.

Second, what is now subdivision (b)(2) is amended to acknowledge the right of the trustee, debtor, or other party in interest, such as the United States trustee, to object to a change in a home-mortgage payment amount after receiving notice of the change under subdivision (b)(1). The amended rule does not set a deadline for filing a motion for a determination of the validity of the payment change, but it provides as a general matter—subject to a contrary court order—that if no motion has been filed on or before the day before the change is to take effect, the announced change goes into effect. If there is a later motion and a determination that the payment change was not required to maintain payments under § 1322(b)(5), appropriate adjustments will have to be made to reflect any overpayments. If, however, a motion is made during the time specified in subdivision (b)(2), leading to a suspension of the payment change, a determination that the payment

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change was valid will require the debtor to cure the resulting default in order to be current on the mortgage at the end of the bankruptcy case.

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



1 **Rule 5005. Filing and Transmittal of Papers**

2 (a) FILING.

3 \* \* \* \* \*

4 (2) Electronic Filing and Signing by Electronic  
5 Means.

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

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17 good cause or is allowed or required by local  
18 rule.

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

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

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

28 (C) Signing. A filing made through a  
29 person's electronic-filing account and authorized  
30 by that person, together with that person's name  
31 on a signature block, constitutes the person's  
32 signature.

33                    (D) Same as a Written Paper. A paper  
34                    document filed electronically by ~~electronic means~~  
35                    ~~in compliance with a local rule constitutes~~ is a  
36                    written paper for ~~the purposes~~ of applying these  
37                    rules, the Federal Rules of Civil Procedure made  
38                    applicable by these rules, and § 107 of the Code.

39                    \* \* \* \* \*

**Committee Note**

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

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

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by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication. Room is also left for a court to require electronic filing by a pro se litigant by court order or by local rule. Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant.

A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature. A person's electronic-filing account means an account established by the court for use of the court's electronic-filing system, which account the person accesses with the user name and password (or other credentials) issued to that person by the court.

1 **Rule 7004. Process; Service of Summons,**  
2 **Complaint**

3 (a) SUMMONS; SERVICE; PROOF OF SERVICE.

4 (1) Except as provided in Rule 7004(a)(2),  
5 Rule 4(a), (b), (c)(1), (d)~~(4)~~(5), (e)–(j), (l), and (m)  
6 F.R.Civ.P. applies in adversary proceedings. Personal  
7 service under Rule 4(e)–(j) F.R.Civ.P. may be made  
8 by any person at least 18 years of age who is not a  
9 party, and the summons may be delivered by the clerk  
10 to any such person.

11 \* \* \* \* \*

**Committee Note**

In 1996, Rule 7004(a) was amended to incorporate by reference F.R.Civ.P. 4(d)(1). Civil Rule 4(d)(1) addresses the effect of a defendant’s waiver of service. In 2007, Civil Rule 4 was amended, and the language of old Civil Rule 4(d)(1) was modified and renumbered as Civil Rule 4(d)(5). Accordingly, Rule 7004(a) is amended to update the cross-reference to Civil Rule 4.

1 **Rule 7062. Stay of Proceedings to Enforce a Judgment**

2 Rule 62 F.R.Civ.P. applies in adversary proceedings,  
3 except that proceedings to enforce a judgment are stayed  
4 for 14 days after its entry.

**Committee Note**

The rule is amended to retain a 14-day period for the automatic stay of a judgment. F.R.Civ.P. 62(a) now provides for a 30-day stay to accommodate the 28-day time periods under the Federal Rules of Civil Procedure for filing post-judgment motions and the 30-day period for filing a notice of appeal. Under the Bankruptcy Rules, however, those periods are limited to 14 days. *See* Rules 7052, 8002, 9015, and 9023.

1 **Rule 8002. Time for Filing Notice of Appeal**

2 (a) IN GENERAL.

3 \* \* \* \* \*

4 (5) Entry Defined.

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

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

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

- 15 • the judgment, order, or  
16 decree is set out in a separate  
17 document; or

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18 • 150 days have run from  
19 entry of the judgment, order, or  
20 decree in the docket under  
21 Rule 5003(a).

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

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

29 (1) *In General.* If a party ~~timely~~ files in the  
30 bankruptcy court any of the following motions and  
31 does so within the time allowed by these rules, the  
32 time to file an appeal runs for all parties from the  
33 entry of the order disposing of the last such remaining  
34 motion:



35 \* \* \* \* \*

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

38 (1) *In General.* If an institution has a system  
39 designed for legal mail, an inmate confined there must  
40 use that system to receive the benefit of this  
41 Rule 8002(c)(1). If an inmate ~~confined in an~~  
42 ~~institution~~ files a notice of appeal from a judgment,  
43 order, or decree of a bankruptcy court, the notice is  
44 timely if it is deposited in the institution's internal  
45 mail system on or before the last day for filing. ~~If the~~  
46 ~~institution has a system designed for legal mail, the~~  
47 ~~inmate must use that system to receive the benefit of~~  
48 ~~this rule. Timely filing may be shown by a~~  
49 ~~declaration in compliance with 28 U.S.C. § 1746 or by~~  
50 ~~a notarized statement, either of which must set forth~~

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51 ~~the date of deposit and state that first class postage~~  
52 ~~has been prepaid, and:~~

53 (A) it is accompanied by:

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

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

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

67 \* \* \* \* \*

### **Committee Note**

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

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

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

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

A clarifying amendment is made to subdivision (b)(1) to conform to a recent amendment to F.R.App.P. 4(a)(4)—from which Rule 8002(b)(1) is derived. Former

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

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

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

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

3 \* \* \* \* \*

4 (c) JOINT CERTIFICATION BY ALL  
5 APPELLANTS AND APPELLEES.

6 (1) How Accomplished. A joint certification by  
7 all the appellants and appellees under 28 U.S.C.  
8 § 158(d)(2)(A) must be made by using the appropriate  
9 Official Form. The parties may supplement the  
10 certification with a short statement of the basis for the  
11 certification, which may include the information listed  
12 in subdivision (f)(2).

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

18 \* \* \* \* \*

**Committee Note**

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

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

1 **Rule 8007. Stay Pending Appeal; Bonds; Suspension**  
2 **of Proceedings**

3 (a) INITIAL MOTION IN THE BANKRUPTCY  
4 COURT.

5 (1) *In General.* Ordinarily, a party must move  
6 first in the bankruptcy court for the following relief:

7 (A) a stay of a judgment, order, or decree  
8 of the bankruptcy court pending appeal;

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

12 \* \* \* \* \*

13 (c) FILING A BOND OR OTHER SECURITY.

14 The district court, BAP, or court of appeals may condition  
15 relief on filing a bond or other ~~appropriate~~ security with the  
16 bankruptcy court.

17 (d) BOND OR OTHER SECURITY FOR A  
18 TRUSTEE OR THE UNITED STATES. The court may



19 require a trustee to file a bond or other appropriate security  
20 when the trustee appeals. A bond or other security is not  
21 required when an appeal is taken by the United States, its  
22 officer, or its agency or by direction of any department of  
23 the federal government.

24 \* \* \* \* \*

**Committee Note**

The amendments to subdivisions (a)(1)(B), (c), and (d) conform this rule with the amendment of Rule 62 F.R.Civ.P., which is made applicable to adversary proceedings by Rule 7062. Rule 62 formerly required a party to provide a “supersedeas bond” to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b) allows a party to obtain a stay by providing a “bond or other security.”

1 **Rule 8010. Completing and Transmitting the Record**

2 \* \* \* \* \*

3 (c) RECORD FOR A PRELIMINARY MOTION  
4 IN THE DISTRICT COURT, BAP, OR COURT OF  
5 APPEALS. This subdivision (c) applies if, before the  
6 record is transmitted, a party moves in the district court,  
7 BAP, or court of appeals for any of the following relief:

- 8 • leave to appeal;  
9 • dismissal;  
10 • a stay pending appeal;  
11 • approval of a ~~supersedeas bond~~, or other security  
12 provided to obtain a stay of judgment~~additional~~  
13 ~~security on a bond or undertaking on appeal~~; or  
14 • any other intermediate order.

15 The bankruptcy clerk must then transmit to the clerk of the  
16 court where the relief is sought any parts of the record

- 17 designated by a party to the appeal or a notice that those  
18 parts are available electronically.

**Committee Note**

The amendment of subdivision (c) conforms this rule with the amendment of Rule 62 F.R.Civ.P., which is made applicable in adversary proceedings by Rule 7062. Rule 62 formerly required a party to provide a “supersedeas bond” to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b) allows a party to obtain a stay by providing a “bond or other security.”

1 **Rule 8011. Filing and Service; Signature**

2 (a) FILING.

3 \* \* \* \* \*

4 (2) *Method and Timeliness.*

5 (A) Nonelectronic Filing.

6 ~~(A)(i)~~ *In General.* ~~Filing~~For a  
7 document not filed electronically, filing may  
8 be accomplished by ~~transmission~~mail  
9 addressed to the clerk of the district court or  
10 BAP. Except as provided in subdivision  
11 ~~(a)(2)(B) and (C)~~ (a)(2)(A)(ii) and (iii),  
12 filing is timely only if the clerk receives the  
13 document within the time fixed for filing.

14 ~~(B)(ii)~~ *Brief or Appendix.* A brief  
15 or appendix not filed electronically is also  
16 timely filed if, on or before the last day for  
17 filing, it is:

18                    (i)• mailed to the clerk by first-  
19                    class mail—or other class of mail that  
20                    is at least as expeditious—postage  
21                    prepaid, ~~if the district court's or BAP's~~  
22                    ~~procedures permit or require a brief or~~  
23                    ~~appendix to be filed by mailing; or~~

24                    (ii)• dispatched to a third-party  
25                    commercial carrier for delivery within  
26                    3 days to the clerk, ~~if the court's~~  
27                    ~~procedures so permit or require.~~

28                    ~~(C)~~(iii) *Inmate Filing.* If an  
29                    institution has a system designed for legal  
30                    mail, an inmate confined there must use that  
31                    system to receive the benefit of this  
32                    Rule 8011(a)(2)(A)(iii). A document not  
33                    filed electronically by an inmate confined in  
34                    an institution is timely if it is deposited in

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35 the institution's internal mailing system on  
36 or before the last day for filing. ~~If the~~  
37 ~~institution has a system designed for legal~~  
38 ~~mail, the inmate must use that system to~~  
39 ~~receive the benefit of this rule. Timely~~  
40 ~~filing may be shown by a declaration in~~  
41 ~~compliance with 28 U.S.C. § 1746 or by a~~  
42 ~~notarized statement, either of which must set~~  
43 ~~forth the date of deposit and state that first-~~  
44 ~~class postage has been prepaid. and:~~

45 • it is accompanied by a  
46 declaration in compliance with 28  
47 U.S.C. § 1746—or a notarized  
48 statement—setting out the date of  
49 deposit and stating that first-class  
50 postage is being prepaid; or evidence  
51 (such as a postmark or date stamp)

52                   showing that the notice was so  
53                   deposited and that postage was  
54                   prepaid; or

55                   •     the appellate court exercises  
56                   its discretion to permit the later filing  
57                   of a declaration or notarized statement  
58                   that \_\_\_\_\_ satisfies \_\_\_\_\_ this  
59                   Rule 8011(a)(2)(A)(iii).

60                   (B) *Electronic Filing.*

61                   (i) *By a Represented Person—*  
62                   *Generally Required; Exceptions.* An entity  
63                   represented by an attorney must file  
64                   electronically, unless nonelectronic filing is  
65                   allowed by the court for good cause or is  
66                   allowed or required by local rule.

67                                   (ii) By an Unrepresented  
68                                   Individual—When Allowed or Required. An  
69                                   individual not represented by an attorney:

70                                   • may file electronically only  
71                                   if allowed by court order or by local  
72                                   rule; and

73                                   • may be required to file  
74                                   electronically only by court order, or  
75                                   by a local rule that includes reasonable  
76                                   exceptions.

77                                   (iii) Same as a Written Paper. A  
78                                   document filed electronically is a written  
79                                   paper for purposes of these rules.

80                                   ~~(D)~~(C) Copies. If a document is filed  
81                                   electronically, no paper copy is required. If a  
82                                   document is filed by mail or delivery to the  
83                                   district court or BAP, no additional copies are



84 required. But the district court or BAP may  
85 require by local rule or by order in a particular  
86 case the filing or furnishing of a specified  
87 number of paper copies.

88 \* \* \* \* \*

89 (c) MANNER OF SERVICE.

90 (1) Nonelectronic Service. Methods. ~~Service~~  
91 ~~must be made electronically, unless it is being made~~  
92 ~~by or on an individual who is not represented by~~  
93 ~~counsel or the court's governing rules permit or~~  
94 ~~require service by mail or other means of delivery.~~  
95 Service Nonelectronic service may be ~~made by or on~~  
96 ~~an unrepresented party~~ by any of the following  
97 ~~methods:~~

98 (A) personal delivery;

99 (B) mail; or

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100 (C) third-party commercial carrier for  
101 delivery within 3 days.

102 (2) Electronic Service. Electronic service may  
103 be made by sending a document to a registered user  
104 by filing it with the court's electronic-filing system or  
105 by using other electronic means that the person served  
106 consented to in writing.

107 ~~(2)~~(3) *When Service ~~is~~ Complete.* Service  
108 by electronic means is complete on ~~transmission~~filing  
109 or sending, unless the ~~party~~person making service  
110 receives notice that the document was not ~~transmitted~~  
111 ~~successfully~~received by the person served. Service by  
112 mail or by commercial carrier is complete on mailing  
113 or delivery to the carrier.

114 (d) PROOF OF SERVICE.

115 (1) *What ~~is~~ Required.* A document presented  
116 for filing must contain either of the following if it was

117 served other than through the court's electronic-filing  
118 system:

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

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

124 (i) the date and manner of service;

125 (ii) the names of the persons served;

126 and

127 (iii) the mail or electronic address, the  
128 fax number, or the address of the place of  
129 delivery, as appropriate for the manner of  
130 service, for each person served.

131 \* \* \* \* \*

132 (e) SIGNATURE. Every document filed  
133 electronically must include the electronic signature of the

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134 person filing it or, if the person is represented, the  
135 electronic signature of counsel. ~~The electronic signature~~  
136 ~~must be provided by electronic means that are consistent~~  
137 ~~with any technical standards that the Judicial Conference of~~  
138 ~~the United States establishes.~~ A filing made through a  
139 person's electronic-filing account and authorized by that  
140 person, together with that person's name on a signature  
141 block, constitutes the person's signature. Every document  
142 filed in paper form must be signed by the person filing the  
143 document or, if the person is represented, by counsel.

**Committee Note**

The rule is amended to conform to the amendments to F.R.App.P. 25 on inmate filing, electronic filing, signature, service, and proof of service.

Consistent with Rule 8001(c), subdivision (a)(2) generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule.

Subdivision (a)(2)(A)(iii) is revised to conform to F.R.App.P. 25(a)(2)(A)(iii), which was recently amended

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

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

Subdivision (c) is amended to authorize electronic service by means of the court's electronic-filing system on registered users without requiring their written consent. All other forms of electronic service require the written consent of the person served.

Service is complete when a person files the paper with the court's electronic-filing system for transmission to a registered user, or when one person sends it to another person by other electronic means that the other person has consented to in writing. But service is not effective if the person who filed with the court or the person who sent by other agreed-upon electronic means receives notice that the paper did not reach the person to be served. The rule does not make the court responsible for notifying a person who filed the paper with the court's electronic-filing system that an attempted transmission by the court's system failed. But a filer who receives notice that the transmission failed is responsible for making effective service.

As amended, subdivision (d) eliminates the requirement of proof of service when service is made through the electronic-filing system. The notice of electronic filing generated by the system serves that purpose.

Subdivision (e) requires the signature of counsel or an unrepresented party on every document that is filed. A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature. A person's electronic-filing account means an account established by the court for use of the court's electronic-filing system, which account the person accesses with the user name and password (or other credentials) issued to that person by the court.

1 **Rule 8013. Motions; Intervention**

2 \* \* \* \* \*

3 (f) FORM OF DOCUMENTS; PAGELLENGTH  
4 LIMITS; NUMBER OF COPIES.

5 \* \* \* \* \*

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

12 (3) *PageLength Limits.* ~~Unless the district~~  
13 ~~court or BAP orders otherwise:~~Except by the district  
14 court's or BAP's permission, and excluding the  
15 accompanying documents authorized by subdivision  
16 (a)(2)(C):

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

24 (B) ~~a reply to a response must not exceed~~  
25 ~~10 pages.~~ a handwritten or typewritten motion or  
26 a response to a motion must not exceed 20  
27 pages;

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

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

33 \* \* \* \* \*



**Committee Note**

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

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

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

6 \* \* \* \* \*

7 (7) *Length.*

8 (A) *Page ~~h~~Limitation.* A principal brief  
9 must not exceed 30 pages, or a reply brief 15  
10 pages, unless it complies with subparagraph (B)  
11 and (C).

12 (B) *Type-volume ~~h~~Limitation.*

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

16 • ~~it~~ contains no more than  
17 ~~14,000~~ 13,000 words; or

18                                   • ~~it~~ uses a monospaced face  
19                                   and contains no more than 1,300 lines  
20                                   of text.

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

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

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

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

- 44                   •   ~~the number of words in the~~
- 45                   ~~brief; or~~
- 46                   •   ~~the number of lines of~~
- 47                   ~~monospaced type in the brief.~~

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

52

\* \* \* \* \*

53

(f) LOCAL VARIATION. A district court or BAP

54

must accept documents that comply with the ~~applicable~~

55

form requirements of this rule and the length limits set by

56

Part VIII of these rules. By local rule or order in a

57

particular case, a district court or BAP may accept

58

documents that do not meet all of the form requirements of

59

this rule or the length limits set by Part VIII of these rules.

60

(g) ITEMS EXCLUDED FROM LENGTH. In

61

computing any length limit, headings, footnotes, and

62

quotations count toward the limit, but the following items

63

do not:

64

• the cover page;

65

• a corporate disclosure statement;

66

• a table of contents;

67

• a table of citations;

68

• a statement regarding oral argument;

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- 69 • an addendum containing statutes, rules, or
- 70 regulations;
- 71 • certificates of counsel;
- 72 • the signature block;
- 73 • the proof of service; and
- 74 • any item specifically excluded by these
- 75 rules or by local rule.

76 (h) CERTIFICATE OF COMPLIANCE.

77 (1) *Briefs and Documents That Require a*  
78 *Certificate.* A brief submitted under  
79 Rule 8015(a)(7)(B), 8016(d)(2), or 8017(b)(4)—and a  
80 document submitted under Rule 8013(f)(3)(A),  
81 8013(f)(3)(C), or 8022(b)(1)—must include a  
82 certificate by the attorney, or an unrepresented party,  
83 that the document complies with the type-volume  
84 limitation. The individual preparing the certificate  
85 may rely on the word or line count of the word-

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

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

**Committee Note**

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

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

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

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

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



1 **Rule 8016. Cross-Appeals**

2 \* \* \* \* \*

3 (d) LENGTH.

4 (1) *Page Limitation.* Unless it complies with  
5 paragraphs (2) ~~and (3)~~, the appellant's principal brief  
6 must not exceed 30 pages; the appellee's principal and  
7 response brief, 35 pages; the appellant's response and  
8 reply brief, 30 pages; and the appellee's reply brief,  
9 15 pages.

10 (2) *Type-~~volume~~Volume Limitation.*

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

15 (i) ~~it contains no more than 14,000~~  
16 13,000 words; or

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

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

22 (i) ~~it~~ contains no more than ~~16,500~~  
23 15,300 words; or

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

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

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

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

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

40 \* \* \* \* \*

#### Committee Note

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

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

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

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

1 **Rule 8017. Brief of an Amicus Curiae**

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

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

7 (2) When Permitted. The United States or its  
8 officer or agency or a state may file an amicus-~~curiae~~  
9 brief without the consent of the parties or leave of  
10 court. Any other amicus curiae may file a brief only  
11 by leave of court or if the brief states that all parties  
12 have consented to its filing, but a district court or BAP  
13 may prohibit the filing of or may strike an amicus  
14 brief that would result in a judge's disqualification.

15 On its own motion, and with notice to all parties to an  
16 appeal, the district court or BAP may request a brief  
17 by an amicus curiae.

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

20                   ~~(1)~~(A)     the movant’s interest; and

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

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

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

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

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

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

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

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

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

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

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

59 ~~(6)~~(E) a certificate of compliance, if  
60 required by Rule 8015(a)(7)(C) or 8015(b)(h).

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



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

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

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

83           (b) DURING CONSIDERATION OF WHETHER  
84           TO GRANT REHEARING.

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

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

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

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

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

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

**Committee Note**

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

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

does not alter or address the standards for when an amicus brief requires a judge's disqualification. It is modeled on an amendment to F.R.App.P. 29(a). A comparable amendment to subdivision (b) is not necessary. Subdivision (b)(1) authorizes local rules and orders governing filings during a court's consideration of whether to grant rehearing. These local rules or orders may prohibit the filing of or permit the striking of an amicus brief that would result in a judge's disqualification. In addition, under subdivision (b)(2), a court may deny leave to file an amicus brief that would result in a judge's disqualification.

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

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

**Committee Note**

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

1 **Rule 8021. Costs**

2 \* \* \* \* \*

3 (c) COSTS ON APPEAL TAXABLE IN THE  
4 BANKRUPTCY COURT. The following costs on appeal  
5 are taxable in the bankruptcy court for the benefit of the  
6 party entitled to costs under this rule:

7 (1) the production of any required copies of a  
8 brief, appendix, exhibit, or the record;

9 (2) the preparation and transmission of the  
10 record;

11 (3) the reporter's transcript, if needed to  
12 determine the appeal;

13 (4) premiums paid for a ~~supersedeas~~ bond or  
14 other security bonds—to preserve rights pending  
15 appeal; and

16 (5) the fee for filing the notice of appeal.

17 \* \* \* \* \*

**Committee Note**

The amendment of subdivision (c) conforms this rule with the amendment of F.R.Civ.P. 62, which is made applicable in adversary proceedings by Rule 7062. Rule 62 formerly required a party to provide a “supersedeas bond” to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b) allows a party to obtain a stay by providing a “bond or other security.”

1 **Rule 8022. Motion for Rehearing**

2 \* \* \* \* \*

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

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

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

**Committee Note**

Subdivision (b) is amended to conform to the recent amendment to F.R.App.P. 40(b), which was one of several appellate rules in which word limits were substituted for page limits for documents prepared by computer. The word limits were derived from the previous page limits using the assumption that one page is equivalent to 260



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

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

1 **Rule 9025. Security: Proceedings Against Sureties**  
2 **Security Providers**

3 Whenever the Code or these rules require or permit  
4 ~~the giving of security by a party~~ a party to give security, and  
5 security is given ~~in the form of a bond or stipulation or~~  
6 ~~other undertaking~~ with one or more ~~sureties~~ security  
7 providers, each ~~surety~~ provider submits to the jurisdiction of  
8 the court, and liability may be determined in an adversary  
9 proceeding governed by the rules in Part VII.

**Committee Note**

This rule is amended to reflect the amendment of Rule 62 F.R.Civ.P., which is made applicable to adversary proceedings by Rule 7062. Rule 62 allows a party to obtain a stay of a judgment “by providing a bond or other security.” Limiting this rule’s enforcement procedures to sureties might exclude use of those procedures against a security provider that is not a surety. All security providers are brought into the rule by these amendments.

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

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

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

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

## 64 FEDERAL RULES OF BANKRUPTCY PROCEDURE

	<b>Rule</b>	<b>Document Type</b>	<b>Word Limit</b>	<b>Page Limit</b>	<b>Line Limit</b>
<b>Parties' briefs (where cross-appeal)</b>	8016(d)	<ul style="list-style-type: none"> <li>• Appellant's principal brief</li> <li>• Appellant's response and reply brief</li> </ul>	13,000	30	1,300
	8016(d)	• Appellee's principal and response brief	15,300	35	1,500
	8016(d)	• Appellee's reply brief	6,500	15	650
<b>Party's supplemental letter</b>	8014(f)	• Letter citing supplemental authorities	350	Not applicable	Not applicable
<b>Amicus briefs</b>	8017(a)(5)	• Amicus brief during initial consideration of case on merits	One-half the length set by the Part VIII Rules for a party's principal brief	One-half the length set by the Part VIII Rules for a party's principal brief	One-half the length set by the Part VIII Rules for a party's principal brief
	8017(b)(4)	• Amicus brief during consideration of whether to grant rehearing	2,600	Not applicable	Not applicable
<b>Motion for rehearing</b>	8022(b)	• Motion for rehearing	3,900	15	Not applicable

**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 amendments to Rules 3002.1, 5005, 7004, 7062, 8002, 8006, 8007, 8010, 8011, 8013, 8015, 8016, 8017, 8021, 8022, 9025, and new Rule 8018.1, new Part VIII Appendix, \*\*\*\*\* , with a recommendation that they be approved and transmitted to the Judicial Conference.

Most of these proposed changes were published for comment in 2016, and the others were recommended for final approval without publication. The Standing Committee recommended Rule 7004 \*\*\*\*\* for final approval at its January 2017 meeting, and recommended the remaining rules \*\*\*\*\* for final approval at its June 2017 meeting.

**Rules \*\*\*\*\* Published for Comment in 2016**

*Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence).* Rule 3002.1(b) and (e) apply with respect to home mortgage claims in chapter 13 cases. These provisions impose notice requirements on the creditor to enable the debtor or trustee to make mortgage payments in the correct amount during a pending bankruptcy case.

There were three comments submitted in response to the publication. The commenters each expressed support for the amendments, with some suggested wording changes. One commenter noted that although the published rule purported to prevent a proposed payment

**Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure**

change from going into effect if a timely objection was filed, under time counting rules the deadline for filing the objection was actually later than the scheduled effective date of the payment change. The advisory committee revised the proposed amendment to eliminate this possibility.

*Rule 5005 (Filing and Transmittal of Papers).* Rule 5005(a)(2) addresses filing documents electronically in federal bankruptcy cases. The amendments published for public comment in August 2016 sought consistency with the proposed amendments to Civil Rule 5(d)(3), which addresses electronic filing in civil cases. The publication of changes to Bankruptcy Rule 5005 and Civil Rule 5 were coordinated with similar proposed changes to the criminal and appellate electronic filing rules: Criminal Rule 49 and Appellate Rule 25.

The advisory committee received six comments on the proposed amendments to Rule 5005(a)(2). Most comments addressed the wording of subdivision (a)(2)(C), the intent of which was to identify who can file a document and what information is required in the signature block. Other advisory committees received similar comments with respect to the parallel provision in their rules, and the advisory committees each worked to coordinate language to clarify the provisions.

In addition, the advisory committee received one comment (also submitted to the other advisory committees) opposing the default wording in the rule that pro se parties cannot file electronically. Along with the other advisory committees, the Bankruptcy Rules Committee chose to retain a default against permitting electronic filing by pro se litigants. It reasoned that under the published version of the rule pro se parties would be able to request permission to file electronically, and courts would be able to adopt a local rule that mandated electronic filing by pro se parties, provided that such rule included reasonable exceptions.

## **Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure**

The Standing Committee approved the proposed amendments to Rule 5005(a)(2), as well as the electronic filing rules proposed by the other advisory committees, after making minor stylistic changes.

*Proposed amendments to conform Bankruptcy Appellate Rules to recent or proposed amendments to the Federal Rules of Appellate Procedure (“FRAP”).* A large set of FRAP amendments went into effect on December 1, 2016. The amendments to Bankruptcy Rules, Part VIII, Rules 8002, 8011, 8013, 8015, 8016, 8017, and 8022, Official Forms 417A and 417C, and the Part VIII Appendix discussed below bring the Bankruptcy Rules into conformity with the relevant amended FRAP provisions. One additional amendment to Rule 8011 was proposed to conform to a parallel FRAP provision that was also published for comment last summer.

- Rules 8002 (Time for Filing Notice of Appeal) and 8011 (Filing and Service; Signature), and Official Form 417A (Notice of Appeal and Statement of Election).

Bankruptcy Rules 8002(c) and 8011(a)(2)(C) include inmate-filing provisions that are virtually identical to, and are intended to conform to, the inmate-filing provisions of Appellate Rules 4(c) and 25(a)(2)(C). These rules treat notices of appeal and other papers as timely filed by inmates if certain specified requirements are met, including that the documents are deposited in the institution’s internal mail system on or before the last day for filing. To implement the FRAP amendments, a new appellate form was adopted to provide a suggested form for an inmate declaration under Rules 4 and 25. A similar director’s form was developed for bankruptcy appeals, and the advisory committee published an amendment to Official Form 417A (Notice of Appeal and Statement of Election) that will alert inmate filers to the existence of the director’s form.

Rule 8002(b) and its counterpart, Appellate Rule 4(a)(4), set out a list of post-judgment motions that toll the time for filing an appeal. The 2016 amendment to Appellate Rule 4(a)(4)

**Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure**

added an explicit requirement that the motion must be filed within the time period specified by the rule under which it is made in order to have a tolling effect for the purpose of determining the deadline for filing a notice of appeal. A similar amendment to Rule 8002(b) was published in August 2016.

No comments were submitted specifically addressing the proposed amendments to Rule 8002, Rule 8011, or Official Form 417A.

- Rules 8013 (Motions; Intervention), 8015 (Form and Length of Briefs; Form of Appendices and Other Papers), 8016 (Cross-Appeals), and 8022 (Motion for Rehearing), Official Form 417C (Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type-Style Requirements), and Part VIII Appendix (length limits). The 2016 amendments to Appellate Rules 5, 21, 27, 35, and 40 converted page limits to word limits for documents prepared using a computer. For documents prepared without using a computer, the existing page limits were retained. The FRAP amendments also reduced the existing word limits of Rules 28.1 (Cross-Appeals) and 32 (Briefs).

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

The advisory committee proposed parallel amendments to Rules 8013(f), 8015(a)(7) and (f), 8016(d), and 8022(b), along with Official Form 417C. In addition, it proposed an appendix to Part VIII that is similar to the FRAP appendix.

In response to publication, no comments were submitted that specifically addressed the amendments to these provisions or to the appendix.



## Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure

- Rule 8017 (Brief of an Amicus Curiae). Rule 8017 is the bankruptcy counterpart to Appellate Rule 29. The recent amendment to Rule 29 provides a default rule concerning the timing and length of amicus briefs filed in connection with petitions for panel rehearing or rehearing en banc. The rule previously did not address the topic; it was limited to amicus briefs filed in connection with the original hearing of an appeal. The 2016 amendment does not require courts to accept amicus briefs regarding rehearing, but it provides guidelines for such briefs as are permitted. The advisory committee proposed a parallel amendment to Rule 8017.

In August 2016 the Appellate Rules Advisory Committee published another amendment to Appellate Rule 29(a) that would authorize a court of appeals to prohibit or strike the filing of an amicus brief if the filing would result in the disqualification of a judge. The Bankruptcy Rules Advisory Committee proposed and published a similar amendment to Rule 8017 to maintain consistency between the two sets of rules.

Two comments were submitted in response to publication of Rule 8017. One commenter opposed the amendment because amicus briefs are usually filed before an appeal is assigned to a panel of judges, and thus the amicus and its counsel would not know whether recusal would later be required. The advisory committee rejected this comment because the proposed amendment merely permits, but does not *require*, striking amicus briefs in order to address recusal issues. The other commenter opposed the wording of the amendment, suggesting instead a more extensive and detailed rewrite of the rule. The advisory committee rejected this comment as beyond the scope of the proposed amendment.

*Additional Amendments to the Bankruptcy Appellate Rules.* In addition to the conforming amendments to Part VIII rules discussed above, amendments to Bankruptcy Appellate Rules 8002, 8006, and 8023 and new Bankruptcy Appellate Rule 8018.1 were published last summer. None of the comments submitted in response to publication specifically

**Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure**

addressed these amendments. Following discussion of the amendments at its spring 2017 meeting, the advisory committee recommended final approval of each rule as published, except for Rule 8023, which the advisory committee sent back to a subcommittee for further consideration.

- Rule 8002 (Time for Filing Notice of Appeal). The proposed amendment to Rule 8002(a) adds a new subdivision (a)(5) defining entry of judgment. The proposed amendment clarifies that the time for filing a notice of appeal under subdivision (a) begins to run upon docket entry in contested matters and adversary proceedings for which Rule 58 does not require a separate document. In adversary proceedings for which Rule 58 does require a separate document, the time commences when the judgment, order, or decree is entered in the civil docket and either (1) it is set forth on a separate document, or (2) 150 days have run from the entry in the civil docket, whichever occurs first.

- Rule 8006 (Certifying a Direct Appeal to the Court of Appeals). The proposed amendment to Rule 8006 adds a new subdivision (c)(2) that authorizes the bankruptcy judge to file a statement on the merits of a certification for direct review by the court of appeals when the certification is made jointly by all the parties to the appeal.

- Rule 8018.1 (District Court Review of a Judgment that the Bankruptcy Court Lacked Constitutional Authority to Enter). New Rule 8018.1 authorizes a district court to treat a bankruptcy court's judgment as proposed findings of fact and conclusions of law if the district court determines that the bankruptcy court lacked constitutional authority to enter a final judgment. The procedure would eliminate the need to remand an appeal to the bankruptcy court merely to recharacterize the judgment as proposed findings and conclusions.

\* \* \* \* \*

**Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure**

Conforming Changes Proposed without Publication

*Rules \*\*\*\*\* Considered at the January 2017 Committee Meeting.* At the Standing Committee's January 2017 meeting, the advisory committee recommended final approval without publication of technical conforming amendments to Rule 7004(a)(1) \*\*\*\*\*.

- Rule 7004 (Process; Service of Summons, Complaint). Rule 7004 incorporates by reference certain components of Civil Rule 4. In 1996, Rule 7004(a) was amended to incorporate by reference the provision of Civil Rule 4(d)(1) addressing a defendant's waiver of service of a summons.

In 2007, Civil Rule 4(d) was amended to change, among other things, the language and placement of the provision addressing waiver of service of summons. The cross-reference to Civil Rule 4(d)(1) in Rule 7004(a), however, was not changed at that time.

Accordingly, the advisory committee recommended an amendment to Rule 7004(a) to refer to Civil Rule 4(d)(5). Based on its technical and conforming nature, the advisory committee also recommended that the proposed amendment be submitted to the Judicial Conference for approval without prior publication.

\* \* \* \* \*

*Rules \*\*\*\*\* Considered at the June 2017 Standing Committee Meeting.* At the Standing Committee's June 2017 meeting, the advisory committee recommended that the changes described below to Rules 7062, 8007, 8010, 8011, 8021, and 9025, \*\*\*\*\* be approved and transmitted to the Judicial Conference.

- Rule 8011 (Filing and Service; Signature). Rule 8011 addresses filing, service, and signatures in bankruptcy appeals. At the time the advisory committee recommended publication of the proposed amendments to Rule 5005 regarding electronic filing, service, and signatures in coordination with the other advisory committees' e-filing rules, it overlooked the

**Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure**

need for similar amendments to Rule 8011. It accordingly recommended that conforming amendments to Rule 8011 consistent with the e-filing changes to Rule 5005 and its counterpart, Appellate Rule 25, be approved without publication so that all of the e-filing amendments could go into effect at the same time. The Standing Committee accepted the advisory committee's recommendation, approving amendments to Rule 8011 after incorporating stylistic changes it made to the other e-filing amendments at the meeting.

- Rules 7062 (Stay of Proceedings to Enforce a Judgment), 8007 (Stay Pending Appeal; Bonds; Suspension of Proceedings), 8010 (Completing and Transmitting the Record, 8021 (Costs), and 9025 (Security: Proceedings Against Sureties). The advisory committee recommended conforming amendments to Rules 7062, 8007, 8010, 8021, and 9025, consistent with proposed and published amendments to Civil Rules 62 (Stay of Proceedings to Enforce a Judgment) and 65.1 (Proceedings Against a Surety) that would lengthen the period of the automatic stay of a judgment and modernize the terminology “supersedeas bond” and “surety” by using instead the broader term “bond or other security.” The Advisory Committee on Appellate Rules also published amendments to Appellate Rules 8 (Stay or Injunction Pending Appeal), 11 (Forwarding the Record), and 39 (Costs) that would adopt conforming terminology.

Because Bankruptcy Rule 7062 incorporates the whole of Civil Rule 62, the new security terminology will automatically apply in bankruptcy adversary proceedings when the civil rule goes into effect. Rule 62, however, also includes a change that would lengthen the automatic stay of a judgment entered in the district court from 14 to 30 days. The civil rule change addresses a gap between the end of the judgment-stay period and the 28-day time period for making certain post-judgment motions in civil practice. Because the deadline for post-judgment motions in bankruptcy is 14 days, however, the advisory committee recommended an amendment to Rule 7062 that would maintain the current 14-day duration of the automatic stay

**Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure**

of judgment. As revised, Rule 7062 would continue incorporation of Rule 62, “except that proceedings to enforce a judgment are stayed for 14 days after its entry.”

Because the amendments to Rules 7062, 8007, 8010, 8021, and 9025 simply adopt conforming terminology changes from the other rule sets that have been recommended for final approval, and maintain the status quo with respect to automatic stays of judgments in the bankruptcy courts, the advisory committee recommended approval of these rules without publication.

\* \* \* \* \*

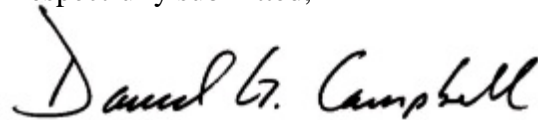
The Standing Committee voted unanimously to support the recommendations of the advisory committee.

**Recommendation:** That the Judicial Conference:

- a. Approve proposed amendments to Bankruptcy Rules 3002.1, 5005, 7004, 7062, 8002, 8006, 8007, 8010, 8011, 8013, 8015, 8016, 8017, 8021, 8022, 9025, and new Rule 8018.1, and the new Part VIII Appendix, 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,



David G. Campbell, Chair

Jesse M. Furman  
Gregory G. Garre  
Daniel C. Girard  
Susan P. Graber  
Frank M. Hull  
Peter D. Keisler

William K. Kelley  
Rod J. Rosenstein  
Amy J. St. Eve  
Larry D. Thompson  
Richard C. Wesley  
Jack Zouhary

Excerpt from the December 5, 2016 Report of the Advisory Committee on Bankruptcy Rules

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

DAVID G. CAMPBELL  
CHAIR  
  
REBECCA A. WOMELDORF  
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

NEIL M. GORSUCH  
APPELLATE RULES

SANDRA SEGAL IKUTA  
BANKRUPTCY RULES

JOHN D. BATES  
CIVIL RULES

DONALD W. MOLLOY  
CRIMINAL RULES

WILLIAM K. SESSIONS III  
EVIDENCE RULES

MEMORANDUM

**TO:** Hon. David G. Campbell, Chair  
Committee on Rules of Practice and Procedure

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

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

**DATE:** December 5, 2016

---

**I. Introduction**

The Advisory Committee on Bankruptcy Rules met in Washington, D.C., on November 14, 2016. \*\*\*\*\*

\*\*\*\*\*

The Committee also approved a technical amendment to one rule \*\*\*\*\*. It seeks the Standing Committee's approval of these amendments without publication.

These action items are discussed in Part II of this report.

\*\*\*\*\*

**II. Action Items**

\*\*\*\*\*

Report to the Standing Committee  
Advisory Committee on Bankruptcy Rules  
December 5, 2016

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**B. Items for Final Approval Without Publication**

**The Committee requests that the Standing Committee approve amendments to Rule 7004(a)(1) \*\*\*\*\* without publication due to their technical and conforming nature.** The Committee recommends that the amendment to Form 101 take effect on December 1, 2017.

**Action Item 2. Reference to Civil Rule 4 in Rule 7004(a)(1) (Summons; Service; Proof of Service).**

Rule 7004 incorporates by reference certain components of Civil Rule 4. In 1996, the Committee amended Rule 7004(a) to incorporate by reference the provision of Civil Rule 4 addressing a defendant's waiver of service of a summons. At that time, the relevant provision of the civil rules was set forth in Civil Rule 4(d)(1), which read:

(1) A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.

In 2007, Civil Rule 4(d) was amended to change, among other things, the language and placement of the foregoing provision. Specifically, the 2007 amendments renumbered the provision as Civil Rule 4(d)(5) and modified the language to read:

**(5) Jurisdiction and Venue Not Waived.** Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.

The cross-reference to Civil Rule 4(d)(1) in Rule 7004(a), however, was not changed at that time.

Accordingly, the Committee recommends an amendment to Rule 7004(a) to incorporate the correct subsection of Civil Rule 4(d), that being Civil Rule 4(d)(5). The language of the proposed amendment to Rule 7004(a) is included in *Appendix A2*. Based on its technical and conforming nature, the Committee further recommends that the proposed amendment to Rule 7004(a) be submitted to the Judicial Conference for approval without prior publication.

\*\*\*\*\*

**Excerpt from the May 22, 2017 Report of the Advisory Committee on Bankruptcy Rules**

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

**DAVID G. CAMPBELL**  
CHAIR

**REBECCA A. WOMELDORF**  
SECRETARY

**CHAIRS OF ADVISORY COMMITTEES**

**MICHAEL A. CHAGARES**  
APPELLATE RULES

**SANDRA SEGAL IKUTA**  
BANKRUPTCY RULES

**JOHN D. BATES**  
CIVIL RULES

**DONALD W. MOLLOY**  
CRIMINAL RULES

**WILLIAM K. SESSIONS III**  
EVIDENCE RULES

**MEMORANDUM**

**TO:** Hon. David G. Campbell, Chair  
Committee on Rules of Practice and Procedure

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

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

**DATE:** May 22, 2017

---

**I. Introduction**

The Advisory Committee on Bankruptcy Rules met in Nashville, Tennessee, on April 6, 2017. \*\*\*\*\*

At the meeting the Committee considered comments that were submitted in response to the publication in August 2016 of one proposed new rule and proposed amendments to ten existing rules \*\*\*\*\* and a new appendix. The majority of these rule and form amendments were proposed to conform to recent and proposed amendments to the civil and appellate rules and forms. After making some changes in response to comments, the Committee gave final approval to all but one of the published rules and to the published forms.

The Committee also approved conforming amendments to six rules that had not been published for comment. These amendments track the wording of proposed amendments to the civil and appellate rules regarding electronic filing, service, and signatures and the posting of security for stays of judgment.



\*\*\*\*\*

The action items presented by the Committee are discussed below in Part II, organized as follows:

A. Items for Final Approval

(A1) Rules \*\*\*\*\* published for comment in August 2016—

- Rule 3002.1(b) and (e);
- Rule 5005(a)(2);
- Rules 8002(b) and (c), 8011(a)(2)(C), 8013, 8015, 8016, 8017, 8022, \*\*\*\*\*, and new Part VIII Appendix;
- Rules 8002(a), 8006, and new Rule 8018.1;
- \*\*\*\*\*

(A2) Conforming changes proposed without publication—

- Rule 8011(a), (c), (d), and (e);
- Rules 7062, 8007, 8010, 8021, and 9025;
- \*\*\*\*\*

\*\*\*\*\*

**II. Action Items**

**A. Items for Final Approval**

*A1. Rules published for comment in August 2016.*

**The Committee recommends that the Standing Committee approve and transmit to the Judicial Conference the proposed rule amendments that were published for public comment in August 2016 and are discussed below.** Bankruptcy Appendix A includes the rules and forms that are in this group.

**Action Item 1. Rule 3002.1(b) and (e) (Notice Relating to Claims Secured by a Security Interest in the Debtor’s Principal Residence).** This rule applies with respect to home mortgage claims in chapter 13 cases. It imposes noticing requirements on the creditor in order to enable the debtor or trustee to make mortgage payments in the correct amount while the bankruptcy case is pending. The published amendments to subdivisions (b) and (e) do three things: they (i) create flexibility regarding a notice of payment change for home equity lines of credit; (ii) create a procedure for objecting to a notice of payment change; and (iii) expand the category of parties who can seek a determination of fees, expenses, and charges that are owed at the end of the case.

Report to Standing Committee  
Advisory Committee on Bankruptcy Rules  
May 22, 2017

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Three comments were submitted in response to the publication. They were submitted by Aderant CompuLaw (BK-2016-0003-0006); the National Conference of Bankruptcy Judges (“NCBJ”) (BK-2016-0003-0007); and the Pennsylvania Bar Association (BK-2016-0003-0008). The Bar Association stated that it supports adoption of the amendments to Rule 3002.1(b) and (e). The other two commenters expressed support for these amendments but made some wording suggestions.

The NCBJ comment made stylistic suggestions, in response to which the Committee divided subdivision (b) into two paragraphs with separate captions and changed the word “that” to “who” in the first sentence of (b)(2).

Aderant noted the impact of Rule 9006(f) on the timing provisions of the proposed amendment to subdivision (b). It pointed out that if a notice of a payment change is served by mail, Rule 9006(f) would give an objector three extra days to file a motion that would keep the change from going into effect. As a result, a timely objection could be filed on or after the effective date of the payment change. For example, if the notice were served by mail 21 days before the payment due date, under the rule an objector would have 24 days to file its motion, thereby permitting a motion designed to stop the change to be filed three days after the change went into effect. Aderant suggested that to avoid this confusion, the rule should require a motion that would stop the payment change from taking effect to be filed “by the day prior to the date the new amount is due.” The Committee made revisions, using slightly different language, in response to this suggestion.

With those changes and additional ones suggested by the style consultants, the Committee unanimously approved the amendments to Rule 3002.1(b) and (e).

**Action Item 2. Rule 5005(a)(2) (Electronic Filing and Signing).** Rule 5005(a)(2) governs the filing of documents electronically in federal bankruptcy cases. Consistent with the Standing Committee’s suggestion that the advisory committees work collaboratively on electronic filing and service issues, the Committee worked with the Civil, Criminal, and Appellate Advisory Committees on matters relating to Rule 5005(a)(2). Bankruptcy Rule 7005 makes Civil Rule 5 applicable in adversary proceedings. Therefore, an amendment to Civil Rule 5(d)(3) automatically applies in adversary proceedings unless Rule 7005 is amended to provide otherwise. The Bankruptcy Rules, however, also address electronic filing in Rule 5005(a)(2). That rule largely tracks the language of current Civil Rule 5(d)(3). Because Rule 7005 incorporates any amendments to Civil Rule 5(d)(3), and Rule 5005(a)(2) should be consistent with Rule 7005, the Committee proposed amending Rule 5005(a)(2) in a similar manner.

The amendments to Rule 5005(a)(2) that were published for public comment in August 2016 were consistent, to the greatest extent possible, with the proposed amendments to Civil Rule 5(d)(3). The variations between the proposed amendments to Rule 5005(a)(2) and Civil Rule 5(d)(3) relate primarily to different terminology used by the Bankruptcy Rules and the

Report to Standing Committee  
Advisory Committee on Bankruptcy Rules  
May 22, 2017

Page 4

Bankruptcy Code.<sup>1</sup>

The Committee received six public comments on the proposed amendments to Rule 5005(a)(2). Notably, the majority of these comments concerned the language of Rule 5005(a)(2)(C), which, as published, read:

(C) *Signing.* The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.<sup>2</sup>

Several comments suggested that this language is confusing and does not clearly state who can file the document, who can sign the document, or the information required on the signature block. The other advisory committees received similar comments on their proposed amendments akin to the language of Rule 5005(a)(2)(C). In addition, our Committee received one comment (also submitted to the other advisory committees) from an individual named Sai (BK-2016-0003-0012) who opposed the default rule that pro se parties cannot file electronically. We received another comment—from the New York City Bar Association—that requested that the following language, which appears in the Committee Note to the proposed amendments to Civil Rule 5, be added to the Committee Note to Rule 5005(a)(2):

Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant.

At the spring meeting, the Committee considered all of these comments and a suggested revision to Rule 5005(a)(2)(C) that the reporters to the various advisory committees had discussed and that the other committees would consider at their spring meetings. The Committee voted unanimously to approve the following language for the provision:

(C) *Signing.* A filing made through a person's electronic-filing account, together with the person's name on a signature block, constitutes the person's signature.

---

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

<sup>2</sup> Comments addressing the signature provision were submitted by Carolyn Buffington (BK-2016-0003-0005), NCBJ (BK-2016-0003-0007), the Pennsylvania Bar Association (BK-2016-0003-0008), Heather Dixon (BK-2016-0003-0010), and the New York City Bar Association (BK-2016-0003-0011).

The Committee decided against inserting the word “authorized” before the word “filing” (a change adopted by some of the other advisory committees) because Rule 5005(a)(2)(C) does not indicate who would authorize the filing or how the authorization would be accomplished. Rather than introduce such ambiguity into this provision, the Committee decided to revise the Committee Note to indicate that the filing must comply with court rules, which may specify when someone may file a document electronically using someone else’s CM/ECF credentials. The following language was approved for inclusion in the Committee Note:

A filing made through a person’s electronic-filing account, together with the person’s name on a signature block, constitutes the person’s signature. A person’s electronic-filing account means an account established by the court for use of the court’s electronic-filing system, which account the person accesses with the user name and password (or other credentials) issued to that person by the court. The filing also must comply with the rules of the court governing electronic filing.

The Committee also accepted the New York City Bar Association’s suggestion that the Committee Note include the language from the civil rule’s Committee Note about ensuring access to courts.

Along with the other advisory committees, our Committee chose not to adopt a default rule permitting electronic filing by pro se litigants. In reaching this conclusion, the Committee examined other potential default rules, including one that would mandate electronic filing by pro se litigants and one that would allow pro se litigants to elect to file either electronically or manually, both subject to certain exceptions and qualifications. It decided that, on balance, it was preferable to maintain the proposed language of the electronic filing and service rules, which would allow a pro se party to request permission to file electronically and allow courts to adopt a local rule that mandated electronic filing by pro se parties, provided that such rule included reasonable exceptions.

**Action Item 3. Proposed amendments to the bankruptcy appellate rules and forms to conform to recent and proposed amendments to the Federal Rules of Appellate Procedure (“FRAP”).** Part VIII of the Bankruptcy Rules (Appeals) was completely revised in 2014 to conform as closely as possible to parallel FRAP provisions. Rather than incorporating FRAP provisions by reference, the Part VIII rules largely track the language of FRAP.

A large set of FRAP amendments went into effect on December 1, 2016. With one exception, the Part VIII amendments included in this action item were proposed to bring the Bankruptcy Rules into conformity with the relevant FRAP provisions that were amended. One

other amendment, discussed below, was proposed to conform to a parallel FRAP provision that was also published for comment last summer.

Three comments were submitted in response to the publication of these rules, forms, and appendix. One commenter—the NCBJ—stated that it supports all of the published bankruptcy appellate rules (BK-2016-0003-0007). It did not comment on the forms or appendix. The other two comments were submitted by the Pennsylvania Bar Association (BK-2016-0003-0008) and attorney Heather Dixon (BK-2016-0003-0009). The Bar Association expressed support for all of the published appellate rules, form, and appendix, except as noted below. Ms. Dixon proposed alternative language for Rule 8017.

The Committee unanimously approved all of these rules, forms, and appendix as published.

**A. Rules 8002(c), 8011(a)(2)(C), \*\*\*\*\*** (inmate filing provisions). Bankruptcy Rules 8002(c) (Time for Filing Notice of Appeal) and 8011(a)(2)(C) (Filing and Service; Signature) include inmate-filing provisions that are virtually identical to the former provisions of Appellate Rules 4(c) and 25(a)(2)(C). These rules treat notices of appeal and other papers as timely filed by such inmates if the documents are deposited in the institution’s internal mail system on or before the last day for filing and several other specified requirements are satisfied. The 2016 FRAP amendments were made to clarify certain issues that have produced conflicts in the case law. They (1) make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions; (2) clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid; and (3) clarify that if sufficient evidence does not accompany the initial filing, the court of appeals has discretion to permit the later filing of a declaration or notarized statement to establish timely deposit. The Committee’s proposed amendments to Rules 8002(c) and 8011(a)(2)(C) track these changes.

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No comments were submitted that specifically addressed these proposed amendments.

**B. Rule 8002(b)** (timeliness of tolling motions). Rule 8002(b) and its counterpart, Appellate Rule 4(a)(4), set out a list of postjudgment motions that toll the time for filing an appeal. Prior to amendment, the appellate rule provided that the motion must be “timely file[d]” in order to have a tolling effect. The 2016 amendment to Rule 4(a)(4) resolved a circuit split on the question whether a tolling motion filed outside the time period specified by the relevant rule, but nevertheless ruled on by the district court, is timely filed for purposes of Rule 4(a)(4). Adopting the majority view on this issue, the amendment added an explicit requirement that the motion must be filed within the time period specified by the rule under which it is made in order

to have a tolling effect for the purpose of determining the deadline for filing a notice of appeal. A similar amendment to Rule 8002(b) was published in August 2016, and no comments were submitted specifically addressing this provision.

**C. Rules 8013, 8015, 8016, 8022, \*\*\*\*\*, and Part VIII Appendix** (length limits). The 2016 amendments to Appellate Rules 5, 21, 27, 35, and 40 converted the existing page limits to word limits for documents prepared using a computer. For documents prepared without the aid of a computer, the page limits set out in those rules were retained. The amendments employed a conversion ratio of 260 words per page. The previous ratio was 280 words per page.

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

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

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

In response to publication, no comments were submitted that specifically addressed the amendments to these provisions or to the appendix.

**D. Rule 8017** (amicus filings). Rule 8017 is the bankruptcy counterpart to Appellate Rule 29. The recent amendment to Rule 29 provides a default rule concerning the timing and length of amicus briefs filed in connection with petitions for panel rehearing or rehearing en banc. The rule previously did not address the topic; it was limited to amicus briefs filed in connection with the original hearing of an appeal. The 2016 amendment does not require courts to accept amicus briefs regarding rehearing, but it provides guidelines for such briefs that are permitted.

Our Committee proposed a parallel amendment to Rule 8017. The proposed amendment designates the existing rule as subdivision (a) and governs amicus briefs during a court's initial consideration of a case on the merits. It adds a new subdivision (b), which governs amicus briefs

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when a district court or bankruptcy appellate panel (BAP) considers whether to grant rehearing. The latter subdivision could be overridden by a local rule or order in a case.

In August 2016 the Appellate Rules Advisory Committee published another amendment to Appellate Rule 29(a). It would authorize a court of appeals to prohibit or strike the filing of an amicus brief to which the parties consented if the filing would result in the disqualification of a judge. Our Committee proposed and published a similar amendment to Rule 8017 in order to maintain consistency between the two sets of rules.

In response to publication, two comments were submitted that addressed the proposed amendment to Rule 8017(a) regarding the striking of amicus briefs to avoid a judge's disqualification. Both the Pennsylvania Bar Association and attorney Heather Dixon incorporated comments that they had submitted in response to publication of the parallel amendments to Appellate Rule 29. The Bar Association stated that it opposed this amendment in both sets of rules because amicus briefs are usually filed before an appeal is assigned to a panel of judges and thus the amicus and its counsel would have no way of knowing whether recusal would later be required. The Association suggested that under those circumstances the better course would be for the judge to recuse. Striking of the amicus brief might be appropriate, the Association commented, if it appeared that the brief was filed for the purpose of obtaining a recusal, but the proposed provision is not so limited. The Association further stated that when an amicus retains counsel for the purpose of prompting a recusal of a judge, the lawyer could be disqualified instead.

Ms. Dixon expressed opposition to the wording of the Appellate Rule 29/Bankruptcy Rule 8017 amendments as published. She proposed a revision of Rule 29(a) and (b) that would eliminate the filing of amicus briefs with the consent of all parties, would not require the amicus brief to accompany a motion for leave to file, and would specify the circumstances under which it would be permissible to file an amicus brief that would cause a judge's recusal.

The Committee voted unanimously to approve Rule 8017 as published, subject to reconsideration if the Appellate Rules Committee concluded that changes to the Appellate Rule 29(a) amendment should be made.<sup>3</sup> The Committee concluded that Ms. Dixon's proposal represented a more fundamental change in the rule than either advisory committee had in mind when it proposed an amendment to address the narrow situation of authorizing the denial of amicus participation, despite the consent of all parties, when recusal would otherwise result. As for the Pennsylvania Bar Association's concern about the potential unfairness of striking amicus briefs, members noted that, because the proposed rule is permissive, an appellate court could

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<sup>3</sup> The Committee was subsequently informed that the Appellate Rules Committee voted not to make any changes to its proposed amendment in response to the comments. It did, however, make some stylistic changes and added to subdivision (b), in addition to (a), the proposed provision regarding amicus briefs that may cause a judge's disqualification. Our Committee made similar changes.

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weigh competing considerations in deciding whether recusal, lawyer disqualification, or striking the brief would be appropriate in a particular case.

**Action Item 4**. **Additional amendments to the bankruptcy appellate rules.** In addition to the conforming amendments to Part VIII rules discussed in the previous action item, three additional bankruptcy appellate rule amendments and a new bankruptcy appellate rule were published last summer in response to a suggestion and comments that the Committee had received.

In response to publication, no comments were submitted specifically addressing these amendments. Following discussion of them at the spring meeting, the Committee voted unanimously to seek final approval of all of them as published, except for Rule 8023, which was sent back to a subcommittee for further consideration. Rule 8023 is discussed as an information item in Part III of this report.

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

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

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

The Committee concluded that the rules specifying when a separate document is required and the impact of the requirement on the date of entry of the judgment are sufficiently confusing that, as suggested by Judge Klein, Rule 8002 would likely be improved by adding a provision



similar to Appellate Rule 4(a)(7). The proposed amendment adds a new subdivision (a)(5) defining entry of judgment. As proposed for amendment, it would clarify that the time for filing a notice of appeal under subdivision (a) begins to run upon docket entry in contested matters and adversary proceedings for which Rule 58 does not require a separate document. In adversary proceedings for which Rule 58 does require a separate document, the time commences when the judgment, order, or decree is entered in the civil docket and (1) it is set forth on a separate document, or (2) 150 days have run from the entry in the civil docket, whichever occurs first.

**B. Rule 8006(c)** (court statement on merits of certification). The Committee published another amendment suggested by Judge Klein in response to the 2012 publication of the Part VIII amendments. Under 28 U.S.C. § 158(d)(2)(A), which is implemented by revised Rule 8006(c), all appellants and all appellees, acting jointly, may certify a proceeding for direct appeal to the court of appeals without any action being taken by the bankruptcy court, district court, or BAP. Judge Klein suggested that a provision be added to Rule 8006(c) that would be a counterpart to Rule 8006(e)(2). The latter provision authorizes a party to file a short supplemental statement regarding the merits of certification within 14 days after the court certifies a case for direct appeal on its own motion. Judge Klein suggested that the bankruptcy court should have a similar opportunity to comment when the parties certify the appeal.

At the fall 2013 meeting, the Committee concluded that the court of appeals would likely benefit from the court's statement about whether the appeal satisfies one of the grounds for certification. The Committee decided, however, that authorization should not be limited to the bankruptcy court. Because under Rule 8006(b) the matter might be deemed to be pending in the district court or BAP at the time or shortly after the parties file the certification, those courts should also be authorized to file a statement with respect to appeals pending before them. The authorization would be permissive, however, so a court would not be required to file a statement. A new subdivision (c)(2) would authorize such supplemental statements by the court.

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

In response to *Stern v. Marshall*, 564 U.S. 462 (2011), Professor Alan Resnick submitted Suggestion 12-BK-H, which proposed a rule amendment to address the situation in which an appeal is taken from a bankruptcy court judgment and the district court decides that the proceeding is one in which the bankruptcy court lacked constitutional authority to enter a final judgment. Adopting a procedure that some districts have authorized by local rule, the proposed rule would allow the district court to review the judgment as if the bankruptcy court had treated

the proceeding as non-core under 28 U.S.C. § 157(c)(1).<sup>4</sup> This procedure would eliminate the need for a remand to the bankruptcy court for the entry of proposed findings and conclusions.

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

The decision made clear that *Stern* claims do not fall within a statutory gap of being neither core nor non-core. Instead, once identified as *Stern* claims, they can be treated under the statutory provisions for non-core claims, as the proposed rule authorizes. Moreover, *Arkison* shows the Court’s acceptance of a pragmatic approach to dealing with errors in the handling of *Stern* claims. Rather than reversing and remanding for the bankruptcy court to handle the proceeding as a non-core matter, it accepted the district court’s review as being tantamount to review of a non-core proceeding. *See also Stern*, 564 U.S. at 471-72 (noting without criticism that “[b]ecause the District Court concluded that Vickie’s counterclaim was not core, the court determined that it was required to treat the Bankruptcy Court’s judgment as ‘proposed[,] rather than final,’ and engage in an ‘independent review’ of the record”).

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

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<sup>4</sup> Section 157(c)(1) provides as follows:

A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such a proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge’s proposed findings and conclusions and after reviewing *de novo* those matters to which any party has timely and specifically objected.

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novo review is sought or whether they should be supplemented with specific objections and responses.

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*(A2) Conforming changes proposed for approval without publication.*

**The Committee recommends that the Standing Committee approve and transmit to the Judicial Conference the proposed rule and form amendments that are discussed below.** The reasons for seeking approval without publication are discussed for each action item. Bankruptcy Appendix A includes the rules and forms that are in this group.

**Action Item 7. Rule 8011(a), (c), (d), and (e) (Filing and Service; Signature).** At the January Standing Committee meeting, the Committee informed the Standing Committee that it had initially overlooked the need to amend Rule 8011 at the same time as it made changes in coordination with the other advisory committees' proposed amendments regarding electronic filing, service, and signatures. In order that conforming amendments to Rule 8011 can be approved to go into effect at the same time as the amendments to Rule 5005(a) and the parallel provisions of the civil, criminal, and appellate rules, the Committee seeks approval of these amendments without publication. The text of the proposed amendments to Rule 8011, which includes the published amendments regarding inmate filing that are discussed at Action Item 2, is set out in Appendix A.

At the spring meeting, the Committee considered the comments that were submitted in response to the publication of Rule 5005(a) and the parallel rules, and it approved responsive changes that generally conform to the proposed amendments to Rule 5005 and Civil Rule 5, Criminal Rule 49, and Appellate Rule 25. The proposed amendments, however, differ in wording from the parallel civil, criminal, and appellate rules in a few respects. First, as is the case with Rule 5005(a)(2)(C), the provision regarding electronic signatures is not limited to "authorized" filings. Second, maintaining a difference in the existing rules, Rule 8011(c)(3) provides that electronic service is "complete upon filing or sending, unless the person making service *receives notice* that the document was not received by the person served." This differs from Civil Rule 5(b)(2)(E)'s and Criminal Rule 49(a)(3)(A)'s references to "the filer or sender<sup>5</sup> *learn[ing]* that the document was not received" and Appellate Rule 25(c)(4)'s reference to "the person making service [*being*] *notified* that the paper was not received." Finally, Rule 8011 generally follows the organization of Appellate Rule 25, which differs from the organization of Civil Rule 5 and proposed Criminal Rule 49.

The Committee unanimously approved the amendments to Rule 8011 as set out in Appendix A.

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<sup>5</sup> The criminal rule says "the serving party" rather than "the filer or sender."

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**Action Item 8. Rules 7062 (Stay of Proceedings to Enforce a Judgment), 8007 (Stay Pending Appeal; Bonds; Suspension of Proceedings), 8010 (Completing and Transmitting the Record), 8021 (Costs), and 9025 (Security: Proceedings Against Sureties).** The Committee seeks approval of amendments to these rules to conform in part to proposed and published amendments to Civil Rules 62 (Stay of Proceedings to Enforce a Judgment) and 65.1 (Proceedings Against a Surety) that would lengthen the period of the automatic stay of a judgment and broaden and modernize the terminology “supersedeas bond” and “surety.” The Appellate Rules Committee has also published amendments to Appellate Rules 8 (Stay or Injunction Pending Appeal), 11 (Forwarding the Record), and 39 (Costs) that would adopt conforming terminology.

If the amendments are approved, Civil Rule 62 would no longer refer to a “supersedeas bond.” Instead, the rule would use the more expansive terms “bond or other security.” This amendment is proposed in order to make clear that security in a form other than a bond may be used. Consistent with that change, Civil Rule 65.1 would be amended to refer to “other security providers.”

Bankruptcy Rule 7062 does not need to be amended to adopt the changed terminology because it provides that Civil Rule 62 “applies in adversary proceedings.” Thus any amendment to Rule 62 automatically applies in bankruptcy adversary proceedings. Rule 9025 does, however, need to be amended to be consistent with amended Rules 62 and 7062. The Committee also seeks approval of amendments to Rule 8007, 8010, and 8021 to conform to the terminology changes proposed for Appellate Rules 8, 11, and 39. The texts of the proposed amendments are included in Appendix A.

In addition to changing the terminology of Civil Rule 62, the published amendments to that rule would lengthen the automatic stay of a judgment entered in the district court from 14 to 30 days. The Committee Note explains this change as follows:

New Rule 62(a) extends the period of the automatic stay to 30 days. Former Rule 62(a) set the period at 14 days, while former Rule 62(b) provided for a court-ordered stay “pending disposition of” motions under Rules 50, 52, 59, and 60. The time for making motions under Rules 50, 52, and 59, however, was later extended to 28 days, leaving an apparent gap between expiration of the automatic stay and any of those motions (or a Rule 60 motion) made more than 14 days after entry of judgment. The revised rule eliminates any need to rely on inherent power to issue a stay during this period. Setting the period at 30 days coincides with the time for filing most appeals in civil actions, providing a would-be appellant the full period of appeal time to arrange a stay by other

means. A 30-day automatic stay also suffices in cases governed by a 60-day appeal period.

If no exception is made to Rule 7062's incorporation of Civil Rule 62, this change will apply to bankruptcy adversary proceedings, thereby lengthening to 30 days the period of the automatic stay of judgment.

The Committee voted unanimously to amend Rule 7062 to retain the current 14-day duration of the automatic stay of judgment. Such a change is needed to keep Rule 7062 consistent with other Bankruptcy Rules that govern post-judgment motions and the time for appeal. When the Civil Rules were amended to provide 28 days for post-judgment motions, the Bankruptcy Rules were not similarly amended. Bankruptcy Rules 7052, 9015, and 9023 provide for a 14-day period for seeking a renewed motion for judgment as a matter of law, an amendment of findings, or a new trial. Similarly, Rule 8002 provides for a 14-day period for filing a notice of appeal. These shorter periods have been retained because expedition is frequently important in bankruptcy cases.

To accomplish this departure from Rule 62's time period, the Committee voted to add the following carve-out to Rule 7062's incorporation of Rule 62: "except that proceedings to enforce a judgment are stayed for 14 days after its entry."

Because these amendments are being proposed to (i) adopt terminology changes that will automatically apply in bankruptcy adversary proceedings and (ii) maintain the status quo with respect to automatic stays of judgments in the bankruptcy courts, the Committee seeks approval of these amendments without publication.

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April 26, 2018

Honorable Paul D. Ryan  
Speaker of the House of Representatives  
Washington, DC 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 that were 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 4, 2017; a redline version of the rules with committee notes; an excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2017 Report of the Advisory Committee on Civil Rules.

Sincerely,

April 26, 2018

Honorable Michael R. Pence  
President, United States Senate  
Washington, DC 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 that were 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 4, 2017; a redline version of the rules with committee notes; an excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2017 Report of the Advisory Committee on Civil Rules.

Sincerely,

April 26, 2018

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 5, 23, 62, and 65.1.

[*See infra* pp. — — —.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2018, 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 2074 of Title 28, United States Code.



**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF CIVIL PROCEDURE**

**Rule 5. Serving and Filing Pleadings and Other Papers**

\* \* \* \* \*

**(b) Service: How Made.**

\* \* \* \* \*

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

**(A)** handing it to the person;

\* \* \* \* \*

**(E)** sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means that the person consented to in writing—in either of which events service is complete upon filing or sending, but is not effective if the filer or sender learns that it did not reach the person to be served; or

\* \* \* \* \*

(3) *Using Court Facilities.* [Abrogated (Apr. \_\_, 2018, eff. Dec. 1, 2018.)]

\* \* \* \* \*

**(d) Filing.**

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

**(A) *Papers after the Complaint.*** Any paper after the complaint that is required to be served must be filed no later than a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to

permit entry onto land, and requests for admission.

**(B) *Certificate of Service.*** No certificate of service is required when a paper is served by filing it with the court's electronic-filing system. When a paper that is required to be served is served by other means:

- (i)** if the paper is filed, a certificate of service must be filed with it or within a reasonable time after service; and
- (ii)** if the paper is not filed, a certificate of service need not be filed unless filing is required by court order or by local rule.

**(2) *Nonelectronic Filing.*** A paper not filed electronically is filed by delivering it:

- (A)** to the clerk; or

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

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

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

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

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

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

(C) *Signing.* A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

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

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**Rule 23. Class Actions**

\* \* \* \* \*

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

\* \* \* \* \*

**(2) Notice.**

\* \* \* \* \*

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

of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

\* \* \* \* \*

**(e) Settlement, Voluntary Dismissal, or Compromise.**

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

**(1) *Notice to the Class.***

**(A) *Information That Parties Must Provide to the Court.*** The parties must provide the court with information sufficient to enable

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it to determine whether to give notice of the proposal to the class.

**(B) *Grounds for a Decision to Give Notice.***

The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

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

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

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



- (A) the class representatives and class counsel have adequately represented the class;
- (B) the proposal was negotiated at arm's length;
- (C) the relief provided for the class is adequate, taking into account:
  - (i) the costs, risks, and delay of trial and appeal;
  - (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
  - (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
  - (iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

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

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

(5) *Class-Member Objections.*

(A) *In General.* Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the

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

**(B)** *Court Approval Required for Payment in Connection with an Objection.* Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

- (i)** forgoing or withdrawing an objection, or
- (ii)** forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

**(C)** *Procedure for Approval After an Appeal.* If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of

Rule 62.1 applies while the appeal remains pending.

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

\* \* \* \* \*

**Rule 62. Stay of Proceedings to Enforce a Judgment**

(a) **Automatic Stay.** Except as provided in Rule 62(c) and (d), execution on a judgment and proceedings to enforce it are stayed for 30 days after its entry, unless the court orders otherwise.

(b) **Stay by Bond or Other Security.** At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or other security.

(c) **Stay of an Injunction, Receivership, or Patent Accounting Order.** Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

- (1) an interlocutory or final judgment in an action for an injunction or receivership; or

(2) a judgment or order that directs an accounting in an action for patent infringement.

(d) **Injunction Pending an Appeal.** While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

- (1) by that court sitting in open session; or
- (2) by the assent of all its judges, as evidenced by their signatures.

\* \* \* \* \*

**Rule 65.1. Proceedings Against a Security Provider**

Whenever these rules (including the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions) require or allow a party to give security, and security is given with one or more security providers, each provider submits to the court's jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the security. The security provider's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly send a copy of each to every security provider whose address is known.



# JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

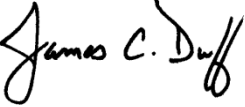
THE CHIEF JUSTICE  
OF THE UNITED STATES  
*Presiding*

JAMES C. DUFF  
*Secretary*

October 4, 2017

## MEMORANDUM

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

From: James C. Duff 

RE: TRANSMITTAL OF PROPOSED AMENDMENT 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 5, 23, 62, and 65.1 of the Federal Rules of Civil Procedure, which were approved by the Judicial Conference at its September 2017 session. The Judicial Conference recommends that the amendments be adopted by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) a copy 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 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the May 2017 Report of the Advisory Committee on Civil Rules.

Attachments



**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF CIVIL PROCEDURE<sup>1</sup>**

1 **Rule 5. Serving and Filing Pleadings and Other Papers**

2 \* \* \* \* \*

3 **(b) Service: How Made.**

4 \* \* \* \* \*

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

7 **(A)** handing it to the person;

8 \* \* \* \* \*

9 **(E)** sending it to a registered user by filing it  
10 with the court's electronic-filing system or  
11 sending it by other electronic means ~~if that~~  
12 the person consented to in writing—in  
13 either of which events service is complete  
14 upon ~~transmission~~ filing or sending, but is  
15 not effective if the ~~serving party~~ filer or

---

<sup>1</sup> New material is underlined; matter to be omitted is lined through.

16 sender learns that it did not reach the person  
17 to be served; or

18 \* \* \* \* \*

19 **(3) *Using Court Facilities.***—~~If a local rule so~~  
20 ~~authorizes, a party may use the court’s~~  
21 ~~transmission facilities to make service under~~  
22 ~~Rule 5(b)(2)(E). [Abrogated (Apr. \_\_, 2018, eff.~~  
23 ~~Dec. 1, 2018.)]~~

24 \* \* \* \* \*

25 **(d) Filing.**

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

27 **(A) *Papers after the Complaint.*** Any paper  
28 after the complaint that is required to be  
29 served ~~together with a certificate of~~  
30 ~~service~~ must be filed ~~with~~ no later than a  
31 reasonable time after service. But  
32 disclosures under Rule 26(a)(1) or (2) and

33 the following discovery requests and  
 34 responses must not be filed until they are  
 35 used in the proceeding or the court orders  
 36 filing: depositions, interrogatories, requests  
 37 for documents or tangible things or to  
 38 permit entry onto land, and requests for  
 39 admission.

40 **(B) Certificate of Service.** No certificate of  
 41 service is required when a paper is served  
 42 by filing it with the court’s electronic-filing  
 43 system. When a paper that is required to be  
 44 served is served by other means:

45 **(i)** if the paper is filed, a certificate of  
 46 service must be filed with it or within  
 47 a reasonable time after service; and

48 **(ii)** if the paper is not filed, a certificate of  
 49 service need not be filed unless filing

50 is required by court order or by local  
51 rule.

52 (2) ~~***Nonelectronic Filing***~~~~***How Filing Is Made***~~~~***In***~~

53 ***General.*** A paper not filed electronically is filed  
54 by delivering it:

55 (A) to the clerk; or

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

59 (3) ~~***Electronic Filing, and Signing, or Verification.***~~

60 ~~A court may, by local rule, allow papers to be~~  
61 ~~filed, signed, or verified by electronic means that~~  
62 ~~are consistent with any technical standards~~  
63 ~~established by the Judicial Conference of the~~  
64 ~~United States. A local rule may require~~  
65 ~~electronic filing only if reasonable exceptions are~~  
66 ~~allowed.~~

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

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

- 76            (i) may file electronically only if allowed  
77            by court order or by local rule; and  
78            (ii) may be required to file electronically  
79            only by court order, or by a local rule  
80            that includes reasonable exceptions.

81            (C) Signing.    A filing made through a person’s  
82            electronic-filing account and authorized by  
83            that person, together with that person’s

84 name on a signature block, constitutes the  
85 person's signature.

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

90 \* \* \* \* \*

#### Committee Note

**Subdivision (b).** Rule 5(b) is amended to revise the provisions for electronic service. Provision for electronic service was first made when electronic communication was not as widespread or as fully reliable as it is now. Consent of the person served to receive service by electronic means was required as a safeguard. Those concerns have substantially diminished, but have not disappeared entirely, particularly as to persons proceeding without an attorney.

The amended rule recognizes electronic service through the court's transmission facilities as to any registered user. A court may choose to allow registration only with the court's permission. But a party who registers will be subject to service through the court's facilities unless the court provides otherwise. With the consent of the person served, electronic service also may be made by means that do not utilize the court's facilities. Consent can

be limited to service at a prescribed address or in a specified form, and may be limited by other conditions.

Service is complete when a person files the paper with the court's electronic-filing system for transmission to a registered user, or when one person sends it to another person by other electronic means that the other person has consented to in writing. But service is not effective if the person who filed with the court or the person who sent by other agreed-upon electronic means learns that the paper did not reach the person to be served. The rule does not make the court responsible for notifying a person who filed the paper with the court's electronic-filing system that an attempted transmission by the court's system failed. But a filer who learns that the transmission failed is responsible for making effective service.

Because Rule 5(b)(2)(E) now authorizes service through the court's facilities as a uniform national practice, Rule 5(b)(3) is abrogated. It is no longer necessary to rely on local rules to authorize such service.

**Subdivision (d).** Rule 5(d)(1) has provided that any paper after the complaint that is required to be served "must be filed within a reasonable time after service." Because "within" might be read as barring filing before the paper is served, "no later than" is substituted to ensure that it is proper to file a paper before it is served.

Under amended Rule 5(d)(1)(B), a certificate of service is not required when a paper is served by filing it with the court's electronic-filing system. When service is not made by filing with the court's electronic-filing system, a certificate of service must be filed with the paper or

within a reasonable time after service, and should specify the date as well as the manner of service. For papers that are required to be served but must not be filed until they are used in the proceeding or the court orders filing, the certificate need not be filed until the paper is filed, unless filing is required by local rule or court order.

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

Filings by a person proceeding without an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in the courts, along with the greater availability of the systems required for electronic filing and the increasing familiarity of most people with electronic



communication. Room is also left for a court to require electronic filing by a pro se litigant by court order or by local rule. Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant. In the beginning, this authority is likely to be exercised only to support special programs, such as one requiring e-filing in collateral proceedings by state prisoners.

A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

1 **Rule 23. Class Actions**

2 \* \* \* \* \*

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

5 \* \* \* \* \*

6 **(2) Notice.**

7 \* \* \* \* \*

8 **(B) For (b)(3) Classes.** For any class certified  
9 under Rule 23(b)(3); —or upon ordering  
10 notice under Rule 23(e)(1) to a class  
11 proposed to be certified for purposes of  
12 settlement under Rule 23(b)(3)—the court  
13 must direct to class members the best notice  
14 that is practicable under the circumstances,  
15 including individual notice to all members  
16 who can be identified through reasonable  
17 effort. The notice may be by one or more

18                   of the following: United States mail,  
19                   electronic means, or other appropriate  
20                   means. The notice must clearly and  
21                   concisely state in plain, easily understood  
22                   language:

23                                   \* \* \* \* \*

24   (e) **Settlement, Voluntary Dismissal, or Compromise.**

25                   The claims, issues, or defenses of a certified class—or  
26                   a class proposed to be certified for purposes of  
27                   settlement—may be settled, voluntarily dismissed, or  
28                   compromised only with the court’s approval. The  
29                   following procedures apply to a proposed settlement,  
30                   voluntary dismissal, or compromise:

31                   (1) **Notice to the Class.**

32                                   (A) **Information That Parties Must Provide to**  
33                                   the Court. The parties must provide the  
34                                   court with information sufficient to enable

35 it to determine whether to give notice of the  
36 proposal to the class.

37 **(B) *Grounds for a Decision to Give Notice.***

38 The court must direct notice in a reasonable  
39 manner to all class members who would be  
40 bound by the proposal if giving notice is  
41 justified by the parties' showing that the  
42 court will likely be able to:

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

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

47 **(2) *Approval of the Proposal.*** If the proposal would  
48 bind class members, the court may approve it  
49 only after a hearing and only on finding that it is  
50 fair, reasonable, and adequate after considering  
51 whether:-

- 52            **(A)** the class representatives and class counsel  
53                            have adequately represented the class;
- 54            **(B)** the proposal was negotiated at arm's length;
- 55            **(C)** the relief provided for the class is adequate,  
56                            taking into account:
- 57                            **(i)** the costs, risks, and delay of trial and  
58    appeal;
- 59                            **(ii)** the effectiveness of any proposed  
60    method of distributing relief to the  
61    class, including the method of  
62    processing class-member claims;
- 63                            **(iii)** the terms of any proposed award of  
64    attorney's fees, including timing of  
65    payment; and
- 66                            **(iv)** any agreement required to be  
67    identified under Rule 23(e)(3); and

68 **(D)** the proposal treats class members equitably  
69 relative to each other.

70 **(3)** **Identifying Agreements.** The parties seeking  
71 approval must file a statement identifying any  
72 agreement made in connection with the proposal.

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

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

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

85 approval. The objection must state whether  
86 it applies only to the objector, to a specific  
87 subset of the class, or to the entire class,  
88 and also state with specificity the grounds  
89 for the objection.

90 **(B)** *Court Approval Required for Payment in*  
91 *Connection with an Objection.* Unless  
92 approved by the court after a hearing, no  
93 payment or other consideration may be  
94 provided in connection with:

95 **(i)** forgoing or withdrawing an objection,  
96 or  
97 **(ii)** forgoing, dismissing, or abandoning  
98 an appeal from a judgment approving  
99 the proposal.

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

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

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



118 proceedings in the district court unless the district  
119 judge or the court of appeals so orders.

120 \* \* \* \* \*

### Committee Note

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

**Subdivision (c)(2).** As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of class certification and approval of the proposed settlement justifies giving notice. This decision has been called “preliminary approval” of the proposed class certification in Rule 23(b)(3) actions. It is common to send notice to the class simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class members to decide by a certain date whether to opt out. This amendment recognizes the propriety of this combined notice practice.

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

Although first class mail may often be the preferred primary method of giving notice, courts and counsel have begun to employ new technology to make notice more effective. Because there is no reason to expect that technological change will cease, when selecting a method or methods of giving notice courts should consider the capacity and limits of current technology, including class members' likely access to such technology.

Rule 23(c)(2)(B) is amended to take account of these changes. The rule continues to call for giving class members "the best notice that is practicable." It does not specify any particular means as preferred. Although it may sometimes be true that electronic methods of notice, for example email, are the most promising, it is important to keep in mind that a significant portion of class members in certain cases may have limited or no access to email or the Internet.

Instead of preferring any one means of notice, therefore, the amended rule relies on courts and counsel to focus on the means or combination of means most likely to be effective in the case before the court. The court should exercise its discretion to select appropriate means of giving notice. In providing the court with sufficient information to enable it to decide whether to give notice to the class of a proposed class-action settlement under Rule 23(e)(1), it would ordinarily be important to include details about the proposed method of giving notice and to provide the court with a copy of each notice the parties propose to use.

In determining whether the proposed means of giving notice is appropriate, the court should also give careful attention to the content and format of the notice and, if

notice is given under both Rule 23(e)(1) and Rule 23(c)(2)(B), any claim form class members must submit to obtain relief.

Counsel should consider which method or methods of giving notice will be most effective; simply assuming that the “traditional” methods are best may disregard contemporary communication realities. The ultimate goal of giving notice is to enable class members to make informed decisions about whether to opt out or, in instances where a proposed settlement is involved, to object or to make claims. Rule 23(c)(2)(B) directs that the notice be “in plain, easily understood language.” Means, format, and content that would be appropriate for class members likely to be sophisticated, for example in a securities fraud class action, might not be appropriate for a class having many members likely to be less sophisticated. The court and counsel may wish to consider the use of class notice experts or professional claims administrators.

Attention should focus also on the method of opting out provided in the notice. The proposed method should be as convenient as possible, while protecting against unauthorized opt-out notices.

**Subdivision (e).** The introductory paragraph of Rule 23(e) is amended to make explicit that its procedural requirements apply in instances in which the court has not certified a class at the time that a proposed settlement is presented to the court. The notice required under Rule 23(e)(1) then should also satisfy the notice requirements of amended Rule 23(c)(2)(B) for a class to be certified under Rule 23(b)(3), and trigger the class members’ time to request exclusion. Information about the

opt-out rate could then be available to the court when it considers final approval of the proposed settlement.

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

The subjects to be addressed depend on the specifics of the particular class action and proposed settlement. But some general observations can be made.

One key element is class certification. If the court has already certified a class, the only information ordinarily necessary is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted. But if a class has not been certified, the parties must ensure that the court has a basis for concluding that it likely will be able, after the final hearing, to certify the class. Although the standards for certification differ for settlement and

litigation purposes, the court cannot make the decision regarding the prospects for certification without a suitable basis in the record. The ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement. If the settlement is not approved, the parties' positions regarding certification for settlement should not be considered if certification is later sought for purposes of litigation.

Regarding the proposed settlement, many types of information might appropriately be provided to the court. A basic focus is the extent and type of benefits that the settlement will confer on the members of the class. Depending on the nature of the proposed relief, that showing may include details of the contemplated claims process and the anticipated rate of claims by class members. Because some funds are frequently left unclaimed, the settlement agreement ordinarily should address the distribution of those funds.

The parties should also supply the court with information about the likely range of litigated outcomes, and about the risks that might attend full litigation. Information about the extent of discovery completed in the litigation or in parallel actions may often be important. In addition, as suggested by Rule 23(b)(3)(B), the parties should provide information about the existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal.

The proposed handling of an award of attorney's fees under Rule 23(h) ordinarily should be addressed in the parties' submission to the court. In some cases, it will be important to relate the amount of an award of attorney's

fees to the expected benefits to the class. One way to address this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results.

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

The parties may supply information to the court on any other topic that they regard as pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court may direct the parties to supply further information about the topics they do address, or to supply information on topics they do not address. The court should not direct notice to the class until the parties' submissions show it is likely that the court will be able to approve the proposal after notice to the class and a final approval hearing.

**Subdivision (e)(2).** The central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate. Courts have generated lists of factors to shed light on this concern. Overall, these factors focus on comparable considerations, but each circuit has developed its own vocabulary for expressing these concerns. In some circuits, these lists have remained essentially unchanged for thirty or forty years. The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.

A lengthy list of factors can take on an independent life, potentially distracting attention from the central

concerns that inform the settlement-review process. A circuit's list might include a dozen or more separately articulated factors. Some of those factors—perhaps many—may not be relevant to a particular case or settlement proposal. Those that are relevant may be more or less important to the particular case. Yet counsel and courts may feel it necessary to address every factor on a given circuit's list in every case. The sheer number of factors can distract both the court and the parties from the central concerns that bear on review under Rule 23(e)(2).

This amendment therefore directs the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal.

Approval under Rule 23(e)(2) is required only when class members would be bound under Rule 23(c)(3). Accordingly, in addition to evaluating the proposal itself, the court must determine whether it can certify the class under the standards of Rule 23(a) and (b) for purposes of judgment based on the proposal.

**Paragraphs (A) and (B).** These paragraphs identify matters that might be described as “procedural” concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement. Attention to these matters is an important foundation for scrutinizing the substance of the proposed settlement. If the court has appointed class counsel or interim class counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus at this point is on

the actual performance of counsel acting on behalf of the class.

The information submitted under Rule 23(e)(1) may provide a useful starting point in assessing these topics. For example, the nature and amount of discovery in this or other cases, or the actual outcomes of other cases, may indicate whether counsel negotiating on behalf of the class had an adequate information base. The pendency of other litigation about the same general subject on behalf of class members may also be pertinent. The conduct of the negotiations may be important as well. For example, the involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests. Particular attention might focus on the treatment of any award of attorney's fees, with respect to both the manner of negotiating the fee award and its terms.

**Paragraphs (C) and (D).** These paragraphs focus on what might be called a “substantive” review of the terms of the proposed settlement. The relief that the settlement is expected to provide to class members is a central concern. Measuring the proposed relief may require evaluation of any proposed claims process; directing that the parties report back to the court about actual claims experience may be important. The contents of any agreement identified under Rule 23(e)(3) may also bear on the adequacy of the proposed relief, particularly regarding the equitable treatment of all members of the class.

Another central concern will relate to the cost and risk involved in pursuing a litigated outcome. Often, courts may need to forecast the likely range of possible classwide



recoveries and the likelihood of success in obtaining such results. That forecast cannot be done with arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure.

If the class has not yet been certified for trial, the court may consider whether certification for litigation would be granted were the settlement not approved.

Examination of the attorney-fee provisions may also be valuable in assessing the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class can be a significant factor in determining the appropriate fee award.

Often it will be important for the court to scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims. A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding.

Paragraph (D) calls attention to a concern that may apply to some class action settlements—inequitable treatment of some class members vis-a-vis others. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief.

**Subdivisions (e)(3) and (e)(4).** Headings are added to subdivisions (e)(3) and (e)(4) in accord with style conventions. These additions are intended to be stylistic only.

**Subdivision (e)(5).** The submissions required by Rule 23(e)(1) may provide information critical to decisions whether to object or opt out. Objections by class members can provide the court with important information bearing on its determination under Rule 23(e)(2) whether to approve the proposal.

**Subdivision (e)(5)(A).** The rule is amended to remove the requirement of court approval for every withdrawal of an objection. An objector should be free to withdraw on concluding that an objection is not justified. But Rule 23(e)(5)(B)(i) requires court approval of any payment or other consideration in connection with withdrawing the objection.

The rule is also amended to clarify that objections must provide sufficient specifics to enable the parties to respond to them and the court to evaluate them. One feature required of objections is specification whether the objection asserts interests of only the objector, or of some subset of the class, or of all class members. Beyond that, the rule directs that the objection state its grounds “with specificity.” Failure to provide needed specificity may be a basis for rejecting an objection. Courts should take care, however, to avoid unduly burdening class members who wish to object, and to recognize that a class member who is not represented by counsel may present objections that do not adhere to technical legal standards.

**Subdivision (e)(5)(B).** Good-faith objections can assist the court in evaluating a proposal under Rule 23(e)(2). It is legitimate for an objector to seek payment for providing such assistance under Rule 23(h).

But some objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process. At least in some instances, it seems that objectors—or their counsel—have sought to obtain consideration for withdrawing their objections or dismissing appeals from judgments approving class settlements. And class counsel sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or other consideration to these objectors. Although the payment may advance class interests in a particular case, allowing payment perpetuates a system that can encourage objections advanced for improper purposes.

The court-approval requirement currently in Rule 23(e)(5) partly addresses this concern. Because the concern only applies when consideration is given in connection with withdrawal of an objection, however, the amendment requires approval under Rule 23(e)(5)(B)(i) only when consideration is involved. Although such payment is usually made to objectors or their counsel, the rule also requires court approval if a payment in connection with forgoing or withdrawing an objection or appeal is instead to another recipient. The term “consideration” should be broadly interpreted, particularly when the withdrawal includes some arrangements beneficial to objector counsel. If the consideration involves a payment to counsel for an objector, the proper procedure is by motion under Rule 23(h) for an award of fees.

Rule 23(e)(5)(B)(ii) applies to consideration in connection with forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal. Because an appeal by a class-action objector may produce much longer delay than an objection before the district court, it is important to extend the court-approval requirement to apply in the appellate context. The district court is best positioned to determine whether to approve such arrangements; hence, the rule requires that the motion seeking approval be made to the district court.

Until the appeal is docketed by the circuit clerk, the district court may dismiss the appeal on stipulation of the parties or on the appellant's motion. See Fed. R. App. P. 42(a). Thereafter, the court of appeals has authority to decide whether to dismiss the appeal. This rule's requirement of district court approval of any consideration in connection with such dismissal by the court of appeals has no effect on the authority of the court of appeals to decide whether to dismiss the appeal. It is, instead, a requirement that applies only to providing consideration in connection with forgoing, dismissing, or abandoning an appeal.

**Subdivision (e)(5)(C).** Because the court of appeals has jurisdiction over an objector's appeal from the time that it is docketed in the court of appeals, the procedure of Rule 62.1 applies. That procedure does not apply after the court of appeals' mandate returns the case to the district court.

**Subdivision (f).** As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a

proposed class-action settlement only after determining that the prospect of eventual class certification justifies giving notice. But this decision does not grant or deny class certification, and review under Rule 23(f) would be premature. This amendment makes it clear that an appeal under this rule is not permitted until the district court decides whether to certify the class.

The rule is also amended to extend the time to file a petition for review of a class-action certification order to 45 days whenever a party is the United States, one of its agencies, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. In such a case, the extension applies to a petition for permission to appeal by any party. The extension recognizes—as under Rules 4(i) and 12(a) and Appellate Rules 4(a)(1)(B) and 40(a)(1)—that the United States has a special need for additional time in regard to these matters. It applies whether the officer or employee is sued in an official capacity or an individual capacity. An action against a former officer or employee of the United States is covered by this provision in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time.

1 **Rule 62. Stay of Proceedings to Enforce a Judgment**

2 ~~(a) Automatic Stay; Exceptions for Injunctions,~~

3 ~~Receiverships, and Patent Accountings.~~ Except as

4 ~~provided in Rule 62(c) and (d), stated in this rule, no~~

5 ~~execution may issue on a judgment, nor may and~~

6 ~~proceedings be taken to enforce it, are stayed for 30~~

7 ~~days until 14 days have passed after its entry, unless~~

8 ~~the court orders otherwise. But unless the court orders~~

9 ~~otherwise, the following are not stayed after being~~

10 ~~entered, even if an appeal is taken:~~

11 ~~(1) an interlocutory or final judgment in an action~~

12 ~~for an injunction or a receivership; or~~

13 ~~(2) a judgment or order that directs an accounting in~~

14 ~~an action for patent infringement.~~

15 ~~(b) Stay Pending the Disposition of a Motion.~~ On

16 ~~appropriate terms for the opposing party's security,~~

17 ~~the court may stay the execution of a judgment or~~

18 ~~any proceedings to enforce it— pending disposition of~~  
19 ~~any of the following motions:~~

20 ~~(1) under Rule 50, for judgment as a matter of law;~~

21 ~~(2) under Rule 52(b), to amend the findings or for~~  
22 ~~additional findings;~~

23 ~~(3) under Rule 59, for a new trial or to alter or~~  
24 ~~amend a judgment; or~~

25 ~~(4) under Rule 60, for relief from a judgment or~~  
26 ~~order.~~

27 **(b) Stay by Bond or Other Security.** At any time after  
28 judgment is entered, a party may obtain a stay by  
29 providing a bond or other security. The stay takes  
30 effect when the court approves the bond or other  
31 security and remains in effect for the time specified in  
32 the bond or other security.

33 **(c) Stay of an Injunction, Receivership, or Patent**  
34 **Accounting Order.** Unless the court orders

35 otherwise, the following are not stayed after being  
36 entered, even if an appeal is taken:

37 (1) an interlocutory or final judgment in an action  
38 for an injunction or receivership; or

39 (2) a judgment or order that directs an accounting in  
40 an action for patent infringement.

41 **(d)** **Injunction Pending an Appeal.** While an appeal is  
42 pending from an interlocutory order or final judgment  
43 that grants, continues, modifies, refuses, dissolves, or  
44 ~~denies~~refuses to dissolve or modify an injunction, the  
45 court may suspend, modify, restore, or grant an  
46 injunction on terms for bond or other terms that secure  
47 the opposing party's rights. If the judgment appealed  
48 from is rendered by a statutory three-judge district  
49 court, the order must be made either:

50 **(1)** by that court sitting in open session; or



51 (2) by the assent of all its judges, as evidenced by  
 52 their signatures.

53 ~~(d) **Stay with Bond on Appeal.** If an appeal is taken, the~~  
 54 ~~appellant may obtain a stay by supersedeas bond,~~  
 55 ~~except in an action described in Rule 62(a)(1) or (2).~~  
 56 ~~The bond may be given upon or after filing the notice~~  
 57 ~~of appeal or after obtaining the order allowing the~~  
 58 ~~appeal. The stay takes effect when the court approves~~  
 59 ~~the bond.~~

60 \* \* \* \* \*

**Committee Note**

Subdivisions (a), (b), (c), and (d) of former Rule 62 are reorganized and the provisions for staying a judgment are revised.

The provisions for staying an injunction, receivership, or order for a patent accounting are reorganized by consolidating them in new subdivisions (c) and (d). There is no change in meaning. The language is revised to include all of the words used in 28 U.S.C. § 1292(a)(1) to describe the right to appeal from interlocutory actions with respect to an injunction, but subdivisions (c) and (d) apply both to interlocutory injunction orders and to final

judgments that grant, refuse, or otherwise deal with an injunction.

New Rule 62(a) extends the period of the automatic stay to 30 days. Former Rule 62(a) set the period at 14 days, while former Rule 62(b) provided for a court-ordered stay “pending disposition of” motions under Rules 50, 52, 59, and 60. The time for making motions under Rules 50, 52, and 59, however, was later extended to 28 days, leaving an apparent gap between expiration of the automatic stay and any of those motions (or a Rule 60 motion) made more than 14 days after entry of judgment. The revised rule eliminates any need to rely on inherent power to issue a stay during this period. Setting the period at 30 days coincides with the time for filing most appeals in civil actions, providing a would-be appellant the full period of appeal time to arrange a stay by other means. A 30-day automatic stay also suffices in cases governed by a 60-day appeal period.

Amended Rule 62(a) expressly recognizes the court’s authority to dissolve the automatic stay or supersede it by a court-ordered stay. One reason for dissolving the automatic stay may be a risk that the judgment debtor’s assets will be dissipated. Similarly, it may be important to allow immediate enforcement of a judgment that does not involve a payment of money. The court may address the risks of immediate execution by ordering dissolution of the stay only on condition that security be posted by the judgment creditor. Rather than dissolve the stay, the court may choose to supersede it by ordering a stay that lasts longer or requires security.

Subdivision 62(b) carries forward in modified form the supersedeas bond provisions of former Rule 62(d). A stay may be obtained under subdivision (b) at any time after judgment is entered. Thus a stay may be obtained before the automatic stay has expired, or after the automatic stay has been lifted by the court. The new rule's text makes explicit the opportunity to post security in a form other than a bond. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security—a party may find it convenient to arrange a single bond or other security that persists through completion of post-judgment proceedings in the trial court and on through completion of all proceedings on appeal by issuance of the appellate mandate. This provision does not supersede the opportunity for a stay under 28 U.S.C. § 2101(f) pending review by the Supreme Court on certiorari. Finally, subdivision (b) changes the provision in former subdivision (d) that “an appellant” may obtain a stay. Under new subdivision (b), “a party” may obtain a stay. For example, a party may wish to secure a stay pending disposition of post-judgment proceedings after expiration of the automatic stay, not yet knowing whether it will want to appeal.

1 **Rule 65.1. Proceedings Against a SuretySecurity**  
2 **Provider**

3 Whenever these rules (including the Supplemental  
4 Rules for Admiralty or Maritime Claims and Asset  
5 Forfeiture Actions) require or allow a party to give security,  
6 and security is given ~~through a bond or other undertaking~~  
7 with one or more ~~sureties~~security providers, each  
8 ~~surety~~provider submits to the court's jurisdiction and  
9 irrevocably appoints the court clerk as its agent for  
10 receiving service of any papers that affect its liability on the  
11 ~~bond or undertaking~~security. The ~~surety's~~security  
12 provider's liability may be enforced on motion without an  
13 independent action. The motion and any notice that the  
14 court orders may be served on the court clerk, who must  
15 promptly ~~mail~~send a copy of each to every ~~surety~~security  
16 provider whose address is known.

**Committee Note**

Rule 65.1 is amended to reflect the amendments of Rule 62. Rule 62 allows a party to obtain a stay of a judgment “by providing a bond or other security.” Limiting Rule 65.1 enforcement procedures to sureties might exclude use of those procedures against a security provider that is not a surety. All security providers, including sureties, are brought into Rule 65.1 by these amendments. But the reference to “bond” is retained in Rule 62 because it has a long history.

The word “mail” is changed to “send” to avoid restricting the method of serving security providers.

**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 Civil Rules 5, 23, 62, and 65.1, 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 2016.

Rule 5 (Serving and Filing Pleadings and Other Papers)

The proposed amendments to Civil Rule 5 are part of the inter-advisory committee project to develop rules for electronic filing and service.

Proposed amendments to Rule 5(b)(2)(E) address electronic service. The present rule allows electronic service only if the person to be served has consented in writing. The proposal deletes the requirement of consent when service is made on a registered user through the court's electronic filing system. Written consent is still required when service is made by electronic means outside the court's system (*e.g.*, discovery materials).

Proposed amendments to Rule 5(d) address electronic filing. Present Rule 5(d)(3) permits papers to be filed, signed, or verified by electronic means if permitted by local rule; a local rule may require electronic filing only if reasonable exceptions are allowed. In practice, most courts require registered users to file electronically. Proposed Rule 5(d)(3)(A) recognizes this reality by establishing a uniform national rule that makes electronic filing mandatory for

**Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure**

parties represented by counsel, except when non-electronic filing is allowed or required by local rule, or for good cause.

Proposed Rule 5(d)(3)(B) addresses filings by pro se parties. Under the proposal, courts would retain the discretion to permit electronic filing by pro se parties through court order or local rule. Any court order or local rule requiring electronic filing for pro se parties must allow reasonable exceptions. While the advisory committee recognizes that some pro se parties are fully capable of electronic filing, the idea of *requiring* a pro se party to electronically file raised concerns that such a requirement could effectively deny access to persons not equipped to do so.

Proposed Rule 5(d)(3)(C) establishes a uniform national signature provision. Commentators found ambiguity in the published language regarding whether the rule would require that the attorney's username and password appear on the filing. In response, the advisory committee, in consultation with the other advisory committees, made revisions to increase the clarity of this amendment.

Finally, the proposal includes a provision addressing proof of service. The current rule requires a certificate of service but does not specify a particular form. The published version of the rule provided that a notice of electronic filing generated by the court's CM/ECF system constitutes a certificate of service. Following the public comment period, the advisory committee revised the proposal to provide that no certificate of service is required when a paper is served by filing it with the court's system. The proposal also addresses whether a certificate of service is required for a paper served by means other than the court's electronic filing system: if the paper is filed, a certificate of service must be filed with it or within a reasonable time after service, and if the paper is not filed, a certificate of service is not required to be filed unless required by local rule or court order.

## **Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure**

### Rule 23 (Class Actions)

The proposed amendments to Rule 23 are the result of more than five years of study and consideration by the advisory committee, through its Rule 23 subcommittee. As previously reported, the decision to take up this effort was prompted by several developments that seemed to warrant reexamination of Rule 23, namely: (1) the passage of time since the 2003 amendments to Rule 23 went into effect; (2) the development of a body of case law on class action practice; and (3) recurrent interest in Congress, including the 2005 adoption of the Class Action Fairness Act. In developing the proposed amendments to Rule 23, the subcommittee attended nearly two dozen meetings and bar conferences with diverse memberships and attendees. In addition, in September 2015, the subcommittee held a mini-conference to gather additional input from a variety of stakeholders on potential rule amendments.

After extensive consideration and study, the subcommittee narrowed the list of issues to be addressed in proposed rule amendments. The proposed amendments published in August 2016 addressed the following seven issues:

1. Requiring earlier provision of information to the court as to whether the court should send notice to the class of a proposed settlement (known as “frontloading”);
2. Making clear that a decision to send notice of a proposed settlement to the class under Rule 23(e)(1) is not appealable under Rule 23(f);
3. Making clear in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice triggers the opt-out period in Rule 23(b)(3) class actions;
4. Updating Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions;
5. Addressing issues raised by “bad faith” class action objectors;
6. Refining standards for approval of proposed class action settlements under Rule 23(e)(2); and



**Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure**

7. A proposal by the Department of Justice to include in Rule 23(f) a 45-day period in which to seek permission for an interlocutory appeal when the United States is a party.

The majority of the comments received during the public comment period for all the proposed Civil Rules amendments—both written and in the form of testimony at three public hearings—addressed the Rule 23 proposals. The advisory committee received some comments urging it to reconsider topics it had determined not to pursue, as well as comments urging it to consider additional topics not previously considered. As to those topics that were included in the proposals published for public comment, most comments addressed the modernization of notice methods and the handling of class member objections to proposed class action settlements.

The subcommittee and advisory committee carefully considered all of the comments received. Minor changes were made to the proposed rule language, and revisions to the committee note were aimed at increasing clarity and succinctness.

Rules 62 (Stay and Proceedings to Enforce a Judgment) and 65.1 (Proceedings Against a Surety)

The proposed amendments to Rule 62 and Rule 65.1 are the product of a joint subcommittee with the Advisory Committee on Appellate Rules. The advisory committee received three comments on the proposed amendments, each of which was supportive.

The proposed amendments to Rule 62 make three changes. First, the period of the automatic stay is extended to 30 days. This change would eliminate a gap in the current rule between automatic stays under subsection (a) and the authority to order a stay pending disposition of a post-judgment motion under subsection (b). Before the Time Computation Project, Civil Rules 50, 52, and 59 set the time for motions at 10 days after entry of judgment. Rule 62(b) recognized authority to issue a stay pending disposition of a motion under Rules 50, 52, or 59, or 60. The Time Computation Project reset at 28 days the time for motions under

**Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure**

Rules 50, 52, or 59. It also reset the expiration of the automatic stay in Rule 62(a) at 14 days after entry of judgment. An unintentional result was that the automatic stay expired halfway through the time allowed to make a post-judgment motion. Rule 62(b), however, continued to authorize a stay “pending disposition of any of” these motions. The proposed amendment to Rule 62(a) addresses this gap by extending the time of an automatic stay to 30 days. The proposal further provides that the automatic stay takes effect “unless the court orders otherwise.”

Second, the proposed amendments make clear that a judgment debtor can secure a stay by posting continuing security, whether as a bond or by other means, that will last from termination of the automatic stay through final disposition on appeal. The former provision for securing a stay on posting a supersedeas bond is retained, without the word “supersedeas.” The right to obtain a stay on providing a bond or other security is maintained with changes that allow the security to be provided before an appeal is taken and that allow any party, not just an appellant, to obtain the stay.

Third, subdivisions (a) through (d) are rearranged, carrying forward with only a minor change the provisions for staying judgments in an action for an injunction or a receivership, or directing an accounting in an action for patent infringement.

The proposed amendment to Rule 65.1 is intended to reflect the expansion of Rule 62 to include forms of security other than a bond. Additional changes were made following the public comment period in order to conform Rule 65.1 to the proposed amendments to Appellate Rule 8(b). As discussed above, the Advisory Committee on Appellate Rules has proposed amendments to the Appellate Rules to conform those rules with the amendments to Civil Rule 62, including amendments to Appellate Rule 8(b). Appellate Rule 8(b) and Civil Rule 65.1 parallel one another. The proposed amendments to Rule 65.1 imitate those to Appellate

**Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure**

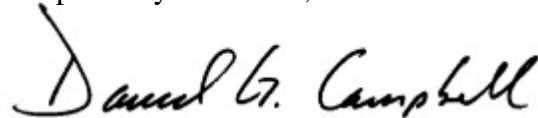
Rule 8(b), namely, removing all references to “bond,” “undertaking,” and “surety,” and substituting the words “security” and “security provider.”

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

**Recommendation:** That the Judicial Conference approve the proposed amendments to Civil Rules 5, 23, 62, and 65.1 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,



David G. Campbell, Chair

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

**MEMORANDUM**

**TO:** Hon. David G. Campbell, Chair  
Committee on Rules of Practice and Procedure

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

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

**DATE:** May 18, 2017

---

*Introduction*

The Civil Rules Advisory Committee met in Austin, Texas, on April 25, 2017. Draft Minutes of this meeting are attached.

Action items are presented in Part I. Proposals to amend Civil Rules 5, 23, 62, and 65.1 were published for comment last August. The Rule 5 proposals coordinate with similar proposals published for comment on recommendations by the Appellate, Bankruptcy, and Criminal Rules Committees. The Rules 62 and 65.1 proposals work in tandem with coordinating proposals published for comment on recommendation of the Appellate Rules Committee. Written comments were submitted on all proposals, although Rule 23 received a majority of them. Three hearings were held, the first on November 3 in conjunction with the Civil Rules meeting, the second on January 4, and the third, by teleconference, on February 16. Almost all of the

testimony addressed Rule 23. Summaries of the comments and testimony are provided with each rule. The Committee recommends that these proposals be recommended for adoption with revisions suggested by the comments and testimony or developed from further joint work with the other advisory committees.

\* \* \* \* \*

## **I. RECOMMENDATIONS TO APPROVE FOR ADOPTION**

### **A. RULE 5**

The proposed amendments of Rule 5 address service and filing of papers after the summons and complaint. The central purpose of the amendments is to recognize the changes that have developed in practice regarding filing and service through the court's electronic-filing system. The amendments also address recurring issues about incidental aspects of e-filing and service.

Turning first to service, proposed Rule 5(b)(2)(E) is recommended for adoption as published. Present Rule 5(b)(2)(E) requires consent of the person served if service is to be made by any electronic means. Present Rule 5(b)(3) provides that if authorized by local rule, a party may use the court's transmission facilities to make service. The proposal changes this system to allow service by sending a paper to a registered user by filing it with the court's electronic filing system. Consent of the registered user is not required. Adopting a uniform national provision entails the further proposal to abrogate Rule 5(b)(3). Rule 5(b)(2)(E) will continue to require written consent of the person to be served when service is made by electronic means outside the court's system.

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Although the service provisions are recommended without change, a new paragraph is proposed for the Committee Note. This paragraph summarizes the service provisions and advises that: “[T]he rule does not make the court responsible for notifying a person who filed the paper with the court’s electronic filing system that an attempted transmission by the court’s system failed.” The Note further observes that a filer who learns that the transmission failed is responsible for making effective service, an obligation imposed by the present rule and carried forward in the proposed rule.

Present Rule 5(d)(3) permits papers to be filed, signed, or verified by electronic means if permitted by local rule. A local rule may require electronic filing only if reasonable exceptions are allowed. Most courts have come to require registered users to file electronically. Proposed Rule 5(d)(3)(A) makes this practice uniform—a person represented by an attorney must file electronically unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule. This amendment has not generated any controversy.

Electronic filing by a person not represented by an attorney is treated differently by proposed Rule 5(d)(3)(B). Electronic filing is permitted only if allowed by court order or by local rule, and may be required only by court order or by a local rule that includes reasonable exceptions. This proposal has generated some concerns. Comments and testimony made it clear that some pro se parties are fully capable of engaging in electronic filing and that permitting this practice can work to benefit the filer, the court, and all other parties. But the Committee—in line with the other advisory committees—concluded that for the present the risks of a general opportunity to file electronically outweigh the benefits. The prospect that a pro se party might be required to file electronically raised fears that access to the court would be effectively denied to persons not equipped to do so. Proposed Rule 5(d)(3)(B) was included in the rule to support programs in a few courts that have set up systems for pro se filing by prisoners. The programs seem to work and to provide real benefits. The Committee Note includes a reminder that access to court must be protected. The Committee concluded that this provision should be included in the recommendation.

Proposed Rule 5(d)(3)(C) is a signature provision to take the place of the provisions in local rules that govern signing an electronic filing. The published version provided that “[t]he user name and password of an attorney of record, together with the attorney’s name on a signature block, serves as the attorney’s signature.” Comments found ambiguity—this wording might be read to require that the name and password appear on the paper. The comments also expressed uncertainty about identifying an attorney of record on the party’s first filing. In consultation with the other advisory committees, the recommendation is to substitute this language:

An authorized filing made through a person’s electronic filing account, together with the person’s name on a signature block, constitutes the person’s signature.

Proposed Rule 5(d), finally, includes a provision for a certificate of service. Present Rule 5(d)(1) states this: “Any paper after the complaint that is required to be served—together

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with a certificate of service—must be filed within a reasonable time after service.” The published proposal aimed to dispense with a separate certificate of service for papers served by filing with the court’s electronic-filing system under proposed Rule 5(b)(2)(E): “A certificate of service must be filed within a reasonable time after service, but a notice of electronic filing constitutes a certificate of service on any person served by the court’s electronic-filing system.” Further discussion found reasons to revise this approach. Treating the notice of electronic filing as a certificate of service has an element of fiction; the Civil Rule proposal then was modified, following the lead of the Appellate Rule proposal, to provide that no certificate of service is required when a paper is served by filing it with the court’s system. That change is carried forward in the revised language set out below.

Additional difficulties emerged from carrying forward the present rule’s provision that a paper must be filed within a reasonable time after service. The principal difficulty seems to be unique to the Civil Rules. Following the direction that a paper must be filed within a reasonable time after service, Rule 5(d)(1)’s second sentence directs that many disclosures and discovery papers “must not be filed until they are used in the proceeding or the court orders filing \* \* \*.” That raised the question whether a certificate of service should be required for a paper that may be filed a long time after it is served, and may well not be filed at all. Several attempts were made to draft a provision to address this situation. Different views were expressed on the value of filing the certificate. Some observers thought that filing certificates would do no more than add needless clutter to court files. But others thought that filing certificates would enable a judge to monitor the docket to ensure that the parties were diligently pursuing an action, and might also prove useful to parties not directly involved with the papers served. Weighing these concerns, the Committee recommends this language for adoption as Rule 5(d)(1)(B), recognizing that item (ii) will be unique to the Civil Rules:

- 1 (B) *Certificate of Service*. No certificate of service is required when a paper is
- 2 served by filing it with the court’s electronic-filing system. When a paper
- 3 that is required to be served is served by other means:
- 4
- 5 (i) if the paper is filed, a certificate of service must be included with it or
- 6 filed within a reasonable time after service, and
- 7
- 8 (ii) if the paper is not filed, a certificate of service need not be filed unless
- 9 filing is required by local rule or court order.

The overstrike and underline version of Rule 5 set out here uses simple overstriking to show changes from present Rule 5, underlining to show new words included in the published proposal, overstriking and underlining to show words included in the published proposal but not in the final proposal, and double underlining to show new words added after publication by the final proposal. The simpler traditional system of overstriking and underlining is used in the Committee Note.

1 **Rule 5. Serving and Filing Pleadings and Other Papers**

2  
3 \* \* \* \* \*

4 **(b) SERVICE: HOW MADE.**

5  
6 \* \* \* \* \*

7  
8 (2) *Service in General.* A paper is served under this rule by:

9  
10 (A) handing it to the person;

11  
12 \* \* \* \* \*

13  
14 (E) sending it to a registered user by filing it with the court's electronic-filing  
15 system or sending it by other electronic means if that the person consented  
16 to in writing—in either of which events service is complete upon  
17 ~~transmission~~ filing or sending, but is not effective if the serving party filer  
18 or sender learns that it did not reach the person to be served; or

19  
20 \* \* \* \* \*

21  
22 ~~(3) *Using Court Facilities.* If a local rule so authorizes, a party may use the court's~~  
23 ~~transmission facilities to make service under Rule 5(B)(2)(E).~~ [Abrogated  
24 (Apr. \_\_, 2018, eff. Dec. 1, 2018.)]

25  
26 \* \* \* \* \*

27  
28 **(d) FILING.**

29  
30 **(1) *Required Filings; Certificate of Service.***

31  
32 (A) *Papers after the Complaint.* Any paper after the complaint that is required to  
33 be served—together with a certificate of service—must be filed within  
34 no later than a reasonable time after service. But disclosures under  
35 Rule 26(a)(1) or (2) and the following discovery requests and responses  
36 must not be filed until they are used in the proceeding or the court orders  
37 filing: depositions, interrogatories, requests for documents or tangible  
38 things or to permit entry onto land, and requests for admission.

39  
40 (B) *Certificate of Service.* ~~A certificate of service must be filed within a~~  
41 ~~reasonable time after service, but a notice of electronic filing constitutes a~~  
42 ~~certificate of service on any person served by the court's electronic filing~~  
43 ~~system.~~ No certificate of service is required when a paper is served by



44 filing it with the court's electronic-filing system. When a paper that is  
45 required to be served is served by other means:

46  
47 (i) if the paper is filed, a certificate of service must be filed with it or  
48 within a reasonable time after service, and

49 (ii) if the paper is not filed, a certificate of service need not be filed unless  
50 filing is required by local rule or court order.

51  
52 \* \* \* \* \*

53  
54 (2) Nonelectronic Filing ~~How Filing is Made in General~~. A paper not filed  
55 electronically is filed by delivering it:

56  
57 (A) to the clerk; or

58  
59 (B) to a judge who agrees to accept it for filing, and who must then note  
60 the filing date on the paper and promptly send it to the clerk.

61  
62 (3) ~~Electronic Filing, and Signing, or Verification~~. ~~A court may, by local rule, allow~~  
63 ~~papers to be filed, signed, or verified by electronic means that are consistent with~~  
64 ~~any technical standards established by the Judicial Conference of the United~~  
65 ~~States. A local rule may require electronic filing only if reasonable exceptions are~~  
66 ~~allowed.~~

67  
68 (A) By a Represented Person—Generally Required; Exceptions. A person represented by  
69 an attorney must file electronically, unless nonelectronic filing is allowed  
70 by the court for good cause or is allowed or required by local rule.

71  
72 (B) By an Unrepresented Person—When Allowed or Required. A person not  
73 represented by an attorney:

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

75 and

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

78  
79 (C) Signing. ~~The user name and password of an attorney of record, together with~~  
80 ~~the attorney's name on a signature block, serves as the attorney's~~  
81 ~~signature~~. An authorized filing made through a person's electronic filing  
82 account, together with the person's name on a signature block, constitutes  
83 the person's signature.

84  
85 (D) Same as a Written Paper. A paper filed electronically ~~in compliance with a~~  
86 ~~local rule~~ is a written paper for purposes of these rules.

87

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COMMITTEE NOTE

**Subdivision (b).** Rule 5(b) is amended to revise the provisions for electronic service. Provision for electronic service was first made when electronic communication was not as widespread or as fully reliable as it is now. Consent of the person served to receive service by electronic means was required as a safeguard. Those concerns have substantially diminished, but have not disappeared entirely, particularly as to persons proceeding without an attorney.

The amended rule recognizes electronic service through the court’s transmission facilities as to any registered user. A court may choose to allow registration only with the court’s permission. But a party who registers will be subject to service through the court’s facilities unless the court provides otherwise. With the consent of the person served, electronic service also may be made by means that do not utilize the court’s facilities. Consent can be limited to service at a prescribed address or in a specified form, and may be limited by other conditions.

Service is complete when a person files the paper with the court’s electronic-filing system for transmission to a registered user, or when one person sends it to another person by other electronic means that the other person has consented to in writing. But service is not effective if the person who filed with the court or the person who sent by other agreed-upon electronic means learns that the paper did not reach the person to be served. The rule does not make the court responsible for notifying a person who filed the paper with the court’s electronic-filing system that an attempted transmission by the court’s system failed. But a filer who learns that the transmission failed is responsible for making effective service.

Because Rule 5(b)(2)(E) now authorizes service through the court’s facilities as a uniform national practice, Rule 5(b)(3) is abrogated. It is no longer necessary to rely on local rules to authorize such service.

**Subdivision (d).** Rule 5(d)(1) has provided that any paper after the complaint that is required to be served “must be filed within a reasonable time after service.” Because “within” might be read as barring filing before the paper is served, “no later than” is substituted to ensure that it is proper to file a paper before it is served.

~~Amended Rule 5(d)(1) provides that a notice of electronic filing generated by the court’s electronic filing system is a certificate of service on any person served by the court’s electronic filing system. Under amended Rule 5(d)(1)(B), a certificate of service is not required when a paper is served by filing it with the court’s electronic-filing system. But if the serving party learns that the paper did not reach the party to be served, there is no service under Rule 5(b)(2)(E) and there is no certificate of (nonexistent) service. When service is not made by filing with the court’s electronic filing system, a certificate of service must be filed with the paper or within a reasonable time after service, and should specify the date as well as the manner of service. For papers that are required to be served but must not be filed until they are used in the~~

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43 proceeding or the court orders filing, the certificate need not be filed until the paper is filed,  
44 unless filing is required by local rule or court order.

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

51  
52 Filings by a person proceeding without an attorney are treated separately. It is not yet  
53 possible to rely on an assumption that pro se litigants are generally able to seize the advantages  
54 of electronic filing. Encounters with the court's system may prove overwhelming to some.  
55 Attempts to work within the system may generate substantial burdens on a pro se party, on other  
56 parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for  
57 governing by local rules or court order. Efficiently handled electronic filing works to the  
58 advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants  
59 with the court's permission. Such approaches may expand with growing experience in the courts,  
60 along with the greater availability of the systems required for electronic filing and the increasing  
61 familiarity of most people with electronic communication. Room is also left for a court to require  
62 electronic filing by a pro se litigant by court order or by local rule. Care should be taken to  
63 ensure that an order to file electronically does not impede access to the court, and reasonable  
64 exceptions must be included in a local rule that requires electronic filing by a pro se litigant. In  
65 the beginning, this authority is likely to be exercised only to support special programs, such as  
66 one requiring e-filing in collateral proceedings by state prisoners.

67  
68 ~~The user name and password of an attorney of record, together with the attorney's name~~  
69 ~~on a signature block, serves as the attorney's signature. An authorized filing through a person's~~  
70 ~~electronic filing account, together with the person's name on a signature block, constitutes the~~  
71 ~~person's signature.~~

72 Gap Report

73  
74 Published Rule 5(d)(1)(B) carried forward the requirement in present Rule 5(d)(1) that  
75 any paper after the complaint that is required to be served "must be filed within a reasonable  
76 time after service." That language does not clearly allow a paper to be filed before it is served. It  
77 is changed to direct filing "no later than" a reasonable time after service.

78  
79 The certificate of service provisions in proposed Rule 5(d)(1)(B) are changed. First, the  
80 provision that a notice of electronic filing constitutes a certificate of service on any person served  
81 by the court's electronic-filing service is replaced by a provision that no certificate of service is  
82 required when a paper is served by filing it with the court's electronic-filing system. Next, the  
83 provision that when a paper is served by other means a certificate of service must be filed within  
84 a reasonable time after service is replaced by a two-part direction: If the paper is filed, a  
85 certificate of service must be filed with it or within a reasonable time after service, and if the

86 paper is not filed, a certificate of service need not be filed unless filing is required by local rule  
87 or court order. The provision recognizing that a paper that has been served may not be filed  
88 reflects the direction in proposed Rule 5(d)(1)(A), carried over from present Rule 5(d)(1), that  
89 many disclosures and discovery papers must not be filed until the court orders filing or they are  
90 used in the action.

91

92 The Committee Note has been changed to reflect these changes.

## RULE 5: CLEAN TEXT

### Rule 5. Serving and Filing Pleadings and Other Papers

\* \* \* \* \*

#### (b) SERVICE: HOW MADE.

\* \* \* \* \*

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

(A) handing it to the person;

\* \* \* \* \*

(E) sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means that the person consented to in writing—in either of which events service is complete upon filing or sending, but is not effective if the filer or sender learns that it did not reach the person to be served; or

\* \* \* \* \*

(3) [Abrogated (Apr. \_\_, 2018, eff. Dec. 1, 2018.)]

\* \* \* \* \*

#### (d) FILING.

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

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served must be filed no later than a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests

for documents or tangible things or to permit entry onto land, and requests for admission.

(B) *Certificate of Service*. No certificate of service is required when a paper is served by filing it with the court's electronic-filing system. When a paper that is required to be served is served by other means:

- (i) if the paper is filed, a certificate of service must be filed with it or within a reasonable time after service, and
- (ii) if the paper is not filed, a certificate of service need not be filed unless filing is required by local rule or court order.

\* \* \* \* \*

(2) *Nonelectronic Filing*. A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

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

(3) *Electronic Filing and Signing*.

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

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

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

(C) *Signing*. An authorized filing made through a person's electronic filing account, together with the person's name on a signature block, constitutes the person's signature.

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

\* \* \* \* \*

COMMITTEE NOTE

**Subdivision (b).** Rule 5(b) is amended to revise the provisions for electronic service. Provision for electronic service was first made when electronic communication was not as widespread or as fully reliable as it is now. Consent of the person served to receive service by electronic means was required as a safeguard. Those concerns have substantially diminished, but have not disappeared entirely, particularly as to persons proceeding without an attorney.

The amended rule recognizes electronic service through the court’s transmission facilities as to any registered user. A court may choose to allow registration only with the court’s permission. But a party who registers will be subject to service through the court’s facilities unless the court provides otherwise. With the consent of the person served, electronic service also may be made by means that do not utilize the court’s facilities. Consent can be limited to service at a prescribed address or in a specified form, and may be limited by other conditions.

Service is complete when a person files the paper with the court’s electronic-filing system for transmission to a registered user, or when one person sends it to another person by other electronic means that the other person has consented to in writing. But service is not effective if the person who filed with the court or the person who sent by other agreed-upon electronic means learns that the paper did not reach the person to be served. The rule does not make the court responsible for notifying a person who filed the paper with the court’s electronic-filing system that an attempted transmission by the court’s system failed. But a filer who learns that the transmission failed is responsible for making effective service.

Because Rule 5(b)(2)(E) now authorizes service through the court’s facilities as a uniform national practice, Rule 5(b)(3) is abrogated. It is no longer necessary to rely on local rules to authorize such service.

**Subdivision (d).** Rule 5(d)(1) has provided that any paper after the complaint that is required to be served “must be filed within a reasonable time after service.” Because “within” might be read as barring filing before the paper is served, “no later than” is substituted to ensure that it is proper to file a paper before it is served.

Under amended Rule 5(d)(1)(B), a certificate of service is not required when a paper is served by filing it with the court’s electronic-filing system. When service is not made by filing with the court’s electronic filing system, a certificate of service must be filed with the paper or within a reasonable time after service, and should specify the date as well as the manner of service. For papers that are required to be served but must not be filed until they are used in the proceeding or the court orders filing, the certificate need not be filed until the paper is filed, unless filing is required by local rule or court order.

Amended Rule 5(d)(3) recognizes increased reliance on electronic filing. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by

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making it generally mandatory in all districts for a person represented by an attorney. But exceptions continue to be available. Nonelectronic filing must be allowed for good cause. And a local rule may allow or require nonelectronic filing for other reasons.

Filings by a person proceeding without an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in the courts, along with the greater availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication. Room is also left for a court to require electronic filing by a pro se litigant by court order or by local rule. Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant. In the beginning, this authority is likely to be exercised only to support special programs, such as one requiring e-filing in collateral proceedings by state prisoners.

An authorized filing through a person's electronic filing account, together with the person's name on a signature block, constitutes the person's signature.

### SUMMARY OF COMMENTS: RULE 5

#### *In General*

Hon. Benjamin C. Mizer, CV-2016-0004-0037: Says simply that the Department of Justice supports these amendments.

Cheryl L. Siler, Esq., Aderant CompuLaw, CV-2016-0004-0058: The proposed revisions are reasonable.

#### *Rule 5(b)*

Pennsylvania Bar Association, CV-0064: The rule should provide for service by electronic means of papers not filed at the time of service, notably disclosures and discovery materials. Service would be by email addressed to attorneys of record at the addresses on the court's electronic filing system. E-service is faster generally, and reduces problems and uncertainty about service.

*Rule 5(d)(1)*

Andrew D’Agostino, Esq., 0035: It should be made clear that the proof of service of the complaint or other case-initiating document can be filed electronically.

Sergey Vernyuk, Esq., 0049: (1) Lawyers regularly include certificates of service as part of the papers served, both in paper form and e-form. The rule should clarify the status of an anticipatory certificate—should the certificate always be a separate document, prepared after actual service? (2) The bar should be educated on the proposition that a certificate need not be included in a disclosure or discovery paper that is not to be filed. (3) Rule 5(d) will continue to direct that “discovery requests and responses,” including “depositions” and “requests for documents [etc.]” not be filed. Does this mean that a Rule 45 subpoena to produce must not be filed as a discovery request to produce documents? (4) The separation of the certificate requirement from its place in the present rule creates an ambiguity. Present Rule 5(d) directs that the certificate be filed when the paper is filed, a reasonable time after service. That means that the certificate is never filed if the paper is never filed, given the direction that disclosures and most discovery papers are to be filed only when the court orders filing or when used in the action. Proposed Rule 5(d)(1)(B) says that the certificate must be filed within a reasonable time after service; on its face it contemplates filing the certificate even though the paper has not been, and may never be, filed.

Michael Rosman, Esq., 0049: As written, Rule 5(d)(1)(B) is ambiguous: the Notice of Electronic Filing constitutes a certificate of service, but must the filer separately file the NEF? It would be better to follow the lead of Appellate Rule 25(d)(1)(B), dispensing with the proof-of-service requirement as to any person served through the court’s system.

Federal Magistrate Judges Association, 0094: With paper, the practice has been to file with the court after making service. With e-filing, filing effects service. If the language of the current rule is retained, something should be added to reflect e-filing: “Any paper after the complaint that is required to be served, **but is served by means other than filing on the court’s electronic filing system**, must be filed within a reasonable time after service.”

*Rule 5(d)(2)*

Sai, 0074: The core message, elaborated over many pages, is direct: The proposed rule impairs the right to appear pro se “by prohibiting pro se litigants from accessing the benefits of CM/ECF on an equal basis with represented litigants.” “This inequity in access and delays results in two procedurally different systems \* \* \*.” “Before the law sit many gatekeepers. Let this not be one of them.”

A pro se litigant who completes whatever training is required for an attorney to become a registered user should be allowed to be a registered user without seeking additional permission, beginning with the right to file a complaint, motion to intervene, or amicus brief. If given access the ability to file a case initiation should prove the filer’s capacity. Inappropriate burdens are



entailed by requiring a preliminary motion for permission, burdens that are particularly inappropriate if the filer is already a CM/ECF filer in the same court. Indeed the rule, as written, would prohibit e-filing even by a registered attorney user who appears pro se as a party. Still worse, a motion cannot be filed unless the case has already been initiated—a pro se plaintiff must always file a paper complaint. The problems that arise when a pro se litigant is not able to use the court’s system effectively can be solved by finding good cause to deny e-filing. But the inevitable small problems can be fixed: “docket clerks routinely screen incoming filings and will correct clear deficiencies or errors.”

At the same time, it should be presumed that a pro se litigant has good cause to file on paper, not in the electronic system. The presumption should be irrebuttable for a pro se prisoner, who should always have the option of paper filing.

The advantages of e-filing are detailed at length. It is virtually instantaneous, and makes the most of applicable time limits. A complaint can be perfected up to the very end of a limitations period. After-hours filing is simple. Only e-filing may be feasible for emergency matters, particularly a request for a TRO or a preliminary injunction—the harm may be done before a paper filing can be prepared and filed. A pro se defendant must wait to be served by non-electronic means.” For litigants with disabilities, who travel frequently, or reside overseas, such as me, waiting for and accessing physical mail imposes routinely delays of weeks. This is just to *receive* filings; one must also respond.”

E-filing also is important for litigants with disabilities, particularly those with impaired vision. A document scanned into the court file from a paper original is more difficult to use, in some settings much more difficult. E-documents “are more readable on a screen; they can be more readily printed in large print or other adaptive formats; they preserve hyperlinks; and they permit PDF structuring, such as bookmarks for sections or exhibits.” “Being required to file on paper hinders *everyone’s* access to the litigant’s filings \* \* \*.”

E-filing also is less expensive, and much less expensive for long filings. Courts often “require multiple duplicates of case initiation documents for service, chambers, etc.” These costs are particularly burdensome for i.f.p. litigants.

A registered user of the CM/ECF system can receive the same notices of electronic filing as the parties to a case. That can support tracking for an eventual motion to intervene or an amicus brief. It can give access to arguments that can be cribbed or anticipated and opposed, evidence found by litigants to other cases, or information of “journalistic interest, where immediate notification of developments is critical to presenting timely news to one’s audience.” (There are other references to citizen journalists and observations that denying access of right to e-filing operates as a prior restraint. The prior restraint observations seem to extend beyond the citizen-journalist concern to the broader themes of burden.) A nonparty pro se can be allowed to file only an initiating document, such as a motion for leave to file; improper filings can be summarily denied or sanctioned.

Nov. 3 Hearing, Sai, pp. 112-124: The argument is clearly made: pro se litigants should be allowed to choose for themselves whether to e-file. There should be no need to ask either for permission or for exemption. This argument is supported by recounting the many advantages Sai has experienced as a pro se litigant when allowed to e-file, and the many disadvantages experienced when not allowed to e-file. (1) Even in courts that allow a pro se litigant to e-file, generally the litigant must first commence the action on paper and then seek leave to e-file. That adds to delay and expense. (2) e-filing is faster and less expensive. Last-minute extensions, for example, can be sought after the clerk’s office has closed. A request for a TRO can be filed instantly, as compared to the cost and delay of mail. And filings by other parties are communicated instantly by the Notice of Electronic Filing, as compared to the cost and delay of periodic access to the court file through PACER. Sai is an IFP litigant, and the costs of printing and mailing are inconsistent with the IFP policy. (3) When paper filings are scanned into the court’s e-files readability suffers, and it is not possible to include links to exhibits, court decisions, and like e-materials. “The structure of a PDF is harmed.” (4) The fears that underlie the “presumption” against pro se e-filing are exaggerated. It should not be presumed that pro se litigants are vexatious. Pro se litigants are not the only ones who occasionally make mistakes in docketing — clerks do it too. Many pro se litigants are fully capable of e-filing; Sai has done it successfully in several cases after going through the chore of getting permission.

*Rule 5(d)(3): Electronic Filing*

Michael Rosman, Esq., 0061: (1) The rule text does not define “user name” or “password.” It could be read to require that they be included in the paper that is filed. But the only way to file electronically is by entering the user name and password. It would be better to say: “For all papers filed electronically by attorneys who are registered users of the Court’s electronic filing system, the attorney’s name on a signature block serves as the attorney’s signature.” (2) What about papers that are not filed at the time of service—disclosures and discovery materials? Rule 26(g) requires that they be signed. They may be served by electronic means outside the court’s system. Some provision should be made. (3) An attorney who files a complaint is not yet an attorney of record, so the filing and name do not satisfy the draft rule text. Why not substitute “attorney registered with the Court’s electronic filing system” for “attorney of record”?

Pennsylvania Bar Association, CV-0064: The proposed text on signing should be clarified—the attorney’s name on a signature block serves as the attorney’s signature if a paper is filed in the court’s system. Beyond that, something should be said about the circumstance in which a paper is filed using an attorney’s name and password, but a different signature appears on the block.

Heather Dixon, Esq., 0067: The signature provision should be revised to make it clear that the attorney’s user name and password are not to be included in the signature block.

New York City Bar Association, 0070: Again, the rule text should be clear that the attorney’s user name and password are not to appear on the signature block.

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Federal Magistrate Judges Association, 0094: The risk that the published proposal will be read to require supplying the filer's user name and password on the signature block can be addressed like this: "For documents filed utilizing the court's electronic filing system, inserting the attorney's name on the signature block and filing the document using the attorney's user name and password will constitute that attorney's signature."

**B. RULE 23**

The great majority of the comments and testimony during the public comment period addressed the Rule 23 package. The summary of comments and testimony is included in this agenda book.

The published preliminary draft principally addressed issues related to settlement of class actions. After study, the Advisory Committee decided not to pursue several additional topics. Some of those topics were nonetheless urged during the public comment period. In addition, comments urged certain additional measures that had not been considered during the Advisory Committee’s review of the rule. Comments about these topics are included at the end of the summary of comments.

Regarding the proposed amendments included in the preliminary draft, the Advisory Committee received much commentary about the modernization of notice methods and about the handling of class member objections to proposed class-action settlements. These matters are also presented in the summary of comments.

After the conclusion of the public comment period, the Rule 23 Subcommittee met by conference call to review and consider the comments received about the published preliminary draft. Very few changes were made in the rule language, and Committee Note language was clarified and shortened during this review.

Notes from the first of those conference calls are included in this agenda book. The second conference call revolved almost entirely around wording choices for the Committee Note, and the materials below reflect those wording choices.

1 **Rule 23. Class Actions**

2  
3 \* \* \* \* \*

4  
5 **(c) Certification Order; Notice to Class Members; Judgment; Issues Classes;**  
6 **Subclasses**

7  
8 \* \* \* \* \*

9  
10 **(2) Notice.**

11  
12 \* \* \* \* \*

13  
14 **(B) For (b)(3) Classes.** For any class certified under Rule 23(b)(3)—or upon  
15 ordering notice under Rule 23(e)(1) to a class proposed to be certified for  
16 purposes of settlement under Rule 23(b)(3)—the court must direct to class  
17 members the best notice that is practicable under the circumstances,

18 including individual notice to all members who can be identified through  
19 reasonable effort. The notice may be by one or more of the following:  
20 United States mail, electronic means, or other appropriate means. The  
21 notice must clearly and concisely state in plain, easily understood  
22 language:

23 \* \* \* \* \*

24  
25  
26 (e) **Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a  
27 certified class—or a class proposed to be certified for purposes of settlement—may be  
28 settled, voluntarily dismissed, or compromised only with the court's approval. The  
29 following procedures apply to a proposed settlement, voluntary dismissal, or  
30 compromise:

31  
32 (1) Notice to the Class

33  
34 (A) Information That Parties Must Provide to the Court. The parties must  
35 provide the court with information sufficient to enable it to determine  
36 whether to give notice of the proposal to the class.

37  
38 (B) Grounds for a Decision to Give Notice. The court must direct notice in a  
39 reasonable manner to all class members who would be bound by the  
40 proposal if giving notice is justified by the parties' showing that the court  
41 will likely be able to:

42  
43 (i) approve the proposal under Rule 23(e)(2); and

44  
45 (ii) certify the class for purposes of judgment on the proposal.

46  
47 (2) Approval of the Proposal. If the proposal would bind class members under  
48 Rule 23(e)(3), the court may approve it only after a hearing and only on finding  
49 that it is fair, reasonable, and adequate after considering whether:-

50  
51 (A) the class representatives and class counsel have adequately represented the  
52 class;

53  
54 (B) the proposal was negotiated at arm's length;

55  
56 (C) the relief provided for the class is adequate, taking into account:

57 (i) the costs, risks, and delay of trial and appeal;  
58

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- 59                            **(ii)**    the effectiveness of ~~any~~ the proposed method of distributing relief  
60                            to the class, including the method of processing class-member  
61                            claims, if required;  
62  
63                            **(iii)**    the terms of any proposed award of attorney's fees, including  
64                            timing of payment; and  
65  
66                            **(iv)**    any agreement required to be identified under Rule 23(e)(3); and  
67  
68                            **(D)**    the proposal treats class members ~~are treated~~ equitably relative to each  
69                            other.  
70  
71                            **(3)**    Identification of Side Agreements. The parties seeking approval must file a  
72                            statement identifying any agreement made in connection with the proposal.  
73  
74                            **(4)**    New Opportunity to Be Excluded. If the class action was previously certified  
75                            under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords  
76                            a new opportunity to request exclusion to individual class members who had an  
77                            earlier opportunity to request exclusion but did not do so.  
78  
79                            **(5)**    Class-Member Objections.  
80  
81                            **(A)**    In General. Any class member may object to the proposal if it requires  
82                            court approval under this subdivision (e); ~~the objection may be withdrawn~~  
83                            only with the court's approval. The objection must state whether it applies  
84                            only to the objector, to a specific subset of the class, or to the entire class,  
85                            and also state with specificity the grounds for the objection.  
86  
87                            **(B)**    Court Approval Required for Payment In Connection With an Objection ~~to~~  
88                            an Objector or Objector's Counsel. Unless approved by the court after a  
89                            hearing, no payment or other consideration may be provided ~~to an objector~~  
90                            or objector's counsel in connection with:  
91  
92                            **(i)**    forgoing or withdrawing an objection, or  
93  
94                            **(ii)**    forgoing, dismissing, or abandoning an appeal from a judgment  
95                            approving the proposal.  
96  
97                            **(C)**    Procedure for Approval After an Appeal. If approval under  
98                            Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the  
99                            court of appeals, the procedure of Rule 62.1 applies while the appeal  
100                            remains pending.  
101

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102 (f) **Appeals.** A court of appeals may permit an appeal from an order granting or denying  
103 class-action certification under this rule, but not from an order under Rule 23(e)(1). ~~if a~~  
104 ~~petition for to appeal is filed~~ A party must file a petition for permission to appeal with  
105 the circuit clerk within 14 days after the order is entered, or within 45 days after the order  
106 is entered if any party is the United States, a United States agency, or a United States  
107 officer or employee sued for an act or omission occurring in connection with duties  
108 performed on the United States' behalf. An appeal does not stay proceedings in the  
109 district court unless the district judge or the court of appeals so orders.  
110

111 \* \* \* \* \*

1 COMMITTEE NOTE

2  
3 Rule 23 is amended mainly to address issues related to settlement, and also to take  
4 account of issues that have emerged since the rule was last amended in 2003.

5  
6 **Subdivision (c)(2).** As amended, Rule 23(e)(1) provides that the court must direct notice  
7 to the class regarding a proposed class-action settlement only after determining that the prospect  
8 of class certification and approval of the proposed settlement justifies giving notice. This  
9 decision has been is sometimes inaccurately called “preliminary approval” of the proposed class  
10 certification in Rule 23(b)(3) actions, ~~and~~ it is common to send notice to the class  
11 simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class  
12 members to decide by a certain date whether to opt out. This amendment recognizes the  
13 propriety of this combined notice practice. ~~Requiring repeat notices to the class can be wasteful~~  
14 ~~and confusing to class members, and costly as well.~~

15  
16 Subdivision (c)(2) is also amended to recognize contemporary methods of giving notice  
17 to class members. Since *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), interpreted the  
18 individual notice requirement for class members in Rule 23(b)(3) class actions, many courts have  
19 read the rule to require notice by first class mail in every case. But technological change since  
20 1974 has introduced meant that other means forms of communication that may sometimes  
21 provide a be more reliable additional or alternative method for giving notice and important to  
22 many. Although first class mail may often be the preferred primary method of giving notice,  
23 cCourts and counsel have begun to employ new technology to make notice more effective, ~~and~~  
24 ~~sometimes less costly.~~ Because there is no reason to expect that technological change will cease  
25 halt soon, when selecting a method or methods of giving notice courts giving notice under this  
26 ~~rule~~ should consider the capacity and limits of current technology, including class members'  
27 likely access to such technology, ~~when selecting a method of giving notice.~~

28 Rule 23(c)(2)(B) is amended to take account of these changes, ~~and to call attention to~~  
29 ~~them.~~ The rule continues to call for giving class members “the best notice that is practicable.” It  
30 does not specify any particular means as preferred. Although it may sometimes often be true that  
31 electronic methods of notice, for example ~~by~~ email, are the most promising, it is important to

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32 keep in mind that a significant portion of class members in certain cases may have limited or no  
33 access to email or the Internet.

34  
35 Instead of preferring any one means of notice, therefore, the amended rule relies on  
36 courts and counsel to should focus on the means or combination of means most likely to be  
37 effective in the case before the court. ~~The amended rule emphasizes that t~~The court should must  
38 exercise its discretion to select appropriate means of giving notice. ~~Courts should take account~~  
39 ~~not only of anticipated actual delivery rates, but also of the extent to which members of a~~  
40 ~~particular class are likely to pay attention to messages delivered by different means.~~ In providing  
41 the court with sufficient information to enable it to decide whether to give notice to the class of a  
42 proposed class-action settlement under Rule 23(e)(1), it would ordinarily may be important to  
43 include details a report about the proposed method of giving notice ~~to the class~~ and to provide  
44 the court with a copy of each notice the parties propose to use.

45  
46 In determining whether the proposed means of giving notice is appropriate, the court  
47 should also give careful attention to the content and format of the notice and, if notice is given  
48 under both Rule 23(e)(1) and as well as Rule 23(c)(2)(B), any claim form class members must  
49 submit to obtain relief. ~~Particularly if the notice is by electronic means, care is necessary~~  
50 ~~regarding access to online resources, the manner of presentation, and any response expected of~~  
51 ~~class members.~~

52  
53 Counsel should consider which method or methods of giving notice will be most  
54 effective; simply assuming that the “traditional” methods are best may disregard contemporary  
55 communication realities. ~~As the rule directs, the notice should be the “best \* \* \* that is~~  
56 ~~practicable” in the given case.~~ The ultimate goal of giving notice is to enable class members to  
57 make informed decisions about whether to opt out or, in instances where a proposed settlement is  
58 involved, to object or to make claims. Rule 23(c)(2)(B) directs that the notice be “in plain, easily  
59 understood language.” Means, format, and content that would be appropriate for class members  
60 likely to be sophisticated, for example in a securities fraud class action, might not be appropriate  
61 for a class having many made up in significant part of members likely to be less sophisticated.  
62 ~~As with the method of notice, the form of notice should be tailored to the class members’~~  
63 ~~anticipated understanding and capabilities.~~ The court and counsel may wish to consider the use  
64 of class notice experts or professional claims administrators.

65  
66 Attention should focus also on the method of opting out provided in the notice. The  
67 proposed method should be as convenient as possible, while protecting against unauthorized opt-  
68 out notices. ~~The process of opting out should not be unduly difficult or cumbersome. As with~~  
69 ~~other aspects of the notice process, there is no single method that is suitable for all cases.~~

70  
71 **Subdivision (e).** The introductory paragraph of Rule 23(e) is amended to make explicit  
72 that its procedural requirements apply in instances in which the court has not certified a class at  
73 the time that a proposed settlement is presented to the court. The notice required under Rule  
74 23(e)(1) then should also satisfy the notice requirements of amended Rule 23(c)(2)(B) for a class  
75 to be certified under Rule 23(b)(3), and trigger the class members' time to request exclusion.



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76 Information about the opt-out rate could then be available to the court when it considers final  
77 approval of the proposed settlement.

78  
79 **Subdivision (e)(1).** The decision to give notice of a proposed settlement to the class is an  
80 important event. It should be based on a solid record supporting the conclusion that the proposed  
81 settlement will likely earn final approval after notice and an opportunity to object. The ~~amended~~  
82 ~~rule makes clear that the~~ parties must provide the court with information sufficient to determine  
83 ~~enable it to decide~~ whether notice should be sent. At the time they seek notice to the class, the  
84 proponents of the settlement should ordinarily provide the court with all available materials they  
85 intend to submit ~~to in support of approval under Rule 23(e)(2) and that they intend to make~~  
86 available to class members. ~~That would give the court a full picture and make this information~~  
87 ~~available to the members of the class~~. The amended rule also specifies the standard the court  
88 should use in deciding whether to send notice -- that it likely will be able both to approve the  
89 settlement proposal under Rule 23(c)(2) and, if it has not previously certified a class, to certify  
90 the class for purposes of judgment on the proposal.

91  
92 ~~There are many types of class actions and class action settlements. As a consequence, no~~  
93 ~~single list of topics to be addressed in the submission to the court would apply to each case.~~  
94 ~~Instead,~~ The subjects to be addressed depend on the specifics of the particular class action and  
95 proposed settlement. But some general observations can be made.

96  
97 One key element is class certification. If the court has already certified a class, the only  
98 information ordinarily necessary ~~in regard to a proposed settlement~~ is whether the proposed  
99 settlement proposal calls for any change in the class certified, or of the claims, defenses, or  
100 issues regarding which certification was granted. But if a class has not been certified, the parties  
101 must ensure that the court has a basis for concluding that it likely will be able, after the final  
102 hearing, to certify the class. Although the standards for certification differ for settlement and  
103 litigation purposes, the court cannot make the decision regarding the prospects for certification  
104 without a suitable basis in the record. The ultimate decision to certify the class for purposes of  
105 settlement cannot be made until the hearing on final approval of the proposed settlement. If the  
106 settlement is not approved ~~and certification for purposes of litigation is later sought~~, the parties'  
107 earlier positions submissions in regarding to the proposed certification for settlement should not  
108 be considered if certification is later sought for purposes of litigation in deciding on certification.

109  
110 Regarding the proposed settlement, many a great variety of types of information might  
111 appropriately be provided included in the submission to the court. A basic focus is the extent  
112 and type of benefits that the settlement will confer on the members of the class. Depending on  
113 the nature of the proposed relief, that showing may include details of the contemplated claims  
114 process ~~that is contemplated~~ and the anticipated rate of claims by class members. ~~If the notice to~~  
115 ~~the class calls for submission of claims before the court decides whether to approve the proposal~~  
116 ~~under Rule 23(e)(2), it may be important to provide that the parties will report back to the court~~  
117 ~~on the actual claims experience. And B~~because some funds are frequently left unclaimed, ~~it is~~  
118 often important for the settlement agreement ordinarily should to address the distribution use of

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119 those funds. ~~Many courts have found guidance on this subject in § 3.07 of the American Law~~  
120 ~~Institute, Principles of Aggregate Litigation (2010).~~

121  
122 ~~It is important for t~~The parties should also ~~to~~ supply the court with information about the  
123 likely range of litigated outcomes, and about the risks that might attend full litigation. ~~In that~~  
124 ~~connection,~~ Information about the extent of discovery completed in the litigation or in parallel  
125 actions may often be important. In addition, as suggested by Rule 23(b)(3)(A), the parties should  
126 provide information about the existence of other pending or anticipated litigation on behalf of  
127 class members involving claims that would be released under the proposal ~~—including the~~  
128 ~~breadth of any such release—~~may be important.

129  
130 The proposed handling of an award of attorney's fees under Rule 23(h) ~~is another topic~~  
131 ~~that~~ ordinarily should be addressed in the parties' submission to the court. In some cases, it will  
132 be important to relate the amount of an award of attorney's fees to the expected benefits to the  
133 class, ~~and to take account of the likely claims rate.~~ One way to method of addressing this issue is  
134 to defer some or all of the award of attorney's fees until the court is advised of the actual claims  
135 rate and results.

136  
137 Another topic that normally should be considered is any agreement that must be  
138 identified under Rule 23(e)(3).

139  
140 The parties may supply information to the court on any other topic that they regard as  
141 pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court  
142 may direct the parties to supply further information about the topics they do address, or to supply  
143 information on topics they do not address. The court should ~~It must~~ not direct notice to the class  
144 until the parties' submissions show it is likely that the court will be able to approve the proposal  
145 after notice to the class and a final approval hearing.

146  
147 **Subdivision (e)(2).** The central concern in reviewing a proposed class-action settlement  
148 is that it be fair, reasonable, and adequate. ~~This standard emerged from case law implementing~~  
149 ~~Rule 23(e)'s requirement of court approval for class action settlements. It was formally~~  
150 ~~recognized in the rule through the 2003 amendments. By then, Ceourts have~~d generated lists of  
151 factors to shed light on this ~~central~~ concern. Overall, these factors focused on comparable  
152 considerations, but each circuit has developed its own vocabulary for expressing these concerns.  
153 In some circuits, these lists have remained essentially unchanged for thirty or forty years. The  
154 goal of this amendment is not to displace any ~~of these~~ factors, but rather to focus the court and  
155 the lawyers on the core concerns of procedure and substance that should guide the decision  
156 whether to approve the proposal.

157  
158 ~~One reason for this amendment is that~~ A lengthy list of factors can take on an  
159 independent life, potentially distracting attention from the central concerns that inform the  
160 settlement-review process. A circuit's list might include a dozen or more separately articulated  
161 factors. Some of those factors—perhaps many—may not be relevant to a particular case or  
162 settlement proposal. Those that are relevant may be more or less important to the particular case.

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163 Yet counsel and courts may feel it necessary to address every ~~single~~ factor on a given circuit's  
164 list in every case. The sheer number of factors can distract both the court and the parties from  
165 the central concerns that bear on review under Rule 23(e)(2).  
166

167 This amendment therefore directs the parties to present the settlement to the court in  
168 terms of a shorter list of core concerns, by focusing on the primary procedural considerations and  
169 substantive qualities that should always matter to the decision whether to approve the proposal.  
170

171 Approval under Rule 23(e)(2) is required only when class members would be bound  
172 under Rule 23(c)(3). Accordingly, in addition to evaluating the proposal itself, the court must  
173 determine whether it can certify the class under the standards of Rule 23(a) and (b) for purposes  
174 of judgment based on the proposal.  
175

176 **Paragraphs (A) and (B).** These paragraphs identify matters that might be described as  
177 “procedural” concerns, looking to the conduct of the litigation and of the negotiations leading up  
178 to the proposed settlement. Attention to these matters is an important foundation for scrutinizing  
179 the substance ~~specifies~~ of the proposed settlement. If the court has appointed class counsel or  
180 interim class counsel, it will have made an initial evaluation of counsel's capacities and  
181 experience. But the focus at this point is on the actual performance of counsel acting on behalf  
182 of the class.  
183

184 The information submitted under Rule 23(e)(1) may provide a useful starting point in  
185 assessing these topics. For example, the nature and amount of discovery in this or other cases, or  
186 the actual outcomes of other cases, may indicate whether counsel negotiating on behalf of the  
187 class had an adequate information base. The pendency of other litigation about the same general  
188 subject on behalf of class members may also be pertinent. The conduct of the negotiations may  
189 be important as well. For example, the involvement of a neutral or court-affiliated mediator or  
190 facilitator in those negotiations may bear on whether they were conducted in a manner that  
191 would protect and further the class interests. ~~In undertaking this analysis, the court may also~~  
192 ~~refer to Rule 23(g)'s criteria for appointment of class counsel; the concern is whether the actual~~  
193 ~~conduct of counsel has been consistent with what Rule 23(g) seeks to ensure.~~ Particular attention  
194 might focus on the treatment of any award of attorney's fees, with respect to both the manner of  
195 negotiating the fee award and its terms.

196 **Paragraphs (C) and (D).** These paragraphs focus on what might be called a  
197 “substantive” review of the terms of the proposed settlement. The relief that the settlement is  
198 expected to provide to class members is a central concern. Measuring the proposed relief may  
199 require evaluation of any ~~the~~ proposed claims process; directing that the parties report back to  
200 the court about ~~and a prediction of how many claims will be made; if the notice to the class calls~~  
201 ~~for pre-approval submission of claims;~~ actual claims experience may be important. The contents  
202 of any agreement identified under Rule 23(e)(3) may also bear on the adequacy of the proposed  
203 relief, particularly regarding the equitable treatment of all members of the class.  
204

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205 Another central concern will relate to the cost and risk involved in pursuing a litigated  
206 outcome. Often, courts may need to forecast ~~what~~ the likely range of possible classwide  
207 recoveries ~~might be~~ and the likelihood of success in obtaining such results. That forecast cannot  
208 be done with arithmetic accuracy, but it can provide a benchmark for comparison with the  
209 settlement figure.

210  
211 If the class has not yet been certified for trial, the court may consider whether  
212 certification for litigation would be granted were the settlement not approved.

213  
214 Examination of the attorney-fee provisions may also be valuable in ~~important to~~ assessing  
215 the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be  
216 evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief  
217 actually delivered to the class can be a significant ~~an important~~ factor in determining the  
218 appropriate fee award. ~~Provisions for reporting back to the court about actual claims experience,~~  
219 ~~and deferring a portion of the fee award until the claims experience is known, may bear on the~~  
220 ~~fairness of the overall proposed settlement.~~

221  
222 Often it will be important for the court to scrutinize the method of claims processing to  
223 ensure that it facilitates filing legitimate claims. A claims processing method should deter or  
224 defeat unjustified claims, but ~~unduly demanding claims procedures can impede legitimate~~  
225 ~~claims. Particularly if some or all of any funds remaining at the end of the claims process must~~  
226 ~~be returned to the defendant, the court should ~~must~~ be alert to whether the claims process is~~  
227 ~~unduly demanding.~~

228  
229 Paragraph (D) calls attention to a concern that may apply to some class action  
230 settlements—inequitable treatment of some class members vis-a-vis others. Matters of concern  
231 could include whether the apportionment of relief among class members takes appropriate  
232 account of differences among their claims, and whether the scope of the release may affect class  
233 members in different ways that bear on ~~affect~~ the apportionment of relief.

234  
235 **Subdivisions (e)(3) and (e)(4).** ~~A heading~~ are ~~is~~ added to subdivisions (e)(3) and  
236 (e)(4) in accord with style conventions. ~~These~~ is ~~additions~~ are ~~is~~ intended to be stylistic only.

237 ~~**Subdivision (e)(4).** A heading is added to subdivision (e)(4) in accord with style~~  
238 ~~conventions. This addition is intended to be stylistic only.~~

239  
240 **Subdivision (e)(5).** ~~Objecting class members can play a critical role in the settlement-~~  
241 ~~approval process under Rule 23(e). Class members have the right under Rule 23(e)(5) to submit~~  
242 ~~objections to the proposal. The submissions required by Rule 23(e)(1) may provide information~~  
243 critical ~~important~~ to decisions whether to object or opt out. Objections by class members can  
244 provide the court with important information bearing on its determination under Rule 23(e)(2)  
245 whether to approve the proposal.

246

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247           **Subdivision (e)(5)(A).** The rule is amended to remove the requirement of court approval  
248 for every withdrawal of an objection. An objector should be free to withdraw on concluding that  
249 an objection is not justified. But Rule 23(e)(5)(B)(i) requires court approval of any payment or  
250 other consideration in connection with withdrawing the objection.

251  
252           The rule is also amended to clarify that objections must provide sufficient specifics to  
253 enable the parties to respond to them and the court to evaluate them. One feature required of  
254 objections is specification whether the objection asserts interests of only the objector, or of some  
255 subset of the class, or of all class members. Beyond that, the rule directs that the objection state  
256 its grounds “with specificity.” Failure to provide needed specificity may be a basis for rejecting  
257 an objection. Courts should take care, however, to avoid unduly burdening class members who  
258 wish to object, and to recognize that a class member who is not represented by counsel may  
259 present objections that do not adhere to technical legal standards.

260  
261           **Subdivision (e)(5)(B).** Good-faith objections can assist the court in evaluating a  
262 proposal under Rule 23(e)(2). It is legitimate for an objector to seek payment for providing such  
263 assistance under Rule 23(h). ~~As recognized in the 2003 Committee Note to Rule 23(h): “In~~  
264 ~~some situations, there may be a basis for making an award to other counsel whose work~~  
265 ~~produced a beneficial result for the class, such as \* \* \* attorneys who represented objectors to a~~  
266 ~~proposed settlement under Rule 23(e).”~~

267  
268           But some objectors may be seeking only personal gain, and using objections to obtain  
269 benefits for themselves rather than assisting in the settlement-review process. At least in some  
270 instances, it seems that objectors—or their counsel—have sought to obtain consideration for  
271 ~~extract tribute to~~ withdrawing their objections or dismissing appeals from judgments approving  
272 class settlements. And class counsel sometimes may feel that avoiding the delay produced by an  
273 appeal justifies providing payment or other consideration to these objectors. Although the  
274 payment may advance class interests in a particular case, allowing payment perpetuates a system  
275 that can encourage objections advanced for improper purposes.

276  
277           The court-approval requirement currently in Rule 23(e)(5) partly addresses this concern.  
278 Because the concern only applies when consideration is given in connection with withdrawal of  
279 an objection, however, the amendment requires approval under Rule 23(e)(5)(B)(i) only when  
280 consideration is involved. Although such payment is usually made to objectors or their counsel,  
281 the rule also requires court approval if a payment in connection with forgoing or withdrawing an  
282 objection or appeal is instead to another recipient. The term “consideration” should be broadly  
283 interpreted, particularly when the withdrawal includes some arrangements beneficial to objector  
284 counsel. If the consideration involves a payment to counsel for an objector, the proper procedure  
285 is by motion under Rule 23(h) for an award of fees; ~~the court may approve the fee if the~~  
286 ~~objection assisted the court in understanding and evaluating the settlement even though the~~  
287 ~~settlement was approved as proposed.~~

288  
289           Rule 23(e)(5)(B)(ii) applies to consideration in connection with forgoing, dismissing, or  
290 abandoning an appeal from a judgment approving the proposal. Because an appeal by a class-

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291 action objector may produce much longer delay than an objection before the district court, it is  
292 important to extend the court-approval requirement to apply in the appellate context. The district  
293 court is best positioned to determine whether to approve such arrangements; hence, the rule  
294 requires that the motion seeking approval be made to the district court.

295  
296 Until the appeal is docketed by the circuit clerk, the district court may dismiss the appeal  
297 on stipulation of the parties or on the appellant's motion. See Fed. R. App. P. 42(a). Thereafter,  
298 the court of appeals has authority to decide whether to dismiss the appeal. This rule's  
299 requirement of district court approval of any consideration in connection with such dismissal by  
300 the court of appeals has no effect on the authority of the court of appeals to decide whether to  
301 dismiss ~~over~~ the appeal. It is, instead, a requirement that applies only to providing consideration  
302 in connection with forgoing, dismissing, or abandoning an appeal. ~~A party dissatisfied with the~~  
303 ~~district court's order under Rule 23(e)(5)(B) may appeal the order.~~

304  
305 **Subdivision (e)(5)(C).** Because the court of appeals has jurisdiction over an objector's  
306 appeal from the time that it is docketed in the court of appeals, the procedure of Rule 62.1  
307 applies. That procedure does not apply after the court of appeals' mandate returns the case to the  
308 district court.

309  
310 **Subdivision (f).** As amended, Rule 23(e)(1) provides that the court must ~~should~~ direct  
311 notice to the class regarding a proposed class-action settlement ~~in cases in which class~~  
312 ~~certification has not yet been granted~~ only after determining that the prospect of eventual class  
313 certification justifies giving notice. ~~This decision is sometimes inaccurately characterized as~~  
314 ~~"preliminary approval" of the proposed class certification.~~ But this decision ~~it~~ does not grant or  
315 deny class certification, and review under Rule 23(f) would be premature. This amendment  
316 makes it clear that an appeal under this rule is not permitted until the district court decides  
317 whether to certify the class.

318  
319 The rule is also amended to extend the time to file a petition for review of a class-action  
320 certification order to 45 days whenever a party is the United States, one of its agencies, or a  
321 United States officer or employee sued for an act or omission occurring in connection with duties  
322 performed on the United States' behalf. In such a case, the extension applies to a petition for  
323 permission to appeal by any party. The extension of time recognizes—as under Rules 4(i) and  
324 12(a) and Appellate Rules 4(a)(1)(B) and 40(a)(1)—that the United States has a special need for  
325 additional time in regard to these matters. The extension applies whether the officer or employee  
326 is sued in an official capacity or an individual capacity; ~~the defense is usually conducted by the~~  
327 ~~United States even though the action asserts claims against the officer or employee in an~~  
328 ~~individual capacity.~~ An action against a former officer or employee of the United States is  
329 covered by this provision in the same way as an action against a present officer or employee.  
330 Termination of the relationship between the individual defendant and the United States does not  
331 reduce the need for additional time.

“Clean” Rule and Note

[In order to facilitate comprehension of the revised proposed Rule and Note language, below is what they would look like if adopted.]

**Rule 23. Class Actions**

\* \* \* \* \*

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

\* \* \* \* \*

**(2) Notice.**

\* \* \* \* \*

**(B) *For (b)(3) Classes.*** For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

\* \* \* \* \*

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

**(1) Notice to the Class**

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

**(B) *Grounds for a Decision to Give Notice.*** The court must direct notice in a reasonable manner to all class members who would be bound by the

proposal if giving notice is justified by the parties' showing that the court will likely be able to:

- (i) approve the proposal under Rule 23(e)(2); and
  - (ii) certify the class for purposes of judgment on the proposal.
- (2) *Approval of the Proposal.* If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
- (A) the class representatives and class counsel have adequately represented the class;
  - (B) the proposal was negotiated at arm's length;
  - (C) the relief provided for the class is adequate, taking into account:
    - (i) the costs, risks, and delay of trial and appeal;
    - (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
    - (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
    - (iv) any agreement required to be identified under Rule 23(e)(3); and
  - (D) the proposal treats class members equitably relative to each other.
- (3) *Identification of Agreements.* The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
- (4) *New Opportunity to Be Excluded.* If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
- (5) *Class-Member Objections.*
- (A) *In General.* Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or



to the entire class, and also state with specificity the grounds for the objection.

**(B)** *Court Approval Required for Payment In Connection With an Objection.* Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

**(i)** forgoing or withdrawing an objection, or

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

**(C)** *Procedure for Approval After an Appeal.* If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

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

\* \* \* \* \*

#### COMMITTEE NOTE

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

**Subdivision (c)(2).** As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of class certification and approval of the proposed settlement justifies giving notice. This decision has been called “preliminary approval” of the proposed class certification in Rule 23(b)(3) actions. It is common to send notice to the class simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class members to decide by a certain date whether to opt out. This amendment recognizes the propriety of this combined notice practice.

Subdivision (c)(2) is also amended to recognize contemporary methods of giving notice to class members. Since *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), interpreted the

individual notice requirement for class members in Rule 23(b)(3) class actions, many courts have read the rule to require notice by first class mail in every case. But technological change since 1974 has introduced other means of communication that may sometimes provide a reliable additional or alternative method for giving notice. Although first class mail may often be the preferred primary method of giving notice, courts and counsel have begun to employ new technology to make notice more effective. Because there is no reason to expect that technological change will cease, when selecting a method or methods of giving notice courts should consider the capacity and limits of current technology, including class members' likely access to such technology.

Rule 23(c)(2)(B) is amended to take account of these changes. The rule continues to call for giving class members “the best notice that is practicable.” It does not specify any particular means as preferred. Although it may sometimes be true that electronic methods of notice, for example email, are the most promising, it is important to keep in mind that a significant portion of class members in certain cases may have limited or no access to email or the Internet.

Instead of preferring any one means of notice, therefore, the amended rule relies on courts and counsel to focus on the means or combination of means most likely to be effective in the case before the court. The court should exercise its discretion to select appropriate means of giving notice. In providing the court with sufficient information to enable it to decide whether to give notice to the class of a proposed class-action settlement under Rule 23(e)(1), it would ordinarily be important to include details about the proposed method of giving notice and to provide the court with a copy of each notice the parties propose to use.

In determining whether the proposed means of giving notice is appropriate, the court should also give careful attention to the content and format of the notice and, if notice is given under both Rule 23(e)(1) and Rule 23(c)(2)(B), any claim form class members must submit to obtain relief.

Counsel should consider which method or methods of giving notice will be most effective; simply assuming that the “traditional” methods are best may disregard contemporary communication realities. The ultimate goal of giving notice is to enable class members to make informed decisions about whether to opt out or, in instances where a proposed settlement is involved, to object or to make claims. Rule 23(c)(2)(B) directs that the notice be “in plain, easily understood language.” Means, format, and content that would be appropriate for class members likely to be sophisticated, for example in a securities fraud class action, might not be appropriate for a class having many members likely to be less sophisticated. The court and counsel may wish to consider the use of class notice experts or professional claims administrators.

Attention should focus also on the method of opting out provided in the notice. The proposed method should be as convenient as possible, while protecting against unauthorized opt-out notices.

**Subdivision (e).** The introductory paragraph of Rule 23(e) is amended to make explicit that its procedural requirements apply in instances in which the court has not certified a class at the time that a proposed settlement is presented to the court. The notice required under Rule 23(e)(1) then should also satisfy the notice requirements of amended Rule 23(c)(2)(B) for a class to be certified under Rule 23(b)(3), and trigger the class members' time to request exclusion. Information about the opt-out rate could then be available to the court when it considers final approval of the proposed settlement.

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

The subjects to be addressed depend on the specifics of the particular class action and proposed settlement. But some general observations can be made.

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

Regarding the proposed settlement, many types of information might appropriately be provided to the court. A basic focus is the extent and type of benefits that the settlement will confer on the members of the class. Depending on the nature of the proposed relief, that showing may include details of the contemplated claims process and the anticipated rate of claims by class members. Because some funds are frequently left unclaimed, the settlement agreement ordinarily should address the distribution of those funds.

The parties should also supply the court with information about the likely range of litigated outcomes, and about the risks that might attend full litigation. Information about the extent of discovery completed in the litigation or in parallel actions may often be important. In

addition, as suggested by Rule 23(b)(3)(A), the parties should provide information about the existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal.

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

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

The parties may supply information to the court on any other topic that they regard as pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court may direct the parties to supply further information about the topics they do address, or to supply information on topics they do not address. The court should not direct notice to the class until the parties' submissions show it is likely that the court will be able to approve the proposal after notice to the class and a final approval hearing.

**Subdivision (e)(2).** The central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate. Courts have generated lists of factors to shed light on this concern. Overall, these factors focus on comparable considerations, but each circuit has developed its own vocabulary for expressing these concerns. In some circuits, these lists have remained essentially unchanged for thirty or forty years. The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.

A lengthy list of factors can take on an independent life, potentially distracting attention from the central concerns that inform the settlement-review process. A circuit's list might include a dozen or more separately articulated factors. Some of those factors—perhaps many—may not be relevant to a particular case or settlement proposal. Those that are relevant may be more or less important to the particular case. Yet counsel and courts may feel it necessary to address every factor on a given circuit's list in every case. The sheer number of factors can distract both the court and the parties from the central concerns that bear on review under Rule 23(e)(2).

This amendment therefore directs the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal.

Approval under Rule 23(e)(2) is required only when class members would be bound under Rule 23(c)(3). Accordingly, in addition to evaluating the proposal itself, the court must

determine whether it can certify the class under the standards of Rule 23(a) and (b) for purposes of judgment based on the proposal.

**Paragraphs (A) and (B).** These paragraphs identify matters that might be described as “procedural” concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement. Attention to these matters is an important foundation for scrutinizing the substance of the proposed settlement. If the court has appointed class counsel or interim class counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus at this point is on the actual performance of counsel acting on behalf of the class.

The information submitted under Rule 23(e)(1) may provide a useful starting point in assessing these topics. For example, the nature and amount of discovery in this or other cases, or the actual outcomes of other cases, may indicate whether counsel negotiating on behalf of the class had an adequate information base. The pendency of other litigation about the same general subject on behalf of class members may also be pertinent. The conduct of the negotiations may be important as well. For example, the involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests. Particular attention might focus on the treatment of any award of attorney's fees, with respect to both the manner of negotiating the fee award and its terms.

**Paragraphs (C) and (D).** These paragraphs focus on what might be called a “substantive” review of the terms of the proposed settlement. The relief that the settlement is expected to provide to class members is a central concern. Measuring the proposed relief may require evaluation of any proposed claims process; directing that the parties report back to the court about actual claims experience may be important. The contents of any agreement identified under Rule 23(e)(3) may also bear on the adequacy of the proposed relief, particularly regarding the equitable treatment of all members of the class.

Another central concern will relate to the cost and risk involved in pursuing a litigated outcome. Often, courts may need to forecast the likely range of possible classwide recoveries and the likelihood of success in obtaining such results. That forecast cannot be done with arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure.

If the class has not yet been certified for trial, the court may consider whether certification for litigation would be granted were the settlement not approved.

Examination of the attorney-fee provisions may also be valuable in assessing the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class can be a significant factor in determining the appropriate fee award.

Often it will be important for the court to scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims. A claims processing method should deter or

defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding.

Paragraph (D) calls attention to a concern that may apply to some class action settlements—inequitable treatment of some class members vis-a-vis others. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief.

**Subdivisions (e)(3) and (e)(4).** Headings are added to subdivisions (e)(3) and (e)(4) in accord with style conventions. These additions are intended to be stylistic only.

**Subdivision (e)(5).** The submissions required by Rule 23(e)(1) may provide information critical to decisions whether to object or opt out. Objections by class members can provide the court with important information bearing on its determination under Rule 23(e)(2) whether to approve the proposal.

**Subdivision (e)(5)(A).** The rule is amended to remove the requirement of court approval for every withdrawal of an objection. An objector should be free to withdraw on concluding that an objection is not justified. But Rule 23(e)(5)(B)(i) requires court approval of any payment or other consideration in connection with withdrawing the objection.

The rule is also amended to clarify that objections must provide sufficient specifics to enable the parties to respond to them and the court to evaluate them. One feature required of objections is specification whether the objection asserts interests of only the objector, or of some subset of the class, or of all class members. Beyond that, the rule directs that the objection state its grounds “with specificity.” Failure to provide needed specificity may be a basis for rejecting an objection. Courts should take care, however, to avoid unduly burdening class members who wish to object, and to recognize that a class member who is not represented by counsel may present objections that do not adhere to technical legal standards.

**Subdivision (e)(5)(B).** Good-faith objections can assist the court in evaluating a proposal under Rule 23(e)(2). It is legitimate for an objector to seek payment for providing such assistance under Rule 23(h).

But some objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process. At least in some instances, it seems that objectors—or their counsel—have sought to obtain consideration for withdrawing their objections or dismissing appeals from judgments approving class settlements. And class counsel sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or other consideration to these objectors. Although the payment may advance class interests in a particular case, allowing payment perpetuates a system that can encourage objections advanced for improper purposes.

The court-approval requirement currently in Rule 23(e)(5) partly addresses this concern. Because the concern only applies when consideration is given in connection with withdrawal of an objection, however, the amendment requires approval under Rule 23(e)(5)(B)(i) only when consideration is involved. Although such payment is usually made to objectors or their counsel, the rule also requires court approval if a payment in connection with forgoing or withdrawing an objection or appeal is instead to another recipient. The term “consideration” should be broadly interpreted, particularly when the withdrawal includes some arrangements beneficial to objector counsel. If the consideration involves a payment to counsel for an objector, the proper procedure is by motion under Rule 23(h) for an award of fees.

Rule 23(e)(5)(B)(ii) applies to consideration in connection with forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal. Because an appeal by a class-action objector may produce much longer delay than an objection before the district court, it is important to extend the court-approval requirement to apply in the appellate context. The district court is best positioned to determine whether to approve such arrangements; hence, the rule requires that the motion seeking approval be made to the district court.

Until the appeal is docketed by the circuit clerk, the district court may dismiss the appeal on stipulation of the parties or on the appellant's motion. See Fed. R. App. P. 42(a). Thereafter, the court of appeals has authority to decide whether to dismiss the appeal. This rule's requirement of district court approval of any consideration in connection with such dismissal by the court of appeals has no effect on the authority of the court of appeals to decide whether to dismiss the appeal. It is, instead, a requirement that applies only to providing consideration in connection with forgoing, dismissing, or abandoning an appeal.

**Subdivision (e)(5)(C).** Because the court of appeals has jurisdiction over an objector's appeal from the time that it is docketed in the court of appeals, the procedure of Rule 62.1 applies. That procedure does not apply after the court of appeals' mandate returns the case to the district court.

**Subdivision (f).** As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of eventual class certification justifies giving notice. But this decision does not grant or deny class certification, and review under Rule 23(f) would be premature. This amendment makes it clear that an appeal under this rule is not permitted until the district court decides whether to certify the class.

The rule is also amended to extend the time to file a petition for review of a class-action certification order to 45 days whenever a party is the United States, one of its agencies, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. In such a case, the extension applies to a petition for permission to appeal by any party. The extension recognizes—as under Rules 4(i) and 12(a) and Appellate Rules 4(a)(1)(B) and 40(a)(1)—that the United States has a special need for additional time in regard to these matters. It applies whether the officer or employee is sued in an official

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capacity or an individual capacity. An action against a former officer or employee of the United States is covered by this provision in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time.

### Gap Report

At several points, the rule language was revised to shorten it or to shift to active voice. In Rule 23(c)(2)(B), the amendment proposal was revised to state that individual notice in Rule 23(b)(3) class actions be sent by “one or more of the following” before inviting use of United States mail, electronic means, or other appropriate means. In Rule 23(e)(2), the phrase “under Rule 23(c)(3),” originally proposed to be added, was removed from the proposed amendment in light of concerns that it might prove misleading in practice. The language of Rule 23(e)(2)(C)(ii) was adjusted to better parallel that of the following subsections. Rule 23(e)(5)(B) was modified to require court approval of any payments or other consideration provided in connection with forgoing, withdrawing or abandoning an objection to a class-action settlement or an appeal from rejection of such an objection. The Committee Note was revised to take account of these modifications in the rule language, to respond to some concerns raised during the public comment period, and to shorten the Note.



SUMMARY OF COMMENTS  
Rule 23 Package  
2016-17

Commentary on the following issues is presented:

Overall assessment

Rule 23(c)

Rule 23(e)(1) -- "frontloading"

Rule 23(e)(1) -- grounds for decision to give notice

Rule 23(e)(2) -- standards for approval

Rule 23(e)(5)(A) -- objector disclosure and specificity

Rule 23(e)(5)(B) and (C) -- court approval of payment to  
objectors or objector counsel

Rule 23(f) -- forbidding appeal from notice of settlement  
proposal

Rule 23(f) -- additional time for appeal in government cases

Ascertainability

Pick off

Other issues raised

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Overall assessment

Washington D.C. hearing

Jeffrey Holmstrand (DRI) (with written testimony): The amendment package is, generally speaking, addressing areas of concern.

Mark Chalos (Tenn. Trial Lawyers Ass'n): Overall, the organization supports the proposed amendments. The "road show" was particularly helpful to the bar in developing an appreciation of these issues. Deferring consideration of ascertainability and pick-off is sensible.

John Beisner (Skadden Arps): The proposed amendments are "directionally correct." They find the right spot as a general matter. But some clarification or reorientation in the Committee Note would be desirable. He will submit written comments.

Stuart Rossman (Nat'l Consumer Law Ctr. & Nat. Ass'n of Consumer Advocates) (with written testimony): His organization has put out three editions of Standards and Guidelines for Litigation and Settling Consumer Class Actions. The third edition was published at 299 F.R.D. 160 (2014). It may be a resource for the Committee's work.

Brent Johnson (Committee to Support Antitrust Laws) (with written testimony): COSAL generally supports the majority of the proposed amendments. They either codify or clarify existing case law.

Phoenix hearing

Jocelyn Larkin (The Impact Fund) (testimony and CV-2016-0004-0063): The Subcommittee's outreach efforts were very valuable, and enabled many to be involved in the process. We are extremely enthusiastic about this package of proposals.

Annika Martin: The Committee's "listening tour" provided a great opportunity to be heard. We are enthusiastic about these efforts.

Paul Bland (Public Justice); I echo the other comments about the process used. The outreach was desirable, and there is consensus in favor of most of the provisions in the amendment package.

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Written comments

Laurence Pulgram and 37 other members of the Council, the Federal Practice Task Force, and other leaders of the ABA Section of Litigation (CV-2016-0004-0057): Since the 2003 amendments to Rule 23 went into effect, we have found that the rule generally has worked well. Nonetheless, the changes proposed in this package will improve class action practice even though they are modest.

Public Citizen Litigation Group (CV-2016-0004-081): We are pleased that the amendments proposed take a moderate, consensus-based approach and generally avoid changes that would disrupt existing practices. In particular, we are pleased that the proposed approach to objectors is similar to the one we proposed in 2015.

Prof. Suzette Malveaux (CV-2016-0004-082): Prof. Malveaux attaches a copy of a draft of an article entitled "The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today." The draft article is mainly about Rule 23(b)(2), but makes some mention of pick-off.

Tennessee Trial Lawyers Ass'n (CV-2016-0004-083): The Committee's hearing, along with the meetings the Committee had with various stakeholders nationwide, fostered a shared sense of purpose and a feeling of participation that have led to a strong process. The decision to abstain from proposing changes that are yet unripe for implementation is particularly appreciated. Ascertainability and pick-off fit in that category.

Public Justice (CV-2016-0004-089): "Public Justice believes that class actions are one of the most powerful tools for victims of corporate and governmental misconduct to seek and achieve justice." It strongly supports the vast majority of the proposed amendments, subject to a few qualifications. We believe that the proposals are useful and appropriate and should be adopted subject to the changes we suggest.

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Rule 23(c)

Washington D.C. hearing

John Beisner (Skadden Arps): The Committee Note on p. 219 should be strengthened about the settling parties advising the court about the planned method of giving notice. The last sentence in the full paragraph on p. 219 should be strengthened to make it mandatory that the parties provide the court with their plan. For one thing, that will ensure that there is a plan. It has happened in the past that the parties do not start thinking about that until later. It should be up front. Regarding the form of notice, the Committee Note has it about right. The problem is to get the parties and the court to focus on the particulars of the case and what will likely work with the class. This is somewhat like advertizing. The parties should dig into the issue up front, and the court should attend to it then also. For the court to do this analysis, it will often be necessary to submit an expert report. Marketing experts can look at the demographic makeup of the class and explain how to give notice and why a given method is calculated or likely to work. It is important to go beyond generalities.

Alan Morrison (George Washington Univ. Law School) (with written testimony CV-2026-0004-0042): The words "under Rule 23(b)(3)" should be deleted from line 12 on p. 211 of the draft. The "best notice practicable" should be sent to class members in (b)(1) and (b)(2) cases as well.

Stuart Rossman (Nat'l Consumer Law Ctr. & Nat. Ass'n of Consumer Advocates) (with written testimony): Class actions are critical to effective relief for the clients represented by his groups. For many of these people -- those who are elderly or poor, for example -- the Internet access that may be commonplace for middle class Americans does not exist. The Census Bureau, the FTC, and other governmental agencies recognize that relying solely on electronic means to reach such people is not effective. So it is critical that the court focus closely on the manner in which notice will be given to ensure that it is suitable to the class sought to be represented. For consumer class actions, often a summary notice that is relatively brief is better than a detailed and full description. And it can show how to get more information. The disappointing reality is that the average American reads at about the fifth grade level. Beyond that, we are a multilingual society, so often giving notice in more than one language is critical.

Brian Wolfman (Georgetown Law School) (testimony and prepared statement): The requirement of individualized notice in (b)(3) cases should be relaxed in cases involving small value claims. For example, if the claims are for less than \$100

individual notice should be unnecessary, or handled on a randomized rather than universal basis. I proposed this in a 2006 article in the NYU Law Review. But don't weaken the means of individual (or other) notice. Banner ads simply do not provide individualized notice. Indeed, it is hard to imagine a case in which electronic notice is best. Instead, it would be best to recognize that individualized notice is unwarranted in small-claim cases. Todd Hilsee is right that electronic means are less effective. But with claims of \$1000, in one case he handled, the payout went to 94% of class members. So the current rule can be made to work. The amendment is not needed, and could be read in a harmful way. The current rule does not say U.S. mail, and there is no empirical basis for saying that banner ads work. Perhaps some form of electronic notice would supplement other methods. For example, consider a product uniquely tied to the use of email, or the members of a professional organization that ordinarily communicates by email. Judges should not be given too much discretion in approving the means of notice.

Hassan Zavareei (testimony and prepared statement): I disagree with Wolfman. I have experienced the benefits of electronic notice. Most organizations communicate with their members this way. This change to the rule does no harm and some good.

Phoenix hearing

Jennie Lee Anderson: We support the allowance of mixed notice. This amendment is practical and provides needed flexibility. The right way to design a notice program is to focus on the demographics of the class. For example, if it's made up of young professionals the means for giving notice might be quite different than for elderly low income class members. It is true that U.S. mail may often be the best way, but not always. Social media can be very useful. Even banner ads may be a valuable way to augment notice in some cases. True, banner ads would not be sufficient alone. One way to support effective notice programs might be to link the attorney fee award to the claims rate. Particularly if there were a reversion provision, that could be important to provide an incentive. Technology can sometimes help in achieving that result. But no matter how good the program is, it won't reach 100% distribution; there will always be some checks that are not negotiated.

Jocelyn Larkin (The Impact Fund) (testimony & CV-2016-0004-0063): We favor the expansion of means for notice. The selection of a notice method must take account of demographics. We particularly endorse the language in the draft Note recognizing that many still do not have access to a computer or the Internet. We think that the Note should highlight the need to ensure that electronic class notices are digitally accessible.

And important work should be done on readability of notices. The Committee Note should be strengthened to stress readability, and stress it in terms that take account of the educational attainment of the class members. For example, graphics can be very helpful. But there is no reason to favor paper over electronic methods of giving notice. We think that the Note should be strengthened in four ways: (1) the judge should be presented with the various forms of notice formatted exactly as the notice will appear either in print or electronically; (2) counsel should be required to make an affirmative showing that the notice is in fact readable to the vast majority of class members; (3) the Note should encourage the use of good design and infographics and, for electronic methods, hyperlinks to definitions or other clarifying materia; (4) electronic notice should be carefully vetted to ensure compliance with the obligation to ensure digital accessibility for people with disabilities. We also think that the FJC should update its Model Class Action notices. They should be build from the bottom up using suggestions and feedback from ordinary people rather than "dumbing down" dense legalese.

Annika Martin: The amendment takes the right approach. There is a need for flexibility, and the court should focus on what is right for the particular case. But the draft does not go far enough. It is preoccupied with the means of notice. That is important, but more effort should be made to address the content of the notice. Regarding the form of notice, it may often be that banner ads are unreliable, but getting into the weeds at this level of detail in a rule would not be justified. It is better to draft broadly, emphasizing the goal -- best practicable notice -- and avoiding embracing or denouncing specific means.

Todd Hilsee: He is a class action notice expert. He has already submitted material to the Committee, and will provide more material later. The basic point, however, is that there is no need for this proposed amendment, and that it will send the wrong signal. There should continue to be a preference for notice by U.S. mail. Although no means of communicating is certain to get the attention of all recipients, mail is most likely. 78% of mail is received or scanned. Electronic communications are often screened out by a spam filter or similar device. Yet there is a race to the bottom in class action notice; unscrupulous plaintiff counsel will seek the cheapest provider who can supply an affidavit claiming to be effective, and defendants will embrace this because it will save them money by minimizing claims. "This rule will foster reverse auctions." The Remington case is an example. Deadly consequences could flow from failure to solve the problem with these rifles, but only a small number of class members responded to a notice program that offered significant relief and provided a basis for cutting off their rights to sue in the event that serious injury or death

resulted from malfunction of the product. In effect, this proposal will be read as urging that courts forgo regular mail in giving notice. There should be a categorical preference for mailed notice.

Paul Bland (Public Justice); We challenged the secrecy in the Remington case, but the problems there do not show that the proposal here is unwise. We support the proposed amendment. There will be settings where electronic notice is best. One example is a case involving a defective app on iPhones. Another involved a cable company; using electronic means got more responses than would have been true with U.S. mail. Communications methods are changing at great speed. Don't presume we can guess now what will be prevalent means of communication in five or ten years. The risk of a reverse auction is overstated. Reversion provisions are rare; judges are alert to their risks. And plaintiff counsel know that judges are also alert to making sure that the notice methods will really work. Cy pres provisions can sometimes mitigate. But the reality is that the plaintiff lawyers are trying to get the money to the class members, and the judges are scrutinizing their efforts.

Dallas/Fort Worth (telephonic) hearing

Ariana Tadler (Milberg): I support the proposed amendment. It helpfully clarifies that notice can be provided by various and multiple means. In today's world, mail and print are not the go-to media for communicating. In class actions, the pertinent question is what method will provide the best notice practicable. There is a "dizzying array" of options for doing so in this digital age. One thing is abundantly clear -- one size does not fit all for this purpose. Some assert that this proposed amendment somehow prefers electronic notice, but it really does not do that. The Committee was right to take something of a "minimalist" approach in its Note. Trying to foresee future developments in electronic communications and offer a hierarchy of what is preferred would be an impossible task. Other comments assume that the amendment would somehow endorse using "banner ads" as the only means of giving notice. But that attitude fails to take account of modern realities. Unlike U.S. mail, electronic means can facilitate multiple efforts at giving notice, and also provide specific feedback on how successful the notice effort has been. Any effective notice effort must now begin by considering the best ways to reach the target audience. My family illustrates the dramatic ways in which communications habits have changed and are changing. My grandmother, born in 1916, has never used a computer. My mother, born in 1943, got her first computer in 2008, but uses no social media. My husband, born in 1966, is mainly a Facebook user, and "does not open postal mail." My two sons, though they are only three years

apart in age, have dramatically different habits. The older one, born in 1997, relies primarily on Facebook and social media. He has "tens of thousands of unread emails," and checks his postal mail perhaps once a month. The younger son, born in 2000, has a Facebook account that is dormant, and presently relies mainly on Instagram and Snapchat, relying also on news feeds through these sources. He rarely and reluctantly uses email, and will use texts for his family. Therefore, for both the court and counsel, the task of designing an effective notice program must be tailored to the case. And multiple means may be the best choice. She therefore endorses the submission of AAJ on this topic. She also thinks that adding "one or more of the following" to the last sentence in the preliminary draft could be an improvement. She was thinking of recommending that the draft be revised to say "and/or" between U.S. mail and electronic means, but recognizes that trying to do so might be inconsistent with the style of the rules.

Steven Weisbrot (Angeion Group) (testimony and CV-2016-0004-0062): I am a partner and Executive Vice President of Notice & Strategy at Angeion, which is a national class action notice and claims administration company. I support the proposed amendment to the notice provision, for it is rooted in common sense and progressive logic that mirrors the current media landscape, and remains flexible enough to accommodate the changes in technology that are currently happening and will inevitably continue to occur for years into the future. Each settlement has its own unique media fingerprint, which is what should guide the preferred dissemination of notice, including individual notice. This individual tailoring of notice programs is critical, given the breakneck speed with which advertising is changing. A "one size fits all" solution that ignores modern communication realities will not work; it is essential to maintain the level of flexibility that the proposed amendment provides. But it is also critical to recognize that the amendment will be counter-productive without more rigorous judicial analysis of any proposed notice plan during the preliminary approval process. We think that no one factor (even "reach") should be given primacy in that assessment. I recently met with representatives of the FJC and suggested a comprehensive approach to fashioning a robust class notice program at the preliminary approval stage of class litigation. the media environment has changed vastly since *Mullane* was decided in 1950, and in class actions it is often true that defendants are in regular contact with class members via email. Indeed, "U.S. mail is becoming less customary in our society." For example, in a recent Telephone Consumer Protection Act settlement, we found a significantly higher claim filing rate amongst those noticed by email compared to those noticed by traditional U.S. mail. For those noticed by email, it was relatively simple to link to the claims filing webpage and finalize a claim, as compared with the extra steps required to



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complete a claim via the U.S. mail notice program. But the key point is that notice programs should be evaluated one by one, using the following criteria: (1) how does the defendant typically communicate with class members; (2) what are the class member demographics; (3) what are the class members' psychographics; (4) what is the amount of the overall settlement in relation to the cost of the notice; and (5) what are the age and media habits of class members? In view of these current realities, adding the phrase "one or more of the following" to the rule-amendment proposal would be a good change. It reflects the value of repeated efforts to give notice, sometimes by multiple methods.

Written Comments

Todd Hilsee (16-CV-E & supplemented by CV-2016-0004-080):  
The Committee Note on p. 219 is wrong in stating that electronic means of giving notice can be "more reliable" There should be a presumption in favor of first class mail. The current rule allows all forms of individual notice, and does not need to be changed. The change wrongly equates electronic forms of notice with first class mail. In particular, banner ads are not effective. Various industry sources and governmental entities (e.g., the FTC) show that the rate of opening email ranges from a low of 7% to a high of less than 25%. The FTC study (attached) shows that physical mailings outstrip email, and far outstrip other forms of notice such as internet banners. According to a booklet published by another claims administrator (attached): "Email notices tend to generate a lower claims rate than direct-mail notice." According to Google, only 44% of banners typically included in "impression" statistics are actually viewable, and for more than half of banner impressions half of the banner is not on the screen for a human to see for more than one second. (Google report attached.) New revelations show that millions of internet banner "impressions" purchased for very low prices are seen not by human beings but by robots or are outright fakes. A Bloomberg report states:

The most startling finding: Only 20 percent of the campaign's "ad impressions" -- ads that appear on a computer or smartphone screen -- were even seen by actual people. . . . As an advertiser we were paying for eyeballs and thought that we were buying views. But in the digital world, you're just paying for the ad to be served, and there's no guarantee who will see it, or whether a human will see it at all. . . . Increasingly, digital ad viewers aren't human.

Some claims administrators have sworn to courts that extremely low claims rates are not normal. Hilsee concludes:

Numerous notice professionals tell me they have assessed

false promises that unscrupulous and untrained vendors have been pitching. But credible notice professionals may speak out only at their own peril. They have been told outright that major firms will not work with them if they publicly oppose notice plans. They face pressure to dial-back effective notice proposals to compete with falsely-effective inexpensive from affiants who are untrained in mass communications. Thus, despite the rule requiring "best practicable" notice, courts are too often presented with the least notice a vendor is willing to sign off on if awarded the contract to disseminate notice and administer the case. We should not compound the problems by making this unnecessary and counter-productive rule change.

Laurence Pulgram and 37 other members of the Council, the Federal Practice Task Force, and other leaders of the ABA Section of Litigation (CV-2016-0004-0057): We appreciate and applaud the efforts to update notice practices and to recognize that the ability to give individual notice by mail may not always be available, and that, even when it is, notice to certain class members may be better effectuated by email or other means. We also believe that the Note does an excellent job recognizing that different methods of individual notice may be better able to reach different audiences, and that the specific targeted audience must be considered in each case. We think, however, that a modest change could beneficially be made to Rule 23(c) (2) (B) as follows:

The notice may be by one or more of United States mail, electronic means, or other appropriate means . . .

This change would communicate more clearly that multiple methods of notice may be appropriate to better ensure reaching different subsets of the class. Using multiple methods of notice is commonly done today, and would enhance the likelihood of reaching the same constituents.

Katherine Kinsela (CV-2016-0004-0060): Based on my 24 years experience with class notice, I oppose the proposed changes regarding class notice. The changes are harmful because they (1) remove any clear standard for notice regardless of class injury; (2) equate all forms of media with individual notice; (3) evidence no understanding of the effectiveness of different forms of class communication; and (4) fail to address the most significant issue -- should all class actions be held to the same notice standard? Moreover, the changes are unnecessary, since courts have for years approved notice in hundreds of cases using media other than U.S. mail. The language of the proposal is vague and sweeps too broadly; "electronic means" can conflate email with electronic display advertising. Making this change "will likely open the floodgates to any and all notice methods."

There cannot be individual notice through mass media. Due to the amendment, the "best notice practicable" may evolve into "cheapest notice possible," and usher in banner ads rather than individual mailed notice even in cases involving substantial recoveries and easy methods of identifying class members. Already, settling parties often demand the cheapest notice possible, and they sometimes enshrine an arbitrary notice budget in the settlement agreement. So-called "experts" with little or no media training routinely submit affidavits stating that a notice program meets due process standards even though a review by trained and experienced experts indicates that it does not. There has been a sea change in what is considered satisfactory reach for a notice program. Where formerly 85% or 90% reach was an ordinary goal, more recently the goal has slipped to 70% and there is a "race to the bottom." Email can work as a notice method if the email list is based on a transactional relationship between the sender and the recipient, but that is not true of all email lists. Even with such a list, there is no reliable way to update the list and deliverability rates are low compared to U.S. mail. Moreover, the average American receives 88 emails a day but only about a dozen pieces of U.S. mail per week. The best solution would be to calibrate notice efforts with class injury. "A class action alleging false advertising regarding the organic content of a food product that settles for \$5 million is wholly different from cases alleging serious money damages." In cases involving serious money damages, the Note should make clear that in most cases with mailing data the preferred notice should be by U.S. mail. The new proposed sentence to Rule 23(c)(2)(B) should be replaced with the following:

When class members are partially or wholly unidentifiable, or the individual or aggregate class injuries are not significant, notice may include media or other appropriate means.

Moreover, the Note should specify that notice experts should be used in most cases. Although the Note now refers also to "professional claims administrators," that is not the same thing as a class notice expert. Judges should require that testifying notice experts possess the following traits: (1) recognition by courts of expert status; (2) credentials that meet the standards of *Daubert* and *Kumho*; (3) training or in-depth experience in media planning; (4) thorough knowledge of Rule 23; (4) the ability to translate complicated legal issues into accurate plain language; (5) the ability to create effective print, Internet, radio, and television notices consistent with best advertising practices; (6) an understanding of direct notice deliverability issues; and (7) the ability to combine direct notice reach, when known, with media reach to ascertain overall unduplicated reach to class members. These requirements should be included in written guidelines and disseminated by the FJC for judicial

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education purposes. Otherwise the "watering down" of notice efforts will continue to occur. "In the 24 years I have designed and implemented notice programs, I have never heard a comment or seen a formal objection that a case had 'too much notice,' or that the notice was 'too expensive.' There is no ground swell of consumers clamoring for less access to their legal rights to keep costs down."

Pennsylvania Bar Association (CV-2016-0004-0064): The amendment is designed to adopt a more pragmatic approach to class notice in light of modern technological advances. By using the broad phrase "electronic means," the amendment would give the court discretion to use the best practicable notice in each case. There may, however, be a concern that recipients would be unwilling to open or click on a message from an unknown sender. In light of this concern, the Note should be revised to say that all emailed notices should provide an option for a class member who is unsure whether to click the link to go instead to the assigned court's webpage, or to call the district court clerk directly, for more information. Using class counsel's website or phone number seems more problematical because a government website would seem more secure.

American Association for Justice (CV-2016-0004-0066): AAJ supports this proposed amendment. It would continue the requirement that the court direct the best notice that is practicable under the circumstances, but remind courts that first-class mail is not the only option. The Committee properly recognizes that the vast technological changes in the past three decades mean that U.S. mail is not the best choice in all cases. AAJ recommends that the Note be revised to suggest that "mixed notice" or "a mix of different types of notice" be suggested. In some cases the use of multiple types of notice would be the most effective way of notifying class members. Nowadays a number of cases involve contact information that would make mixed notice not only feasible but also the most cost-effective method of notice. For instance, many companies collect email addresses as well as mailing addresses for their customers. AAJ also recommends acknowledging that electronic notice can take forms other than email. The statement that "email is the most promising" may not always be correct. Younger consumers, in particular, may interact with the marketplace through other electronic means. Referring to "email" implies a limited ability to keep up with the evolution of technology. There is no mention of other electronic platforms, such as Facebook Twitter, and Instagram, or other smart phone applications or notification options. For example, consider a case against a ride-share company such as Uber in which notifying class members using the application might be the best choice.

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Joe Juenger & Donna-lyn Braun (Signal Interactive Media) (CV-2016-0004-078): We believe that amending the rule is not necessary. We advocate the use of digital media where suitable, but believe the current language of the rule adequately authorizes such efforts. Courts are already approving settlements that rely on electronic notice. Changing the rule might be urged to make electronic means the preferred or predominant means even though not justified. Existing Rule 23(c) is adequate and therefore should not be amended. Instead, the Note should be revised to say that electronic means are allowable where required to achieve the most effective notice.

Public Citizen Litigation Group (CV-2016-0004-081): In light of the concerns raised by Todd Hilsee and Katherine Kinsella, it seems prudent to proceed cautiously. We suggest that the Committee refrain from any suggestion that courts dispense with mailed notice in cases where it is practicable. At a minimum, the Note should emphasize that courts should generally continue to use mailed notice when it is feasible and that other means of notice should supplement rather than displace it. Whether there should be any change to the rule is a difficult question. The best practices in this area surely deserve further study. If the amendment goes forward, we urge that the Note say that the objective is not to encourage courts to rush to adopt electronic or other alternatives means of notice that are not demonstrated to be superior to mail.

Richard Simmons (Analytics) (CV-2016-0004-084): I have over 26 years of experience in designing and implementing class notification and claims programs. I can report that the use of digital notice, where appropriate, is common practice. Digital notice provides fundamentally different opportunities and challenges than traditional mailed notices. Existing practices, rules, and guidance that have been used to evaluate whether or not a notice program provides the "best practicable" notice are still necessary, but they are no longer sufficient to address the complexities of digital media. To address evolving methods of providing notice, the rules and Note should be modified to recommend that courts take account not only of the likelihood that members of the class will receive a message but also the extent to which they are likely to act in response to messages delivered by different means. The 2016 FTC orders to class action claims administrators about forms of notice is, to my knowledge, the first independent analysis of the effectiveness of alternative forms of class notice. When designing notice programs, a key question beyond initial "reach" is that the program actually prompt responses. It is possible to design a program that has great reach but actually minimizes the likelihood of claims being submitted. Digital notice is fundamentally different from traditional mailed notice because it can be targeted, calibrated, limited or expanded and because it

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can provide data regarding how recipients interact with the notice materials. Unfortunately, some in this business do not fully exploit the information-gathering characteristics of digital notice by gathering and reporting data on how many of the notices were actually opened, how many links were clicked, etc. Another strategy is to exploit those digital capacities to design a notice program that is actually more effective. Unfortunately, market forces in class action practice often seem to favor the lowest cost provider, while overlooking the critical questions of real effectiveness of the notice. Active management of a notice campaign, for example, often generates additional costs. In light of these realities, my view is that the amendments and Note are necessary, but no longer sufficient to deal with the advent of digital notice campaigns.

Public Justice (CV-2016-0004-089): We endorse the proposed amendment because it wisely permits courts to adopt the best notice practices available for different types of cases. Methods of communication are evolving, and are very likely to continue to do so. In many instances, first class mail will remain the best practicable form of notice. But in a case in which the defendant communicates with class members by electronic means, as in privacy litigation relating to some apps or electronic product or service, first class mail may not be the best approach. We therefore applaud the Note at p. 219, which says that "courts giving notice under this rule should consider current technology, including class members' likely access to such technology, when selecting a method of giving notice." We believe the proposed amendment will help judges do their job.

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Rule 23(e)(1)(A) -- "frontloading"

Washington D.C. hearing

Alan Morrison (George Washington Univ. Law School)  
(testimony & CV-2016-0004-0040): This provision will aid the court and aid unnamed class members. It is very important that the rule require full details to be submitted well in advance of the deadline for objecting or opting out. In the NFL concussion litigation, the proponents of the settlement filed about 1,000 pages of material after that deadline for action by class members (e.g., opting out or objecting) had passed. And the specifics about the attorney fee application should be included. That should be submitted at least 21 days before objections and opting out must be done. But it need not be filed with the settlement notice. The filing need not be in detail comparable to the final fee request, but at a minimum it should state the maximum amount of the proposed fee award. In addition, it is important to bring in others at the point the court is considering approving the giving of notice to get additional views on the quality of the settlement proposal. Later the parties' and court's views may harden if a massive notice effort has already occurred before objections are heard. At least in some cases it is not difficult to identify additional people to notify. If there is an MDL proceeding on the same general set of issues, that provides a ready list of those who could be notified rather easily -- the attorneys for the litigants involved in the MDL. Some potential problems can be eased at this point. For example, simplifying the claim form may produce substantial benefits but not be easy to do later.

Phoenix hearing

Jocelyn Larkin (The Impact Fund) (testimony & CV-2016-0004-0063): One concern might be about disclosure of the details of side agreements, particularly "blow up" provisions that permit the settling defendant to withdraw from the settlement if more than a certain number of class members have opted out. If that is not intended by the statement that the parties must submit all the things they intend to rely upon when seeking approval under Rule 23(e)(2), it should be clarified that "identifying" these agreements under Rule 23(e)(3) does not require such disclosures. One way to do that would be to revise the sentence in the Note on p. 221 of the pamphlet to read: "That would give the court a full picture and make non-confidential ~~this~~ information available to the members of the class." [It might be noted that the Note accompanying the 2003 amendment to Rule 23(e) said the following with regard to the requirement that other agreements be identified: "A direction to disclose a summary or copy of an agreement may raise concerns of confidentiality. Some agreements may include information that merits protection against general disclosure."]

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Written comments

Public Justice (CV-2016-0004-089): We believe that the frontloading requirement is a positive change that would assist both judges and class members. We particularly applaud the Note at 221: "The decision to give notice . . . should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object."



Rule 23(e) (1) (B) -- grounds for decision to give notice

Washington D.C. hearing

John Beisner (Skadden Arps): The Committee Note on p. 222 should be strengthened. At present it says that if the proposal to certify for purposes of settlement is not approved, "the parties' earlier submissions in regard to the proposed certification should not be considered in deciding on certification." The possibility of such use of submissions supporting the settlement will make defendants very nervous. A way should be found to avoid this deterrent to settlement.

Alan Morrison (George Washington Univ. Law School)  
(testimony & CV-2016-0004-0040): Even though the draft wisely avoids the term "preliminary approval" because that makes the task of objectors too difficult, it should be revised because the standards for approving notice sound too much like a decision that the settlement will be approved and the class certified. His preferred locution would be something like "a sufficient possibility the proposal will warrant approval." In addition, the inclusion of "under Rule 23(c) (3)" on p. 213 at line 45 is unnecessary and possibly confusing. Readers may think that the phrase applies only to classes under (b) (3), which is not correct. In addition, subparagraphs (i) and (ii) should be reversed if they are retained. They are not necessary, but the point of reversing them is to recognize that class certification logically precedes settlement approval.

Phoenix hearing

James Weatherholtz: He is concerned about Note language about the standard for directing notice to the class and for approving a proposed settlement after notice to the class. One concern focuses on p. 222 of the published draft, where the Note says "The decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement." That seems too strong. Does that mean the court may not take any action based on the expectation that the settlement will be approved? How about enjoining collateral litigation by class members? The decision to send notice should be recognized as a final judgment for some purposes (such as supporting an injunction against collateral litigation by class members). But that could be seen as inconsistent with the proposed change to Rule 23(f) regarding immediate review of decisions under Rule 23(e) (1), and might foster efforts to obtain immediate review under Rule 23(f). Another concern is that, later in the Note on p. 222 it is said that the court should concern itself with the claims rate. That should not be made dispositive, for people may have many reasons for declining to submit claims. Some may simply oppose the idea of class actions.

That should not prevent approval of a settlement. Finally, the sentence citing § 3.07 of the ALI Principles on p. 223 should be removed because it seems tacitly to endorse the cy pres doctrine. The prior sentence of the draft ("And because some funds are frequently left unclaimed, it is often important for the settlement agreement to address the use of those funds.") is not problematic. But the parties should be free simply agree to disposition of those funds; the court should not be involved in reviewing or rejecting that agreement.

Dallas/Fort Worth (telephonic) hearing

Michael Pennington (DRI) (testimony and written submission): The Committee Note, p. 222, contains the following statement "The decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement." This "sweeping prohibition" is too broad. It might interfere with necessary actions like enjoining suit by class members who have not opted out. Moreover, it could be read to mean that class counsel is not really representing the class until the final approval of the settlement and certification for that purpose. It might also have implications for judicial restrictions on communications between class counsel and class members during the time the proposed settlement is under consideration. It is difficult to determine why certification for settlement purposes before the final settlement approval hearing can never be appropriate. DRI recommends softening the statement to take account of the possibility of settlement-only certification on proper evidence before the final hearing.

Timothy Pratt (Boston Scientific): Unlike all the other witnesses, he is a client. Boston Scientific is a party to a large amount and range of litigation. Pratt is Executive Vice President. Pratt is also involved with Lawyers for Civil Justice and the Federation of Corporate Counsel. He wishes to rebut the narrative put forward by others -- that defendants always want to draw things out. To the contrary, his experience is that he wants to get to the merits and get the matter resolved so his company can move on. We commend the changes in terms of general direction regarding settlement processing and review. But there is one change that should be made. In the Note, at p. 223, there is a reference to the ALI Principles of Aggregate Litigation § 3.07. That appears to endorse, or perhaps to create, a right to rely on cy pres in class actions in federal court. The Committee considered whether to adopt a rule provision addressing cy pres, and wisely decided to back away from that idea. But this comment in the Note "back into" the same problem. This should be left to party agreement, and not burdened with the restrictions that the ALI found desirable. Beyond that, the Note says that reversion of funds to the defendant should not be allowed, and mentions deterrence as a reason for that. That's

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not proper, and those statements should be removed or modified.

Written comments

Laurence Pulgram and 37 other members of the Council, the Federal Practice Task Force, and other leaders of the ABA Section of Litigation (CV-2016-0004-0057): Our concerns relate to two issues:

(1) Disapproval of the term "preliminary approval." We are troubled by statements in the Note seemingly disavowing the use of the term "preliminary approval." The amendment instead calls the decision under Rule 23(e)(1) a "decision to give notice." But "preliminary approval" is the existing term and practice for the juncture at which the court first reviews a proposal for settlement. The term "preliminary approval" means simply that the court has determined that the proposed settlement is deserving of the expense and effort of class notice. Most forms of order submitted to the court are called "Preliminary Approval Orders." Class action practitioners understand that when the court orders notice it is not substantively approving either class certification (assuming that has not already happened) or the terms of the settlement. We recommend that the title reflect existing practice by using the title "Preliminary Approval -- the Decision to Give Notice" or simply "Preliminary Approval." As an alternative, perhaps it could instead be labelled "Preliminary Review." If that were done, Rule 23(e)(2) could be renamed "Final Approval of the Proposal." We understand that the Committee is concerned about making it appear that the decision to give notice means that approval of the proposal is inevitable. But the explicit findings the amendment required before notice can be authorized may increase, rather than decrease, the risk of settled expectations that the court will approve the settlement. Requiring that the judge specifically *find* that (1) the court will "likely" approve the proposal, and (2) the court will "likely" certify the class for purposes of settlement may make approval seem even more likely than under the rule's current language. The proposed phrasing could deter objectors from objecting because they would assume under that standard that certification and settlement approval is a "done deal." Compare the experience we have had with litigating before a judge who has made findings about likelihood of success in regard to a preliminary injunction -- a very difficult task. Our proposed solution would be to make clear that the preliminary findings are of a "prima facie" nature, either by using that term or using words to the effect that the court has found preliminarily, based on the materials submitted, that the class may ultimately be certified for settlement purposes and that the

proposed settlement appears worthy of approval.

(2) Reference to attorney's fees arrangement as part of the preliminary approval decision. The draft says that the court should order notice unless the parties show that it will likely be able to "approve the proposal under Rule 23(e)(2)." That provision, in turn, includes (iii) -- "the terms of any proposed award of attorney's fees, including timing of payment." We understand that under existing law, and in common practice, the decision on attorney's fees is not made until final approval. The separation between the attorney's fees question and the approval of the settlement on the merits therefore should make it clear that the preliminary approval does not extend to the attorney's fees aspect. One solution would be to revise proposed 23(e)(1)(B)(i) as follows:

- (i) approve the proposal under Rule 23(e)(2) except (C)(iii); and

Relabelling this decision "preliminary approval" or "preliminary review" would assist in making this distinction.

Pennsylvania Bar Association (CV-2016-0004-0064): We support adoption of this provision. The information involved would be useful to avoid problems in the case later on.

Gary Mason & Hassan Zavareei (CV-2016-0004-0065): We believe that the Note on 23(e)(1) improperly over-emphasizes the importance of claims rates. This emphasis is not consistent with current law to the extent it pulls out the claims rate as the most important factor in determining fees. A myriad of other factors routinely are considered. Indeed, numerous courts have held that claims rates are *not* a determinative factor. We propose revising the Note as follows:

The proposed handling of an award of attorney's fees under Rule 23(h) is another topic that ordinarily should be addressed in the parties' submission to the court. In some cases it may be appropriate to consider ~~will be important to relate~~ the amount of an award of attorney's fees to the expected benefits to the class, and to take account of the likely claims rate. However, the settlement's fairness may also be judged by the opportunity created for class members. ~~One method of addressing this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results.~~ (p. 223)

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New York City Bar (CV-2016-0005-070): The Committee Note suggests twice that the court review claims rates in assessing settlements. We agree that such review is generally appropriate, but believe the Note should be edited to make it clear that such review is not always appropriate. We agree that is generally a good idea to assess the likely claims rates in class settlements, and to treat that information as a data point in determining whether a settlement delivers meaningful relief. Tying "actual claims experience" to fees incentivizes the parties to implement automatic distribution of settlement proceeds where possible, to implement a robust notice program to reach class members, if automatic distribution is not possible, and to create a simple, easy-to-understand claim form. But in some cases the claims rate is difficult to determine in part because the number of class members -- the denominator -- is difficult to determine with precision. We recommend modifying the note on p. 223 as follows:

It may in some cases, it will be important for the court to consider to relate the amount of an award of attorney's fees in relation to the expected benefits to the class, and, when it is feasible and cost-effective to measure the claims rate, to take account of the likely claims rate. One method of addressing this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results.

Similarly, we recommend the following changes to the Note on p. 227:

Provisions for reporting back to the court about actual claims experience, where it is feasible and cost-effective to, and deferring a portion of the fee award until the claims experience is known, may bear on the fairness of the overall proposed settlement.

Defense Research Institute (CV-2016-0004-072): There are a number of references in the Note to the claims rate. Although some courts do take that into account in determining an appropriate attorney's fee award, we do not think it is an appropriate consideration in evaluating the fairness of the settlement itself. The Note should be revised to make it clear that this factor does not bear on the fairness of the settlement. To be sure, a claims process should be based on the need for information from class members to process claims. It should never be used simply to diminish payouts. But when a court determines that such a process is justified under a given settlement and finds that the notice proposed is satisfactory, the actual response should not have any bearing on the fairness of the settlement. What matters is the relief offered, not how often it is claimed. Class members may decide not to make claims for a variety of reasons. The object of such settlements is not

to deter defendants from certain conduct; they have not admitted any wrongdoing. A settlement can be fair, reasonable, and adequate, and class members may nonetheless decide, for some reason, not to pursue relief. In addition, on p. 222 the Note says that the court cannot certify the class for purposes of settlement until the final hearing. That sweeping prohibition could inhibit the court from taking needed actions, such as enjoining litigation about the same claims by class members. It might also weaken efforts to regulate communications with the class if it meant that class counsel are not yet the lawyers for the class. DRI recommends softening that statement. On p. 223, the Note also refers to the ALI Principles of Aggregate Litigation. That reference introduces a substantive matter that offers a windfall to a nonlitigant in place of relief for a litigant.

Nelson Mullins Riley & Scarborough LLP (CV-2016-0004-073): The citation to the ALI Principles of Aggregate Litigation on p. 223 of the Note should be removed. Contrary to the implication of the draft Note, judicial citation to § 3.07 of that publication does not evidence a broad approval of cy pres provisions in class action settlement agreements. Instead, it urges a broadening or redefinition of the law, and does not presume merely to restate the law as it stood at the time of publication in 2010. The Note's reference to cy pres is also unnecessary and premature. Private agreements regarding the disbursement of unclaimed funds to non-litigants who have suffered no harm are not necessary for the approval of proposed settlement agreements.

Aaron D. Van Oort (CV-2016-0004-075): Using the standard "likely to be able to" approve the settlement and (where needed) class certification is a sound addition to the rule because it will help prevent one of the most harmful scenarios in class action practice -- rejection of settlement only after notice is sent and class members have submitted claims. Guarding against this risk is important, and the rule change is a good step in that direction. The factors identified in the proposed rule are sound, but I am concerned that the rule does not address the concept of proportionality -- the question of how much review is enough in a given case. The Note likewise does not address this concept. Many class action settlements involve low value claims or defendants in financial distress, or both. Courts should be given flexibility to adapt the burden of review to match the complexity and value of the case. I propose adding the following to the paragraph at pp. 223-24 of the Note:

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

further information about the topics they do address, or to supply information on topics they do not address. In determining the amount and detail of information it requires the parties to submit at the notice stage under Rule 23(e) (1) and the approval stage under Rule 23(e) (2), the court should consider whether the burden of generating and submitting the information is proportional to the value of the claims, the amount of the settlement, and other factors informing the scope of review. The court ~~It~~ must not direct notice to the class until the parties' submissions show it is likely that the court will be able to approve the proposal after notice to the class and a final approval hearing.

Public Citizen Litigation Group (CV-2016-0004-081): We strongly support the approach of replacing the prevailing non-rule-based concept of "preliminary settlement approval" and "conditional certification" of settlement classes with a rule requiring that the court give early consideration to whether the parties have made a sufficient showing to justify giving notice. We are worried, however, about the use of the word "if" in the amendment to (e) (1) because that might imply that sometimes courts can approve settlements without giving notice. Although this misunderstanding may seem unlikely, we urge the Committee to make the rule clear to avoid any risk of misinterpretation. In addition, the "likely to be approved" standard seems likely to revive the disfavored "preliminary approval" idea sometimes in vogue. We favor the use instead of "reasonable likelihood" of approval. Accordingly, we would replace the proposed new language in (e) (1) (B) with the following:

The court shall direct such notice if it finds that consideration of the proposal is justified by the parties' showing that there is a reasonable likelihood that the court will be able to (i) certify the class for purpose of judgment on the proposal, if the class has not previously eeg certified; and (ii) approve the proposal under Rule 23(e) (2).

This proposal is similar to the one submitted by Prof. Alan Morrison, and we would also support the proposal he made in his Oct. 10, 2016, comments at pp. 6-7.

Diane Webb (Legal Aid at Work) (CV-2016-0004-086): We are program that was founded more than 100 years ago to provide legal aid to low-wage workers. We rely on charitable gifts, foundation grants, money from the California State Bar Legal Services Trust Fund, and cy pres distributions. These sources of funding have been drying up. The State Bar trust fund, for example, has had reduced funds for a long time due to low interest rates. Currently, we rely on cy pres funds to support our Workers'

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Rights Clinic activities, including expanded services in rural areas of California. To save money, we rely on "virtual clinics" using video-call technology. In 2016, our Workers' Rights Clinic served more than 1200 clients. We wish to emphasize that cy pres funding is essential to our organization's mission and its continued sustainability. We believe that including a reference to the availability and appropriateness of cy pres in the Notes to the Rule 23 amendments will provide valuable guidance to litigants and the courts alike.

Washington Legal Foundation (CV-2016-0004-087): WLF believes that any proposed reference to cy pres awards should be eliminated. Cy pres is a highly controversial mechanism used to justify class actions even though the remotely situated class members cannot feasibly be identified or when identifying them would be more expensive than any potential recovery would warrant. With increasing frequency, cy pres has been utilized in federal class actions to award unclaimed funds to one or another charities supposedly relevant in some way to the issues presented in the case. Although the Committee prudently withdrew the idea of a rule provision addressing use of cy pres, the Note at pp. 222-23 still contains a reference to cy pres and also cites the ALI Aggregate Litigation Principles on this subject. WLF believes there is no basis to enshrine cy pres in the rules. More often than not, the primary function of cy pres is to ensure that a settlement fund is large enough to guarantee substantial attorney's fees or to make the bringing of the class action economically feasible. And cy pres distributions can contribute to a significant potential conflict of interest between class counsel and class members, because class counsel has no incentive to work hard to get the recoveries to class members as a way to justify reference to the overall class "recovery" as a basis for a large attorney's fee. There are serious Article III implications of unrestrained use of cy pres, and these "awards" are akin to punitive damages, which generally are permitted only where the courts have legislative authorization for them. Instead of citing cy pres approvingly, the rule amendments should clarify that Rule 23 provides no basis whatsoever for cy pres awards.



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Rule 23(e) (2) -- standards for approval

Washington D.C. hearing

John Beisner (Skadden Arps): The Note fails to address what the court should do if it concludes that the proposed settlement should not be approved. This could apply either at the stage of deciding whether to give notice or at the final settlement-approval stage. It would be very helpful to have a discussion of what to do at that point. There could be some tension with the line of cases saying that the court may not rewrite the parties' agreement "for" them. So the Note should warn against being too specific about what changes would be likely to earn the court's approval. But at the moment this is a void in the Note. In addition, regarding the Note on p. 227, it is critical that the reference to the "relief actually delivered" specify that payment of a significant part or all of the attorney fee award ordinarily should await a report to the court about the results of the payout effort. If the lawyers are paid in full and it turns out that only 5% of the settlement funds have actually been claimed, it may be too late to do anything about it.

Brent Johnson (Committee to Support Antitrust Laws) (with written testimony): COSAL is concerned that proposed 23(e) (2) (C) (ii) could be used to support something like an ascertainability obstacle to class certification. The use of the word "effectiveness" as a criterion there might prompt some courts to conclude that a class action is not proper unless a heightened ascertainability standard is met. Ascertainability has split the circuits, and should not be insinuated here. Instead, the rule should say that "best methods" for distribution are the court's focus at this point.

Phoenix hearing

Thomas Sobol: I represent plaintiffs in pharmaceutical pricing and other health cases. It is good that the amendment addresses the distribution of relief. Responsible class counsel make efforts to ensure that money actually gets to class members. Judges also take an active role in doing so. One example was a case in Boston where Judge William Young would not authorize payment of our counsel fees until we improved the effectiveness of our payout. The first effort drew only 10,000 claims, and we were able to develop a list of 250,000 class members and improve the claims rate. Nevertheless, Rule 23(e) (2) (C) (ii) is phrased in a way that creates ambiguity. One interpretation is that it sets an absolute standard of distribution effectiveness. There is a risk it would be interpreted to say that, for all cases, there is an absolute standard of distribution effectiveness, and that the court should reject the proposal if it does not satisfy that absolute standard. On the other hand, it might only call

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for focusing on the comparative effectiveness of reasonably selected alternative methods of affording relief. The first interpretation would work mischief. That risk could be avoided by revising the factor:

- (ii) the effectiveness of the proposed method of distributing relief to the class as compared to other, reasonably available methods of distribution under the circumstances, including the method of processing class-member claims, if any.

Jocelyn Larkin (The Impact Fund) (testimony & CV-2016-0004-0063): Factor (D) is very important; I am frequently asked whether different segments of the class can be treated differently. But it would be better to phrase (iv) in active voice -- "the proposal treats class members equitably relative to the value of their claims." Also, it might be good to add something like "relative to the value of their claims."

Paul Bland (Public Justice); I agree with Sobol that there is a risk the proposed rule language could be misinterpreted. But the solution probably is to make changes in the Note, not the rule, to clarify what is meant.

Dallas/Ft. Worth (telephonic) hearing

Michael Pennington (DRI) (testimony and CV-2016-0004-088): There are a number of references in the Committee Note suggesting that the court should focus on the anticipated or actual claim rate as an appropriate measure of whether the settlement itself is reasonable. Claims rates will always be lower than 100%. And class members may have a variety of reasons for not making claims, including being philosophically opposed to class actions, not feeling that they have a claim against the defendant, or not thinking that the payoff is worth the effort. Although the court might properly take an interest in whether the claiming process was fair or, instead, too burdensome, that determination can be made well before the claims process is engaged. The approval of the settlement should not depend on how many class members choose to avail themselves of the benefits offered. Treating a low claims rate as a "red flag" of problems with the settlement is using 20/20 hindsight. The settlement should be judged in terms of its provisions, and that judgment is not dependent on the subsequent developments.

Prof. Judith Resnik (Yale Law School) (testimony & CV-2016-0004-092): The amendments make a desirable effort to improve the settlement process, but more needs to be done. The key improvement is more explicit recognition of the court's responsibility for assuring that relief is really delivered to class members. I believe these changes are consistent with the

proposals already made and could be added without the need for republication and a further public comment period. Already the Note to (e)(1) and (e)(2) addresses the importance of judicial scrutiny of the proposed means for giving notice and making claims. The preliminary draft also suggests that reporting back to the court on the actual claims experience is desirable, and that the amount or timing of attorney fee payments to class counsel depend in part on the success of the claims program in delivering relief to class members. At present, the lack of court involvement in the phase after the settlement has been approved has resulted in a paucity of information on the public record about the actual success of the class action in delivering relief to the class. The rules should recognize that courts have responsibilities as "fiduciaries" of the class to ensure that class members receive the intended relief. Courts have done that in the context of structural injunctions, but not other cases. Learning about the intended methods of inviting and processing class member claims (as the current draft suggests) is desirable, but it is not enough. The rule should create a presumption that the parties file a statement about actual claims experience. Presently the Note only says that it may be important to provide that the parties do that. Courts should be directed to require that settlement agreements provide for regular reporting back to the court about distribution decisions, and also that, if conflicts about distribution across sets of claimants emerge, there is a method to return to court. Periodic reports to the court should be required, with regard to both structural relief and dollars distributed. It would also be desirable to impose sliding-scale fee awards for class counsel keyed to the success of the settlement in delivering actual relief to class members. That would build in an incentive for class counsel to make distribution a priority.

Theodore Frank (Competitive Enterprise Institute) (testimony and CV-2016-0004-0085): These changes are not explicit enough to achieve the desired result of ensuring that attorney fee awards are proportional to the benefits actually delivered to class members. In the 2003 amendments, the Committee Note to Rule 23(h) clearly stated that the benefits to class members should be a major factor in determining the amount of the fee award. But the reality is that the courts have too often disregarded this idea. Even after the adoption of CAFA, with its focus on coupon settlements, counsel still manage to camouflage coupons behind some other title, such as "vouchers," and justify over-large attorney fee awards by invoking the alleged total value of the coupons available to class members. The courts of appeals have split on whether courts are required to pierce these showings and make certain that the attorney fee awards do not exceed the benefits actually delivered to the class. The Seventh Circuit has been a leader in insisting that district courts make certain of proportionality. But if this amendment is adopted,

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that may not only fail to bring the other courts into line, but prompt the courts that heeded the Committee's advice in 2003 to back off their requirement of proportionality. Under these circumstances, the right course would be to revise the amendment and adopt the Seventh Circuit's view. To achieve this result, the Rule 23(e) (2) (C) (iii) proposal should be revised as follows:

- (iii) the terms of any proposed aware of attorney's fees, including timing of payments, and, if class members are being required to compromise their claims, the ratio of (a) attorney's fees to (b) the amount of relief actually delivered to class members; and

In addition, the settlement approval provisions should explicitly prohibit clear sailing and reversion provisions in class action settlements. Claims administrators can very accurately forecast the take-up rate, and defendants rest assured that they will not face large actual pay-outs. Indeed, they can even buy insurance against the risk of over-high pay-outs.

Written comments

Lawyers for Civil Justice (CV-2016-0004-0039): The Committee should abandon this provision because unifying the standards is unlikely to provide genuine uniformity and it may instead cause increased litigation. Because the amendment only allows courts to "consider" these criteria, it is not likely to produce genuine uniformity. One criterion that has been useful -- the number and strength of objections of class members -- is not on the Committee's list. Because there is no catch-all provision, it is possible that important factors will be overlooked. But any catch-all provision must be limited. The limit could be to make it clear that any additional factor must go to whether the settlement is "fair, reasonable, and adequate." The current reality is that courts need flexibility. "Although there is clearly variation among the circuits, there is no indication that differences in settlement approval criteria are responsible for the rejection of settlements that should have been approved or the approval of settlements that should have been rejected." Moreover, some criteria are not adequately explained. For example, the timing of the payment of attorney fee awards is mentioned but not explained. Counsel sometimes press for a "quick pay" provision to ward off objectors. Is that what is meant? Defendants are unlikely to consent to such a provision absent a guarantee of repayment in the event of appellate reversal. Similarly, the "method of processing class-member claims, if required" is vague and ambiguous. This is a new requirement. Does it mean that arrangements in which a third-party processes claims are inherently more fair? Also, the new header for Rule 23(e) (3) -- "identification of side agreements" -- is likely to raise questions due to the use of the word "side."

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For example, if the parties agree to pursue settlement approval in a jurisdiction where the law is clear on how that is to be done, is that a "side" agreement subject to disclosure? The word "side" should be deleted.

Gregory Joseph (CV-2016-0004-0040): The phrase "proposed to be certified for purposes of settlement" raises a question -- proposed to be settled where? Currently, if the parties want to settle a case originally filed in federal court in a state court instead, they can dismiss the federal action because it is uncertified and refile in state court. Is this change intended to prevent that result? That seems unwarranted, and is not hinted at in the Committee Note. Does the amendment change that if the federal court decides for some reason not to approve the proposal for settlement? Again, it does not seem that the federal court has a reason to prevent the parties from seeking approval in another court.

Laurence Pulgram and 37 other members of the Council, the Federal Practice Task Force, and other leaders of the ABA Section of Litigation (CV-2016-0004-0057): Our comments focus on three matters:

(1) The adequacy of relief to the class: We believe the first factor in the rule text should be moved up to (C), rather than included in subpart (i). Although the likelihood of success is mentioned in the Note, we believe it is often a dominant consideration, and one that should be balanced against the costs, risks and delay of further proceedings. If the plaintiffs' claims are strong, the court should expect that fact to be reflected in the relief to the class. But sometimes plaintiffs' claims are weak, or the defenses are strong also, and sometimes the law is uncertain. The point should be that the likelihood of success factor will support a settlement that otherwise might not be viewed as adequate, but is reasonable in light of the circumstances. Moreover, the costs of trial and appeal are not the only matters to be taken into account; the prospect of motions to dismiss or for summary judgment, and discovery costs, should be considered also. Thus, we would favor revising (C) and (i) as follows:

(C) the relief provided to the class is adequate, taking into account the likelihood of success and the following:

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

(2) Timing of notice under (e) (1): Under (e) (2), the court

may approve the proposal only "after a hearing." Some practitioners believe there is an ambiguity regarding whether notice must be given under (e)(1) before a hearing to approve the settlement under (e)(2) is scheduled. To clarify this matter, we propose that (e)(2) be revised, perhaps in one of the following ways:

*Alternative 1*

If the proposal would bind class members under Rule 23(c)(3), the court may approve it only after notice and a hearing . . .

*Alternative 2*

If the proposal would bind class members under Rule 23(c)(3), the court may approve it only after directing notice as provided in Rule 23(e)(1), a hearing . . .

(3) Reference in Note to extent of discovery as a factor bearing on approval of the proposal: More than once, the Note speaks of informing the court about the nature and amount of discovery in this and other cases, suggested that it is an important consideration in approval of the proposal. Although the extent of discovery could be relevant, we believe the Note should balance this discussion with language suggesting that early settlements before discovery has commenced should not be discouraged. The 2015 amendments emphasized the importance of proportionality in discovery, but some lawyers nevertheless take the position that they cannot approach settlement until a requisite amount of discovery is taken. Others will negotiate an early settlement but insist upon "confirmatory discovery" after the terms of settlement have been reached. As currently written, the Note might be seen to encourage wasteful discovery. Particularly in cases involving mergers and acquisitions, this would be an undesirable thing.

Pennsylvania Bar Association (CV-2016-0004-0064): We support this amendment, but think it is important to state that the factors are not exclusive. Some of the factors seem redundant. For example, adequacy of representation has already been addressed under Rule 23(a)(4). Although the amendment reflects an effort to clarify the factors already used by courts, by focusing on some and not mentioning others it may be interpreted to confine courts' discretion. To avoid that result, it would be desirable to say in the rule that the list is not exclusive.

Gary Mason & Hassan Zavareei (CV-2016-0004-0065): We believe that the Note on 23(e)(2) improperly over-emphasizes the importance of claims rates. This emphasis is not consistent with current law to the extent it pulls out the claims rate as the most important factor in determining fees. A myriad of other factors routinely are considered. Indeed, numerous courts have held that claims rates are *not* a determinative factor. We propose revising the Note as follows:

Examination of the attorney-fee provisions may also be important to assessing the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. The number of claims submitted may not be a significant factor in cases where the award of attorney's fees is based on lodestar or is determined based on the full benefits made available by the settlement. Nevertheless, the relief actually delivered to the class ~~may~~ can be an important factor in determining the appropriate fee award. ~~In some cases, the Provisions for reporting back to the court about actual claims experience, and deferring a portion of the fee award until the claims experience is known,~~ may bear on the fairness of the overall proposed settlement. (p. 227)

American Association for Justice (CV-2016-0004-0066): AAJ applauds and supports the effort to streamline the information courts consider when determining whether to approve a proposed class-action settlement. The addition of the word "only" regarding the existing criteria (fair, reasonable, and adequate) is more emphatic. The rewrite of the rule focuses the courts and litigants properly on the core concerns regarding settlement and move away from focusing on other lists of circuit-specific factors, which may be irrelevant to particular cases and may have remained unchanged in certain circuits for over 30 years. AAJ is concerned, however, about the two references to attorney's fees (on pp. 223 and 227) may complicate the review process and confuse courts and litigants with regard to settlement review. The suggestion that the reference to "claims rate" and the suggestion of deferring fee awards could be misconstrued by courts to have broad application. We offer the following views:

(1) Although the proposed attorney's fee award is a factor that bears on sending notice to the class, the reference to this factor on p. 223 seems unduly to stress this issue. Emphasizing this one factor, and not others, could be interpreted in limiting the courts' flexibility. Deferral of some or all attorney's fees seems to us out of place in regard to giving notice (the focus on p. 223). Even in regard to application of the 23(e)(2) approval factors, the emphasis seems unwarranted to us because it likely matters

in a minority of settlements. Focusing on claims rates may overlook important deterrence and other benefits provided by the settlement. AAJ thinks that the paragraph on p. 223 so that only the first sentence remains:

The proposed handling of an award of attorney's fees under Rule 23(h) is another topic that ordinarily should be addressed in the parties' submission to the court.

Alternatively, if a reference to "claims rate" remains in the Note, we think that the Note on p. 223 should be rewritten as follows:

The proposed handling of an award of attorney's fees under Rule 23(h) is another topic that ordinarily should be addressed in the parties submission to the court. In a small number of some cases, it may will be appropriate important to evaluate the expected benefits to the class or to take into account the likely claims rate relate the amount of an award of attorney's fees when considering the settlement and the award of attorney's fees. In such cases, other consideration may predominant, such as the difficult of the work, the quality of the representation and the results obtained, deterrence of violations of the law, and appropriate use of unclaimed funds, such as cy pres awards. Further, it may be appropriate to allow for inclusion of fees for significant additional work class counsel performs after notice is disseminated. to the expected benefits to the class, and to take account of the likely claims rate. One method of addressing this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results.

(2) The topic of attorney's fees comes up again in the Note on p. 227. The first two sentences of the second full paragraph on that page are accurate. But AAJ is concerned about the further discussion of "the relief actually delivered to the class" and possible deferral of fees until the claim experience is reported. This seems to reinforce the minority of cases where the settlement is a "claims made" settlement as opposed to a common fund. By referring to this special consideration, without providing other equally important factors, the Note could be interpreted as making claims rate experience both a general and exclusive concern. But some cases have low claims rates are only one factor in assessing the overall value of the case. Even if there is a low claims rate, the case may have considerable deterrent value. Other factors come into play, including



whether the underlying statute has an attorney's fee provision that indicates that the legislature has determined that a fully compensatory fee should be paid somewhat without regard to compensation in the individual case. But AAJ recognizes also that listing all these factors might overburden the Note. If the Committee deems it necessary to retain reference to claims experience, it favors revising the paragraph on p. 227 as follows:

Examination of the attorney-fee provisions may also be important to assessing the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, evaluation of the relief actually delivered to the class can be an important factor in determining the appropriate fee award. In these cases, Provisions for reporting back to the court about actual claims experience is not an exclusive factor and other relevant factors, including, but not limited to, deterrent effect, legislative intent, and alternative use of the unclaimed funds, and deferring a portion of the fee award until the claims experience is known, may bear on the fairness of the overall proposed settlement.

(3) AAJ is also concerned about factor (D) regarding equitable treatment of class members relative to each other. If that provision remains, it is important that courts not interpret "equitable" to be the same as "equal." Careened law does not require that a class action settlement benefit all class members equally. For example, if there are statute of limitations problems that affect the claims of some class members but not others, that would justify different treatment. To avoid misunderstanding, AAJ strongly urges revision of the Note on pp. 227-28 as follows:

Paragraph (D) calls attention to a concern that may apply to some class action settlements -- inequitable treatment of some class members vis-a-vis others. Equitable treatment does not mean that all class members benefit equally from the settlement, but rather that the settlement be objectively fair to all members. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that affect the apportionment of relief.

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Yvonne McKenzie (Pepper Hamilton) (CV-2016-0004-0069): We have two comments that focus on Rule 23(e) (2) :

(1) We agree with the following statement in the Note on p. 226: "The relief that the settlement is expected to provide to class members is a central concern. Measuring the proposed relief may require evaluation of the proposed claims process and a prediction of how many claims will be made . . . ." But we are concerned that the rule does not address a related concern that courts may not take adequate measures to define the class or otherwise to ensure that uninjured class members do not recover. This concern is particularly significant in the growing number of consumer class actions that are being brought based on technical violations of state and federal statutes with no concrete injury common to all class members. In *Spokeo v. Robins*, 136 S.Ct. 1540 (2016), the Supreme Court has held that a bare procedural violation does not satisfy Article III. The rule should be clarified to state that the class representative must show that all class members have Article III standing. One way to do this would be to amend Rule 23(a) (3) to clarify that typicality means that all class members have an injury similar to the one alleged by the class representative. Chief Justice Roberts recognized the importance of this issue in his concurring opinion in *Tyson Foods v. Bouaphakeo*, 136 S.Ct. 1036, 1051 (2016): "I am not convinced that the District Court will be able to devise a means of distributing the award only to injured class members."

(2) The second comment is related to the first. Proposed Rule 23(e) (2) (C) (ii) addresses in part the concern with compensating uninjured parties by requiring the court to take account of "the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required." The Note adds that the "claims processing method should deter or defeat unjustified claims, but unduly demanding claims procedures can impede legitimate claims." We believe that this concern is better addressed at the class-certification stage. To illustrate, consider the recent Ninth Circuit decision in *Briseno v. ConAgra Foods*, 844 F.3d 1121 (9th Cir. 2017), where the court affirmed class certification in a case involving an allegedly misleading label claim that cooking oil was "all natural," even though many class members would likely be unable to recall what brand of cooking oil they purchased, much less whether the label claimed to be all natural. But the Ninth Circuit decision simply kicked the issue whether these class members could satisfy Article III down the road, an impractical result that could be avoided by a rigorous analysis at the class-certification stage.

Since it is not resolved at the certification stage, things are kicked down the line until the settlement stage. But the proposed Note to (e) (1) and (e) (2) do little to address this problem. Instead, they only call for attention to the method of processing class member claims and concern about the "claims rate." This comes close to endorsing diversion of the defendant's money to uninjured cy pres recipients. That is a mistake. Cy pres simultaneously facilitates the flaws and in modern class actions and creates the illusion of class compensation.

New York City Bar (CV-2016-0005-070): We are generally in favor of this proposal and believe it is helpful to lay out a specific framework for evaluating whether to approve a class settlement. The articulation of these criteria should minimize distinctions among the circuits, which we support. We do propose some edits, however:

(1) On p. 224, the Note says that the purpose of the amendment is "not to displace any of [the circuits'] factors." We fear that this may cause confusion. Instead, we suggest that the Note read as follows:

The goal of this amendment is not to displace any of these factors, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal the case law developed by the circuits because that case law remains relevant to determining whether a settlement meets the criteria for approval detailed in Rule 23(e) (2) itself. Because those same central concerns are embodied in the factors listed in Rule 23(e) (2), the amendment directs the parties to principally address the fairness, reasonableness and adequacy of the settlement to the court in terms that encompass the shorter list of core concerns, when all of those factors are appropriate.

(2) We are concerned that the amendment may be taken to direct consideration of all the factors even in cases in which they are not apposite. We think that the rule language on p. 213 at line 47-48 should be revised as follows:

only after finding that it is fair, reasonable, and adequate after considering factors including, where appropriate, whether:

(3) We offer the following comments on two of the factors in 23(e) (2):

23(e) (2) (C) (ii) focuses on "the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required." This type of factor has not regularly been addressed by the courts of appeals, and we are concerned that the district courts could apply it inconsistently. The Note should say that this factor does not require a specific method or absolute standard for distribution. Moreover, with regard to non-monetary relief, we worry that this standard might restrict creativity in tailoring relief before the method has been used. At a minimum, the Note should indicate that this factor may be inapposite for non-monetary settlements.

23(e) (2) (D) calls for the court to focus on whether "class members are treated equitably relative to each other." The Note should make clear that "equitable" is not the same as "equal," and that subclassing may often lead to different relief for different subclasses.

(4) We believe that another factor should be added -- "the nature of the class members' and objectors' reaction." We think this factor is not included in the proposed list, and that it is important. We say the focus should be on "the nature" of the reaction because otherwise there may be a risk courts will simply engage in nose-counting. A qualitative analysis of the class members' reaction is more important than an quantitative one.

Aaron D. Van Oort (CV-2016-0004-075): The provision in Rule 23(e) (2) (D) regarding equitable treatment of class members vis-a-vis each other is an important instruction for courts and lawyers. My concern is that the Note does not explain this important concept, and recognize that settlements must smooth out differences between class members in order to achieve speed, simplicity, efficiency, and finality. In a way, this point focuses on the differences between common and individual questions, particularly pertinent in this day of increased use of Rule 23(c) (4). "Because of the limitations imposed by the Rules Enabling Act, nearly all litigation classes are issue classes under Rule 23(c) (4), whether they are designated such or not." This is not to open a debate on a topic the Committee has put aside, but designed to make the point that when they settle parties can compromise on some of those individual questions even though courts might be unable to resolve them via litigation. Courts should therefore recognize as common for purposes of settlement issues that -- if litigated fully -- would be individual. I would therefore add to the Note paragraph on pp. 227-28 as follows:

Paragraph (D) calls attention to a concern that may apply to some class action settlements -- inequitable treatment of some class members vis-a-vis others. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that affect the apportionment of relief. In applying Rule 23(c)(2)(D), courts may give due regard to the parties' ability to compromise and simplify the treatment of claims to achieve speed, simplicity, efficiency, and finality.

Public Citizen Litigation Group (CV-2016-0004-081): We generally support these changes. But we also support the suggestions of COSAL and Thomas Sobol that the criterion concerning the distribution of relief should be clarified. Rather than suggesting that all settlements must meet some absolute standard of efficacy of distribution of the settlement's benefits, the rule should recognize that the question is one of available alternatives. We suggest that proposed (e)(2)(C)(ii) be revised as follows:

- (ii) ~~the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required, is~~ reasonable in relation to other practicable methods of distribution under the circumstances;

Public Justice (CV-2016-0004-089): We have concerns about the focus of proposed Rule 23(e)(2)(C)(ii). In the first place, the rule seems to assume that class actions generally include claims systems. In our experience there are a great many class actions where every member of the class is sent a check, or receives a credit or otherwise automatically gets relief. That reality should not be overlooked. Second, particularly when the defendant has dragged out the case, the settling class representatives and class counsel may encounter great difficulty in locating many class members. When that happens, the right solution is a cy pres use of the remaining funds that addresses the grievance raised by the suit. We know that the Note to Rule 23(e)(1) makes a brief reference to this possibility at pp. 222-23. We urge the Committee to expand on this point. In cases we have handled involving illegal debt collection practices, residual funds were properly committed to support organizations that protect the rights of debtors in the same geographic area as the class members. The inclusion of that possibility is and should be a factor in support of approval of the settlement.

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Rule 23(e) (5) (A) -- objector disclosure and specificity

Washington D.C. hearing

Mark Chalos (Tenn. Trial Lawyers Ass'n): District courts routinely allow discovery about prior objections by objectors before them. It would be desirable to include a requirement that all objectors disclose how many times in the past they have objected. This listing should include case name, the court in which the case was pending, the docket number of all other cases in which the objector has submitted objections.

Alan Morrison (George Washington Univ. Law School)  
(testimony & CV-2016-00004-0040): This provision is not objectionable. But it is worth noting that sometimes settlement proponents go too far in policing the objections process. For example, in the NFL concussion case the parties required that all objections be personally signed by all the objectors and not just their lawyers even though they had pending cases in the MDL proceeding. That violates 28 U.S.C. § 1654 and was burdensome to lawyers who had more than one or two clients. On occasion it resulted in lawyers being unable to file objections on behalf of all of their clients.

Phoenix hearing

Thomas Sobol: The amendment does not go far enough. Keep in mind what is required of the class representative and class counsel. The representative must demonstrate typicality and adequacy. Class counsel must satisfy Rule 23(g). These requirements are essential to ensure that the court does not improvidently authorize somebody inappropriate to take actions that impair the legal rights of others. Yet objectors can put at risk the rights of the other class members by simply objecting. If they are doing so only on their own behalf, that should be their right, but if they assert that their objections are submitted on behalf of others, or perhaps the entire class, the court should consider insisting that they satisfy the same requirements that the class representative and class counsel must satisfy. The court should not consider the objection until this scrutiny of the objector and objector counsel is completed. The court has inherent power to do this, but the power should be made explicit. The following could be added at the end of proposed (e) (5) (A) :

If an objection applies to a specific subset of the class or to the entire class, the court may require the class member filing such an objection to make a factual showing sufficient to permit the court to find (i) that the class member is a member of the affected class or a subset of the class; (ii) that the class member will fairly and adequately

represent the interests of the class; and/or (iii) that the counsel for each class member is qualified to fairly and adequately represent the interests of the class. Absent such a finding, a court may overrule the objection without considering it further.

Annika Martin: The required disclosures for objectors are a good idea, but they should be augmented. In addition, objectors should be required to disclose whether they have previously objected to a proposed settlement and, if so, to provide specifics about when those prior objections were made and the outcome. This might facilitate additional discovery about the objector. This might also call for some information about objector counsel's prior objections.

Dallas/Ft. Worth (telephonic) hearing

Michael Pennington (DRI) (testimony and CV-2016-0004-088): Proposed (e)(5)(A) says that the objector should specify whether the objection is offered only on behalf of the objector, on behalf of a specific subset of the class, or on behalf of the entire class. This provision invites class members to assert objections on behalf of other people. But those objectors have not been appointed to represent the class (as the class representative has been so appointed -- at least conditionally -- in connection with the proposed settlement). Moreover, this provision may create confusion about how much real opposition there is to the settlement. We have seen instances in which objectors have purported to "opt out" an entire state's population from a class action. But they have not been authorized to take any such action. There is no empirical need to have objectors instruct a district court how to interpret their various objections, and adding this invitation would only complicate an already-complicated settlement review process.

Theodore Frank (Competitive Enterprise Institute) (testimony and CV-2016-0004-0085): These standards for objector submissions are going to produce harmful results. The change to the rule is unnecessary because district courts already effectively manage such submissions. Adopting more formal requirements will only encourage arguments that objections should be rejected for failure to adhere to the favored form. Presently, the courts of appeals direct district judges to provide a reasoned response to all non-frivolous objections. But suggesting that some such objections can be rejected out of hand for being in the wrong form invites district courts not to address the merits of the objections. I agree with Mr. Isaacson that -- though there may be some unjustified objections -- there is no significant problem of frivolous, bad-faith objectors. There is a much more important problem of class counsel collaborating in faux settlements that benefit them but not the class, and allow the

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defendant off cheaply. The goal of the amendment is to give class counsel a stick to use against the rare bad-faith objector, but what will happen is that the stick will be used against good-faith objectors. But if the Committee insists on proceeding with this rule change, it should ensure that class notice includes advising class members of these requirements. At the end of proposed (e) (5) (A) the following should be added:

The notice to the class must notify class members of the requirements contained in this paragraph. An objector's failure to satisfy technical standards is not a basis for dismissal of an objection. An objector does not waive an objection nor any rights to proceed on appeal for failure to meet the requirements of this paragraph.

Written comments

Alex Owens (CV-2016-0004-0036): The changes regarding serial objectors are wise. Professional objectors are the vast majority of class action objectors, and they tend to behave unethically. These attorneys generally have retainer agreements that limit the client to receiving no more than \$5,000. There should be guidance concerning the disclosure of such retainer agreements in that they effectively provide a contingency fee that often approaches 95%. There should be clearer standards not just regarding the details of the objection but also the manner in which the objector came to object and the bona fides of the objection. An additional subsection setting out a standard for when objectors or their counsel engage in sanctionable behavior would also help ensure that the objectors that object are not engaged in extortionate activity. Judges may often be unaware of this sort of activity.

Defense Research Institute (CV-2016-0004-072): The rule invites class members to object on behalf of others. That is not justified and should be changed. DRI agrees that the grounds of the objection should be stated with specificity, but sees no reason affirmatively to invite class members to raise objections "on behalf" of others. The court certainly can determine whether the objection has ramifications with regard to other class members without this invitation to class members to volunteer objections for others. This invitation could lead to side disputes and needless litigation.

Public Citizen Litigation Group (CV-2016-0004-081): We agree with the requirement that objections be stated specifically. In our experience, courts routinely disregard objections that are not stated specifically. But we think that the language should be modified to add the word "reasonable" between "with" and "specificity." This addition would provide support in the rule for the comment in the Note that pro se



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objectors should not be held to "technical legal standards." In addition, we find the rule requirement that the objection specify whether it is on behalf only of the individual class member confusing. What does it mean for an objection to "apply to" all or part of the class is unclear. Because the court can only approve the settlement as presented to it, any valid objection in some sense "applies to" the entire class because it will, if accepted, be a ground to refusal approval of the settlement. We would therefore delete that language. This would result in (e) (5) (A) reading:

Any class member may object to the proposal if it requires approval under this subdivision (e). The objection must state its grounds with reasonable specificity.

Tennessee Trial Lawyers Ass'n (CV-2016-0004-083): We believe that Rule 23(e) (5) (A) regarding the objector's submission should be amplified with the following sentence:

Objector and Objector's counsel, if any, must list by case name, court, and docket number all other cases in which she or he filed an objection.

This information should be discoverable in any event, but getting to that point takes considerable motion practice. This addition would streamline that process.

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Rule 23(e) (5) (B) and (C) -- court approval of payment to objectors or objector counsel

Washington D.C. hearing

Jeffrey Holmstrand (DRI) (with written testimony): DRI completely agrees with the idea that bad faith objectors should be deterred. But it is not certain that this proposal will accomplish that objective. Courts seem presently to be able to tell the "good" from the "bad" objectors. But many objectors tend to blend some "good" and some "bad" features.

Mark Chalos (Tenn. Trial Lawyers Ass'n): The draft should be improved to cover a possible loophole. Sometimes these deals involve payment to a recipient other than the objector or objector counsel. For example, the payment may be to an organization with which the objector is associated. The rule should forbid any payment "directly or indirectly" to the objector. In addition, there is a risk of payments that escape the court-approval requirement. There should be a requirement that, whenever an objector withdraws and objection, the objector must file with the court a certification saying that there has been no payment made in connection with the withdrawal of the objection.

Alan Morrison (George Washington Univ. Law School) (testimony & CV-2016-00004-0040): He strongly supports adding the court-approval requirement. Indeed, he would apply the court-approval requirement of Rule 23(e) to all settlements in putative class actions whether or not the court has ruled on class certification, or whether the settlement purported to bind others in the class (as was the general rule before the 2003 amendments). Regarding the Note on p. 229 about the possibility class counsel will believe that paying off objectors to avoid delay is worth the price, it might be added that defendants may also succumb to this sort of pressure. In at least one case, he understands that a defendant paid off an objector after an appeal was filed. Defendants may, at least subconsciously, agree to a larger attorney fee for class counsel in anticipation that some of it will be used to pay off objectors.

Stuart Rossman (Nat'l Consumer Law Ctr. & Nat. Ass'n of Consumer Advocates) (with written testimony): He strongly supports this effort to prevent bad faith objectors from profiting. But it is important also to ensure that if objectors are paid the payment should come either from the defendant or from class counsel. If the objection results in a substantial increase in the settlement amount, however, that increase should not become a bonus for class counsel, and it could produce funds that would cover the payment to the objector who produced the increase.

Brian Wolfman (Georgetown Law School) (testimony and prepared statement): I have represented objectors in about 30 national class-action settlements. I support this proposed rule. Indeed, in 1999, I proposed a very similar rule to this Committee. But the rule has a gap -- it says nothing about the standards for approving such a payment. I think that a court should approve a payment to an objector different from the payout via the settlement only in the rarest circumstances. In effect, proposed 23(e) (2) (D) -- regarding equitable treatment among class members -- essentially says that. The solution is an addition to proposed 23(e) (5) (B) :

The court may not approve a payment or a transfer of other consideration to an objector or objector's counsel unless it finds that (1) the objector's circumstances relative to other class members clearly justify treatment different from the treatment accorded to other class members under the proposal; and (2) the objector lacked a realistic opportunity to prosecute a separate action.

In addition, the Committee Note at p. 229 says that class counsel may conclude that a payoff to an objector is justified in order to get relief to the class. That is true, but may be taken to be a justification a court could adopt to support approval of a payment to an objector. This should never be a justification for a payoff. I propose that the Note be augmented by adding: "That is not a proper reason for providing payment or other consideration to these objectors. Rule 23(e) (5) (B) (ii) seeks to eliminate any incentive for providing such payment or consideration in the first place."

Phoenix hearing

Jennie Lee Anderson: We applaud this proposal. The bad faith objector problem affects both sides of the "v." The right of class members to object is important and should be protected. But the activities of these people have no bearing on that. This amendment should improve the situation, although it may not, by itself, be a complete solution. It will be important to monitor what happens. There may later be a need to involve the appellate rules also.

Jocelyn Larkin (The Impact Fund): The draft might be improved by providing examples to illustrate the grounds for approving a payment to an objector.

Annika Martin: It is good to require court approval for payments to drop an objection, or desist from making one. But there is a risk that this proposal has a loophole. Counsel may simply create a nonprofit organization that can be the recipient of the payment, thereby sidestepping the rule as presently

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written. Revising proposed (e)(5)(B) to add this possibility would be a good idea. Alternatively, it might be sufficient to achieve a similar result by removing words from the rule proposal:

Unless approved by the court after a hearing, no payment or other consideration may be provided ~~to an objector or objector's counsel~~ in connection with:

- (i) forgoing or withdrawing an objection or
- (ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal;

Dallas/Ft. Worth (telephonic) hearing

Eric Alan Isaacson (testimony and CV-2016-0004-0076): I have 26 years' experience with the plaintiff class action bar. I have never seen a payment offered to an objector for a groundless objection. To the contrary, when objectors are offered money that is a sign that their objections are justified. Class counsel use payoffs to avoid appellate review that would likely lead to reversal of the approval of the settlement. There simply is no groundless objector problem. But there is a problem with payoffs that curtail appellate review. Consider a school teacher who has at best a \$1,000 claim and objects to an inadequate settlement. Suppose she is offered \$25,000 to drop the objection or an appeal. It is very difficult for average people to turn down such a payment, particularly in a time when so many people have trouble making ends meet. The requirement of court approval is not a solution to this problem, particularly because the proposed amendment does not state a standard for whether to approve the payment. One judge might think that paying objectors for dropping frivolous objections is bad, while another might think it makes perfect sense as a way to expedite completion of the settlement claims process. A better idea would be to provide explicitly in the rule for paying objector counsel. As things now stand, what frequently happens is that objectors become the target of harassment from class counsel. Suddenly they are subpoenaed to provide testimony about their lives as part of an effort to discredit them. That will become a bigger problem due to the removal of the current requirement (added in 2003) for court approval of objections without payment to objectors.

Theodore Frank (Competitive Enterprise Institute) (testimony and CV-2016-0004-0085): Proposed (B) and (C) should be deleted because they will only increase extortionate payments to bad-faith objectors. By requiring that payoffs be disclosed to the court and approved, it will encourage other entrepreneurial attorneys catch on. "Newcomers to the objector blackmail market will see that they too can file a boilerplate objection with

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conclusory allegations and be paid to go away." Moreover, class counsel can use this process to protect their bad settlements from appellate review. What should be done is to build in the right incentives by stating explicitly in the rule that objectors can recover an attorney's fee award for providing a benefit to the class. (B) should be rewritten as follows:

The court may approve an objector's request for an award of reasonable attorney's fees and nontaxable costs after a hearing and on a finding that the objection realized a material benefit for the class. An objector may not receive payment or consideration in connection with ~~Unless approved by the court after a hearing, no payment or other consideration may be provided to an objector or objector's counsel in connection with:~~

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

If the Committee proceeds with (B) and (C) as currently formulated, it should add an enforcement mechanism. The remedial concept of disgorgement should be invoked along the following lines in a new (D):

(D) Enforcement. Any party or class members may initiate an action to enforce paragraph (B) and (C) by filing a motion for disgorgement of any consideration received by an objector in connection with forgoing or dismissing an objection or appeal.

Written comments

Gregory Joseph (CV-2016-0004-0040): Is it possible that this court-approval requirement will merely make it more expensive to buy off the objector? In addition, it is not clear how the limitation on payment for "forgoing" an objection is to be enforced. How will the court become aware of this event that leaves no blemish in the court's docket?

Hassan Zaverreei (CV-2016-0004-0048): I am concerned that this rule will not actually deter bad faith objectors, who are unethical and unlikely to abide by its provisions. Class counsel sometimes feel they must give in to objectors in order to get relief to the class. The court approval requirement would effectively remove the decision whether to do so from class counsel's toolbox, for they would be unwilling to subject themselves to the public embarrassment of being on the record as having paid a professional objector. I am also concerned that the narrowness of retained district-court jurisdiction after an

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appeal has been docketed may mean that changes to the Appellate Rules are also needed. Requiring approval by the district court is contrary to traditional notions of appellate jurisdiction. To avoid these jurisdictional difficulties, a better approach would be to add something along the following lines to Rule 23(e):

*Request for Finding that Objection Was Filed in Bad Faith.*

At the request of any party to consider whether an objection has been filed in bad faith, the court may consider all surrounding facts and circumstances -- including whether the objector complied with Rule 23(e) (5) (A), whether the objector complied with all noticed requirements for the submission of an objection, whether grounds for the objection have legal support, conduct by the objector or objector's counsel in the instant case, and previous findings that the objector or objector's counsel has pursued an objection in bad faith -- and, if it deems it appropriate, make a finding that an objection was brought in bad faith.

Pennsylvania Bar Association (CV-2016-0004-0064): This amendment is a good start in addressing frivolous or meritless objections, which can impact the settlement of a class action. We recommend adoption.

New York City Bar (CV-2016-0005-070): We agree with the decision to require court approval before payment to objectors or objector counsel. But we do not believe that it should always require a hearing to obtain that approval. Accordingly, we think that the rule language at lines 90-94 on p. 216 should be revised as follows:

Unless approved by the court after a hearing or, if the Court deems it appropriate, based solely on written submission on notice to all interested parties, no payment or other consideration may be provided to an objector or objector's counsel in connection with:

Public Citizen Litigation Group (CV-2016-0004-081): The proposed amendment requiring court approval is along the lines we proposed in 2015. We do think two modifications would improve it. First, we think that the words "to an objector or objector's counsel" should be removed from the rule to deal with the risk that some might direct payment to third parties affiliated with the objector or lawyer. Second, we are concerned about the absence of any standard for approving payments. Courts may conclude that paying off objectors is justified to finalize the settlement without regard to the validity of their objections. We think that the Note should make it clear that this sort of reason does not justify approval. We think that the standard should be whether the payment would be approved as fair and

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reasonable from the standpoint of the class as a whole, which would incorporate the standard in (D) about treating class members equitably relative to each other. We propose that the following be added to (e) (5) (B) :

The court may approve such payment or consideration only upon finding that it is fair and reasonable from the standpoint of the class as a whole, taking into considerations the factors set forth in Rule 23(e) (2).

Tennessee Trial Lawyers Ass'n (CV-2016-0004-083): We urge that the proposed rule be revised to close a potential loophole for clever objectors and lawyers to set up entities to receive the payment. We suggest that the phrase "directly or indirectly" be added before "to an objector or objector's counsel." We know of objectors who have demanded that payments be made to a non-profit or "think tank" by which the objector is employed. We think also that a sentence should be added to the rule requiring that any objector who withdraws an objection or appeal without compensation file a notice with the court so stating. An explicit certification requirement would give the courts a method to enforce the rule.

Public Justice (CV-2016-0004-089): We endorse the proposal to require court approval for payment to an objector or objector counsel. We believe this provision will help deter so-called "professional objectors" from holding up an otherwise valid class action settlement.

Richard Kerger (CV-2016-0004-090) (letter initially sent to Chief Judge Guy Cole of the Sixth Circuit): I understand that a rule proposal has been made to deal with the problem of professional objectors, and write to report on an experience I have encountered in an MDL proceedings in which I was involved. After four and a half years of hard-fought litigation, both the direct purchaser and the indirect purchaser classes in these cases reached settlements. The indirect purchaser settlement, on which I was working, was attacked by several objectors including a particular pro se objector. For a year or more, this objector ignored directives from the district judge and also repeatedly accused the judge and the Sixth Circuit of conspiring with counsel to approve the settlement. The settlement was for more than \$151 million, but the objector asserted (without an iota of evidence) that it was fraudulent and done solely to line the pockets of lawyers. Even though the district judge eventually imposed an appeal bond requirement, this objector appealed without paying the bond. Eventually the appeal was dismissed. The objector's conduct delayed the settlement and caused the class to lose money because one of the defendants was not obligated to make its \$43.5 million deposit into escrow until all appeals had been resolved and the settlement upheld. Finally,

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the district judge imposed a financial sanction on the objector. We tried to take his deposition, but he objected to the timing and then failed to appear. At this point, the district judge found him in contempt and had him arrested in Michigan at a motel and transported to the courthouse in Ohio by two marshalls. This man has been found to be a professional and serial objector and a vexatious litigator. In the past, he has received at least \$67,000 in payments for his objections. "The concern is that the history of this case is an advertisement for him as to why class counsel should cave in to professional objectors and pay them the relatively nominal amount they want to just 'go away'." Besides the current amendment proposal, other ideas occur to me: (1) insist that there be some proportionality between the amount of the class members' claim and the overall settlement; (2) amending Rule 23 to shorten the time by which a notice of appeal from denial of an objection must be filed; (3) making appellate review of objections discretionary, as is true under Rule 23(f) for class-certification orders; and (4) some sort of deterrent to prevent frivolous objections and appeals. "No objector with a minuscule claims, such as what [this objector] has in this case or others in which he has filed objections, should be allowed to go undeterred to prevent hard-fought class action settlements to proceed to finality. Without some degree of risk imposed on serial objectors, they will continue to obstruct the judicial process and our orderly system will remain broken."



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Rule 23(f) -- forbidding appeal from notice of settlement  
proposal

Washington D.C. hearing

Jeffrey Holmstrand (DRI) (with written testimony): This proposal makes sense. Indeed, it seems implicit, but it makes sense to make it explicit.

Written comments

Frederick Longer (CV-2016-0004-0038): This change is very welcome. Rule 23(f) appeals can be very disruptive, but appeals from the sending of notice exacerbate this potential disruption. That notice occurs when the court and the parties clearly contemplate further proceedings that may significantly affect what the appellate court may see if the proposal is approved. Codifying the result reached by the Third Circuit in the NFL case relieves other litigants and judges of the need to worry about this point.

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Rule 23(f) -- additional time for appeal in government cases

Washington D.C. hearing

Jeffrey Holmstrand (DRI) (with written testimony): This proposal does not go far enough. The class certification decision is, by far, the most important in the case. There should be an appeal as of right. Although 23(f) was a good idea, the reality has been that the rate of taking appeals has fallen. Most circuits seem to think that appeals should be allowed only when there is an open legal question to be answered. The rule should take the view of the ALI Aggregate Litigation project, and ensure appellate review of right in all cases.

Dallas/Ft. Worth (telephonic) hearing

Michael Pennington (DRI) (testimony and written submission): We have no problem with extending the time for seeking review in cases in which the United States is a party. But we think it should be recognized that the 14-day time limit in the current rule is too short for many others. There is often no way to know when a class certification decision will be rendered. It happens on occasion that counsel simply cannot free up the time to focus on that issue when the court's decision is made. What if counsel is in trial, for example? Certainly counsel should put the matter on the front burner, but there are limits to being able to do that. We are not advocating an extension to 45 days for all cases, but extending to 21 or 28 days would relieve a serious pressure point without creating significant risks of delay. It could also provide courts of appeal with better fashioned presentations; as things now stand, the submissions they receive are of necessity often the product of rushed work.

Written comments

Benjamin Mizer (U.S. Dep't of Justice) (CV-2016-0004-0037 and 0041): The Department strongly supports the amendment to Rule 23(f), which it initially proposed, to extend the time for seeking appellate review of a class-certification decision in cases in which the U.S. is a party. Any appeal by the U.S. government must be authorized by the Solicitor General, which depends on a deliberative process that typically requires substantial time. Multiple agencies and offices within the government might have different interests implicated in a specific case. Those interests are sometimes in tension, particularly in cases involving class actions. The current 14-day period for seeking review is particularly challenging because the court of appeals is expressly precluded from granting an extension of time, and it is not clear whether a district court might have the authority to extend the deadline. And unlike a notice of appeal, a petition under Rule 23(f) is not a mere

placeholder. Instead, it is a substantive filing that must set forth arguments for reversing the class certification decision. Like the decision to seek review, the petition must be drafted by DOJ attorneys and authorized by the Solicitor General. Allowing additional time for the government is consistent with various provisions of the Appellate Rules. For example, Appellate Rule 4(a)(1)(B) provides 60 days (rather than the usual 30) for filing a notice of appeal in a case in which the government is a party. Similarly, Appellate Rule 40(a)(1) provides that a petition for rehearing or rehearing *en banc* in a civil case may be filed within 45 days (instead of 14 days) when the government is a party. The extension to 45 days in Rule 23(f) is a reasonable resolution of the timing problem for the government. Though it extends the current 14-day period, it is short of the full 60 days permitted to file a notice of appeal.

Lawyers for Civil Justice (CV-2016-0004-0039): There should be a right to interlocutory review of every certification decision. Rule 23(f) has not achieved its goal of increased uniformity of district court practice regarding class certification. Actually, the number of grants of petitions for review is modest -- about 5.2 grants per Circuit per year. And even where there is a grant, there is an opinion in only a fraction of the cases, a total of 47 opinions during a seven-year period studied in a 2008 report. On average, that works out to less than one opinion per Circuit per year. The problem is that the rule now says that the decision whether to allow an appeal is in the "sole discretion of the court of appeals." And the courts of appeals have developed criteria that are so flexible that they provide little guidance beyond "unfettered" decision-making. There is a simple remedy -- providing appeal as of right from decisions whether to certify a class.

Cheryl Siler (Aderant CompuLaw Court Rules Department) (CV-2016-0004-0058): The extension of the period for filing a petition for review in cases in which the United States or its officer is a party is sensible. This amendment would bring Rule 23 in line with other rules setting deadlines for appeal.

Pennsylvania Bar Association (CV-2016-0004-0064): We support this amendment. It affords all parties the extended period to seek review in cases in which the U.S. government is a party.

Defense Research Institute (CV-2016-0004-072): DRI has no problem with the extension of time for cases in which the government is a party. But in other cases as well, 14 days is really not enough time. That deadline is so short that it hinders the best advocacy and thus impairs the presentation to the court of appeals. Both sides of the "v" would appreciate have a bit more time. Without that needed time, the lawyers best

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situated to work on the petition may be unavailable due to other professional commitments (in trial, for example) when the ruling on class certification is made. A 28 day period would be much fairer, and more in keeping with what lawyers are accustomed to have for such complicated matters.

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Ascertainability

Washington D.C. hearing

Jeffrey Holmstrand (DRI) (with written testimony): This should be addressed in the rule. There is an open circuit split. DRI proposes that Rule 23(a)(1) be amended as follows:

(1) the class is so numerous that joinder of all members is impossible the members of the class are objectively identifiable by reliable and feasible means without individual testimony from putative class members and without substantial administrative burden, and as so identified are sufficiently numerous that joinder of all class members is impracticable;

This is an issue of fundamental fairness. The proposal may be a bit beyond what any court has required so far, but perhaps that's because it's more succinct. But doing this would require a separate amendment package or republication because it is not included in the current package.

Dallas/Ft. Worth (telephonic) hearing

Peter Martin (State Farm Mutual Ins.): The Committee should amend the rule to ensure that class definitions provide an administratively feasible way to identify every class member. The Third Circuit has been in front of this issue, and its lead should be followed. This is a matter of fundamental fairness; the defendant is entitled to know who is on the other side.

Written comments

Frederick Longer (CV-2016-0004-0038): As a lawyer who has directly confronted the Third Circuit's evolving doctrine of ascertainability, I believe that the restraint demonstrated by the Committee in refraining from putting out a proposed rule provision is wise. "I commend the Committee's decision to await further developments in the lower courts, rather than attempt to draft a cure that may create more problems than it solves."

Lawyers for Civil Justice (CV-2016-0004-0039): The Committee should add an explicit ascertainability requirement to the rule. Courts will almost certainly continue to find an implicit requirement, but it makes sense to add it explicitly to the rule. The way to do that is to add a Rule 23(a)(5) as follows:

(5) the members of the class are objectively identifiable by reliable and feasible means without individual testimony from putative class members and without substantial

administrative burden.

Alternatively, Rule 23(b)(3) could be amended as follows:

(3) the court finds that questions of law or fact common to class members, including but not limited to the type and scope of injury, predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Laurence Pulgram and 37 other members of the Council, the Federal Practice Task Force, and other leaders of the ABA Section of Litigation (CV-2016-0004-0057): We believe that the Committee's decision to defer any action on ascertainability was a wise choice.

Michael Ruttinger (Tucker Ellis) (CV-2016-0004-0068): In the wake of the Supreme Court's denial of certiorari in cases addressing ascertainability, it is disappointing that the Committee has declined to propose draft language to provide guidance on these issues. A distinct split now exists among the circuits. The First, Second, Third, Fourth, and Eleventh Circuits require courts to consider whether there is an administratively feasible way to distribute relief. But the Sixth, Seventh, and Eighth use a less rigorous standard. The unsettled state of the law leads to inconsistent results.

Defense Research Institute (CV-2016-0004-072): DRI urges the Committee to move forward on ascertainability. Recent decisions in the Sixth, Seventh, and Ninth Circuits have created a clear need for addressing this issue by rejecting the view of the Second, Third, Fourth, and Eleventh Circuits. It may be that the Supreme Court will one day resolve the dispute in terms of the present rule. DRI believes that the Committee should pretermitt the need for such a ruling by adopting a express and robust ascertainability. The need for such guidance in the rule is clear. Class actions that bog down in efforts to determine class membership are as inefficient as those that bog down in making individual determinations of liability. The Sixth and Seventh Circuits' views really result from the absence of language in the rule itself. One way would be to adopt the method DRI proposed to the Committee in September, 2015, by amending Rule 23(a)(1) as follows:

~~the class is so numerous that joinder of all members is impracticable~~ the members of the class are objectively identifiable by reliable and feasible means without individual testimony from putative class members and without substantial administrative burden, and as so identified are sufficient numerous that joinder of all class members is

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impractical;

Among many benefits of this approach, it would indirectly reduce the need to resort to cy pres remedies.

Washington Legal Foundation (CV-2016-0004-087): Nothing in the rule now explicitly requires that class members be ascertainable. Such a requirement would not only protect defendants by ensuring that all people who will be bound by the judgment are clearly identifiable, but it would also safeguard the rights of absent class members to receive fair notice. WLF believes that an unascertainable class is no class at all. Adding the requirement to the rule would bring it into conformity with the widespread practice of many federal courts. Forcing defendants to guess how many people will claim, for example, to have purchased a product, cannot comport with due process or the purpose of Rule 23. Class certification surely cannot require a defendant to forfeit its right to litigate substantive defenses to the claims. As the ALI Aggregate Litigation project recognized, there is no point in aggregate litigation if the same issues will have to be revisited in other proceedings. See ALI § 2.02 comment (e).

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Pick off

Washington D.C. hearing

Mark Chalos (Tenn. Trial Lawyers Ass'n): He is not aware of pick-off problems arising since the Supreme Court's Campbell-Ewald decision.

Stuart Rossman (Nat'l Consumer Law Ctr. & Nat. Ass'n of Consumer Advocates) (with written testimony, supplemented by CV-2016-0004-079): There have been a number of cases since the Supreme Court's Campbell-Ewald decision, but no major problems. The courts are handling this just fine by themselves. Even before the Supreme Court's decision, the courts were handling the matter without difficulty.

Written Comments

Laurence Pulgram and 37 other members of the Council, the Federal Practice Task Force, and other leaders of the ABA Section of Litigation (CV-2016-0004-0057): We believe that the Committee's decision to defer any action on pick off was a wise choice.

Michael Ruttinger (Tucker Ellis) (CV-2016-0004-0068): The Supreme Court's decision in Campbell-Ewald Co. v. Gomez, 136 S.Ct. 663 (2016), left open the possibility that a defendant could moot a class action by consenting to the entry of judgment against it and depositing money in escrow with the court. This open question has generated confusion with the lower courts. Although the Ninth Circuit rejected a tender of payment in Chen v. Allstate, 819 F.3d 1136, 1145 (9th Cir. 2016), district courts have demonstrated a greater degree of uncertainty. This uncertainty poses a real risk of a continued split among the lower courts and, consequently, forum shopping. Should a consensus not emerge, the Committee should consider amending the rule.



Other issues raised

Washington D.C. hearing

John Parker Sweeney (DRI): He would focus his comments on no injury classes. The Supreme Court's decision in Spokeo confirmed the basic Article III principle that one must suffer a concrete harm to file a suit. But American businesses face class actions on behalf of large numbers of people who have not suffered any injury. Nonetheless, the lawyers who file these cases seek to recover the statutory minimum for every member of the class, leading to such enormous exposure that businesses have no choice but to settle. In effect, this results in punishing companies for technical violations that really did no harm to anyone. Prof. Joanna Shepard of Vanderbilt recently did a study showing that during the period 2005 through 2015 there were some 454 "no injury" class actions resulting in total settlement payments of \$4 billion. The sensible solution would be a rule requiring that classes be defined in a way that limits the class in (b)(3) cases to those who have suffered an actual injury. Surveys show that Americans broadly regard that sort of requirement as appropriate in class actions. But this idea is not in the current amendment package, and the current package should not be held up to add this idea.

Stuart Rossman (Nat'l Consumer Law Ctr. & Nat. Ass'n of Consumer Advocates) (with written testimony): Another problem that has arisen in cases involving consumer issues is that on occasion courts will entertain defense motions to strike class action allegations based only on the complaint. It would be desirable for the rule to say somewhere that certification decisions should not be based solely on the complaint. But that issue is not one that should hold up this amendment package. The Supreme Court has made it clear that these decisions should not be based only on the pleadings. Sufficient time for needed discovery must be allowed. That is also consistent with the 2003 amendments to Rule 23(c), removing that prior provision that the decision be made "as soon as practicable after commencement of an action." In addition, his groups agree that citation in the Note to ALI § 3.07 is a good and productive way of dealing with the contentious cy pres issue.

Mary Massaron (President of Lawyers for Civil Justice): The reference to § 3.07 of the ALI Principles of Aggregate Litigation should be removed. LCJ has sought an outright ban in the rule on use of cy pres. But this citation to the ALI section essentially puts the rule's imprimatur on the practice. This is a substantive change that raises Rules Enabling Act issues. Courts do cite the ALI treatment, so there is no need to do so here in the Note. In addition, LCJ favors revising Rule 23(a)(3) so that typicality requires the court to focus on the "type and

scope" of injury sustained by class members and ensure that all within the class have the same type and scope of alleged injury as the named plaintiff. More generally, cy pres should be banned; although a residue after distribution to the class might justify a second distribution, if the class members who make claims have been fully compensated making other uses of the money is essentially punitive and beyond the authority of the procedure rules.

Brian Wolfman (Georgetown Law School) (testimony and prepared statement): The reference in the Note to the ALI treatment of cy pres is not an endorsement and should be retained.

Phoenix hearing

Thomas Sobol: Some who have made proposals for amendment to Rule 23 are seeking to curtail the legitimate authority of federal judges. Rule 23 is a tool for increasing that power in appropriate cases. Attacks on that power should be rejected unless supported by a clear and convincing showing of need for change.

Michael Nelson (testimony & CV-2016-9994-077): The time has come to recognize that Rule 23(f) is not working. Some circuits almost never allow interlocutory review of district court orders granting class certification. Something stronger than the unbridled discretion built into the current rule should be adopted. For example, courts may insist that the petition show that failure to review at this point will be the "death knell" of the case. How does one do that for a defendant? Yet interlocutory review is very valuable. What would we do, for example, without the Third Circuit decision in Hydrogen Peroxide? So the rule should be revised to say that the court of appeals "should," or perhaps "must" grant the request for review. True, there are not any statistics about cases in which review was denied, and the court later reversed certification after entry of final judgment. But that's because there is always a settlement. If the verb is not as strong as "must," however, it is not certain what standard should be employed to guide the courts in making this decision.

Scott Smith: There should be an absolute right to appeal under Rule 23(f). Indeed, this should be classified as a final judgment, although there should not be a requirement to appeal immediately if the defendant does not want to do so. In addition, Rule 23 should be amended to solve the problem created by Shady Grove, and provide that a federal court may not certify a class if the state law on which the claims are based forbids class treatment of such claims. This is the point made by Justice Ginsburg in Shady Grove (in dissent). A number of states

have statutes like the New York statute involved in that case and the deserve respect.

Dallas/Ft. Worth (telephonic) hearing

Timothy Pratt (Boston Scientific): There should be an automatic right to appeal. Certification is a pivotal decision in a case. From the defendant's perspective, it "turns a snowstorm into an avalanche." Delaying review of that decision until final judgment on the merits builds in more delay than allowing immediate review at that point. It also provides plaintiffs with a powerful settlement weapon. And this could be added to the rule without the need for republication because it has been brought up throughout the process. Many speakers have endorsed this addition to the rule in public fora. There would be no need to re-publish.

Gerald Maatman (Seyfarth Shaw): The Committee Note to the 2003 amendments to Rule 23(c)(1)(A) recognized that a trial plan is a valuable item to consider in making a class certification decision. Experience since then has made this proposition indisputable because it sheds light on whether the case is manageable for purposes of class-wide adjudication. A simple change to Rule 23 requiring the presentation of a viable trial plan in connection with any motion for class certification would therefore be very beneficial. This is the approach adopted by the California Supreme Court in *Duran v. U.S. Bank Nat. Ass'n*, 59 Cal. 4th 1, 27 (2014), which dealt with statistical proof. This requirement should be applied to all class actions, not only those dealing with statistical proof. Deferring serious consideration of these issues until the eve of trial can produce a considerable waste of resources. In light of the central importance of certification decisions, Rule 23(f) should be amended to guarantee appellate review of all decisions certifying classes. In addition, Rule 23 should be amended to address the proper application of proportionality to pre-certification discovery. It is true that the certification decision looms as the most important one in many cases (for which reason I favor amending Rule 23(f) to enable an immediate appeal of class-certification orders), but that does not necessarily mean that expansive discovery is per se proportional. Finally, it would be desirable for a rule amendment to address the standards for certification for purposes of settlement. The Rule 23 Subcommittee initially considered that possibility, but did not proceed with a proposed amendment. Manageability should not matter to settlement certification, even in a case involving the laws of multiple states, and the rule should say so.

Prof. Judith Resnik (Yale Law School) (testimony and CV-2016-0004-092): Amending Rule 23(f) to guarantee immediate appellate review of all class-certification orders would not be

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desirable. There are a lot of routes to appeal in addition to 23(f), such as mandamus. Opening more routes leads to delay for plaintiffs and burden for the courts.

Peter Martin (State Farm Mut. Ins. Co.): I favor amending Rule 23(f) to guarantee an immediate appeal. The rule has not fulfilled its promise. The rate of grants of review has fallen. In 2007, it was around 40%, but now it is about 20%. As the Fifth Circuit pointed out in *Castano*, class certification tends to draw claims to the action. Consistency in class-certification rulings is a paramount concern, and making appellate review available as a matter of course is a way to assure consistency. In addition, the Committee should amend the rule to eliminate the possibility of a no injury class action. That violates Article III. In addition, the rule should be amended to make it clear that certification under Rule 23(c)(4) is allowed only when common issues predominate in the case as a whole. That is the position that the Fifth Circuit took in *Castano*, but since then other courts have moved away from that.

Patrick Paul (Snell & Wilmer): Rule 23(f) should be amended to guarantee a right to appellate review of any order granting or denying class certification. If the class is certified, the settlement pressure becomes extreme. If certification is denied, similar pressures apply to the plaintiff, who almost certainly cannot support litigation on the merits in an individual action.

Written comments

Lawyers for Civil Justice (CV-2016-0004-0039): LCJ favors rule changes to deal with the problem of no injury class actions. Prof. Shepherd's study of such cases shows that some \$4 billion was paid to settle such cases during the period 2005-15, but that only about 9% of this huge amount went to class members. An average of 37.9% went to class counsel. A simple solution would be amend Rule 23(a)(3) as follows:

(3) the claims or defenses, and type and scope of injury of the representative parties are typical of the claims, or defenses, and type and scope of injury of the class . . .

The Committee should also remove the reference to § 3.07 of the ALI Aggregate Litigation Project from the Committee Note. This is an implicit endorsement of cy pres, which the Committee has chosen not to add to the rule. If the Committee is going to do anything about cy pres, it should be to clarify that Rule 23 provides no basis for such arrangements.

Laurence Pulgram and 37 other members of the Council, the Federal Practice Task Force, and other leaders of the ABA Section of Litigation (CV-2016-0004-0057): We believe that the

Committee's decision to defer any action on cy pres was a wise choice.

Michael Ruttinger (Tucker Ellis) (CV-2016-0004-0068): The Committee should monitor the issue of the no-injury class action. Many hoped that the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016), would clarify the issues, but the decision did not do so. Should the current confusion about what is a "concrete and particularized" injury continue or deepen, the Committee should consider an amendment to address the question. A bright-line rule is necessary to guide lower courts, particularly as data breach litigation has grown in importance. Those data breach cases tend to be filed so shortly after notice of a data breach that there will rarely be sufficient time for consumers to suffer actual harm. Allowing data breach plaintiffs to claim "concrete and particularized" damages before any real harm has occurred is inconsistent with much long-standing precedent, but the *Spokeo* decision provides little guidance for how to handle these cases.

Defense Research Institute (CV-2016-0004-072): Rule 23(f) should provide an automatic right to review of all class-certification decisions at the request of any party. The conundrum facing plaintiffs and defendants due to the absence of appeal of right was recognized by the Note to the 23(f) amendment that is now in force. The actual operation of the current rule shows that it is not up to the task. The circuits are uneven in their exercise of their discretion in deciding when to entertain appeals. In recent years, fewer than 25% of the petitions for review have been granted. Rule 23 should also prohibit class certification in federal court for claims that are based on statutes that expressly prohibit class treatment. The Supreme Court's *Shady Grove* decision created a paradoxical, unintended, and unjustifiable policy result. The problem results from the Court's reading of the rule as mandating class certification when ever the rule's provisions are satisfied, and without regard to the limitations of underlying law. A good solution would be to reword Rule 23 so that it clearly vests discretion in the district court to grant or deny certification. DRI recommends, however, that the following new Rule 23(a)(5) be added:

- (5) the action is not brought under a state statute that
  - (i) confers a substantive right; and
  - (ii) prohibits class action treatment or classwide recoveries.

DRI also urges the Committee to address "no injury" classes. Today plaintiffs who admit they have suffered no harm regularly sue businesses, and act on behalf of large classes made up of similarly uninjured people. DRI recommends that Rule 23(b)(3) be amended to solve this problem:

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- (3) the court finds that each class representative and each proposed class member suffered actual injury of the same type; that the existence, type and extent of each class member's injury, as well as the amount of monetary relief due each class members, can be accurately determined for each class member on the basis of classwide proof, without depriving the defendant of the ability to prove any fact or defense that defendant would be entitled to prove as to any class member if that class member's claims were adjudicated in an individual trial; that questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings of predominance and superiority include:

The Supreme Court's Spokeo decision has not reduced the need for this amendment.

Nelson Mullins Riley & Scarborough LLP (CV-2016-0004-073):  
We support amending Rule 23(f) to provide appellate review as of right. The certification decision is the tipping point in litigation. Given its centrality, immediate review should be available. Instead, the current rule has permitted divergent approaches across circuits on when or whether to allow review.

Washington Legal Foundation (CV-2016-0004-087): Rule 23 should be amended to prevent plaintiffs who are denied class certification from an end run around Rule 23(f) by dismissing the individual plaintiff's suit and appealing from that dismissal. The Supreme Court has granted certiorari on that issue in *Microsoft v. Baker*, but if it does not resolve the issue this inequitable possibility should be foreclosed by rule amendment.

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Rule 23 Subcommittee  
Advisory Committee on Civil Rules  
Conference Call  
March 1, 2017

On March 1, 2017, the Rule 23 Subcommittee held a conference call. Participating were Judge Robert Dow (Chair, Rule 23 Subcommittee), Judge John Bates (Chair, Advisory Committee), Elizabeth Cabraser, Dean Robert Klonoff, John Barkett, Prof. Edward Cooper (Reporter, Advisory Committee), Prof. Richard Marcus (Reporter, Rule 23 Subcommittee), and Lauren Gailey (Rules Law Clerk).

The purpose of the call was to review ideas emerging from the public comment period about modifying the preliminary draft published in August, 2016. Before the call, Prof. Marcus circulated a marked up version of the preliminary draft, including draft changes to parts of the rule and Note, and footnotes explaining some draft changes and raising issues about other things that might be changed. There were 33 footnotes in this document.

Based on a review of the redraft, Judge Dow circulated an email in advance of the call identifying a number of footnotes that seemed to present "consent" issues that could be adopted without the need for discussion by the Subcommittee. In addition, he identified six topical areas for discussion and a number of "miscellaneous" footnotes that seemed to warrant discussion but not to fit within the six topical categories.

At the beginning of the call, the question was posed whether any on the call wanted to discuss the "consent" items. There was no interest in discussing any of those, so they would be considered consented to.

Discussion then turned to Judge Dow's six categories:

(1) Notice methods

The proposed amendment do Rule 23(c)(2)(B) regarding individual notice in Rule 23(b)(3) class actions had received considerable attention during the public comment period. Concerns were expressed that it might be taken to authorize online methods of notice that would not really be effective. Others said that the amendment was not necessary because courts have already begun using methods of notice other than first class mail. But strong support for amending the rule had also been expressed, on the ground that it is necessary to recognize that methods of communication are changing and that it is important for the rule to take note of that major development.

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The first proposed change was to the rule amendment itself - adding a phrase to the new sentence at the end of the rule provision:

The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means.

This addition was initially suggested by Judge Jesse Fuhrman (S.D.N.Y.) a new member of the Standing Committee who attended the hearing in Phoenix on the amendment package. Several others who commented supported this change, and supported the idea of "mixed notice" or using multiple methods. Using some electronic methods, for example, could be augmented by also using other electronic means.

The consensus was to add the above words to the rule-amendment proposal, and discussion shifted to modifications to the Note that addresses this rule change. One change is to soften the draft Note language saying that forms other than first class mail are "more reliable" ways of giving notice. Instead, the Note can say:

But technological change since 1974 has introduced ~~meant that~~ other forms of communication that may sometimes provide a ~~be more~~ reliable additional or alternative method for giving notice and important to many. Although it may often be that first class mail is the preferred primary method of giving notice, ~~c~~ourts and counsel have begun to employ new technology to make notice more effective, ~~and sometimes less costly.~~

This change was approved, except that the published phrase "and sometimes less costly" seemed unnecessary and might best be removed due to sensitivity about excessive concern with the cost of notice undermining its effectiveness. (That phrase is therefore overstricken in the quotation above.)

Attention shifted to the reference in the redraft of the Note to the "likely reading ability of the class" and "arcane" legal terminology. It was noted that Rule 23(c)(2)(B) already directs that notice "clearly and concisely state in plain, easily understood language" a variety of things listed in the rule. We are only clarifying the methods of giving notice that satisfies that rule provision. Restoring that language to the version of the rule included in the package may be helpful. It would also be useful to include in the Note a reminder of what the rule has said since 2003, adding attention to the likely capacities of the class in understanding and using the form of notice recommended to the court. This clarifications may improve practice. Prof. Marcus is to try to revise the Note language on this point.



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Attention shifted to draft language concerning the need to attend more closely to the array of choices presented in the current environment than in the past, when first class mail was probably conceived as the default method. The draft language was:

This amendment recognizes that courts may need to attend more closely than in the past to the method or methods of giving notice; simply assuming that the "traditional" methods are best may disregard contemporary communication realities.

It was objected that this seemed to criticize courts for what they had done in the past, which should not be the goal. Indeed, as recognized elsewhere in the Note, the courts had already begun to use alternative means of notice without a change to the rule. The focus, instead, should be on the lawyers, and their obligation to advise the court about what is most effective for this class in today's media world. Perhaps a reference to the Comment on Rule 1.1 of the ABA Ethics Code regarding competence including familiarity with technological change would be in order. Again, Prof. Marcus is to try to devise superior substitute language, and perhaps to relocate some of the added language.

A caution was raised: This is a very long Note. We are mainly talking about adding more to it. We should be cautious about doing that unless really needed. A reaction was that, though it is generally worthwhile to say relevant things in the Note it is also important to be aware of how long the Note can get. Although there is a question about whether most lawyers attend to what's in the Note, it can be a "treasure trove."

There was some discussion of ways in which a longer Note may be helpful to the profession. There is also the temptation to say things in the Note about subjects related to the rule change but not precisely about it. For example, the content of the notice to the class is not really the focus of the rule change we have been discussing, which is the method of giving notice, but it is fairly closely related to that subject, and may actually be pertinent to the form of notice. So saying something about it can be useful.

In this instance, the goal is to link the method to the message. One need not go as far as Marshall McLuhan ("The medium is the message.") to say that there is a link between the medium and the message.

(2) Rule 23(e)(1) concerns

The second set of issues focused on comments submitted by the ABA about the way in which the decision to send notice to the class is handled. The ABA submission urged that the term "preliminary approval" should not be disapproved because it has been in use for a long time and is widely recognized. Others, however, urged that the standard for sending notice should be softened because it would result in a de facto signal of approval even though the term "preliminary approval" was not used.

The discussion focused on the terminology used in the beginning of the Note regarding the decision to send notice. As published, the Note said that the decision to send notice "is sometimes inaccurately called 'preliminary approval.'" Is it really necessary to say this is inaccurate? One view was that this seems needlessly tendentious. Another view was that it would be useful to foster what should be a learning process for the bar about what this decision is. Another idea was to cite the ALI Aggregate Litigation principles on this subject; they oppose use of the term "preliminary approval."

The consensus was that Professor Marcus should try to reword that portion of the Note to avoid calling the current practice "inaccurate" but also convey the idea that the decision is a tentative one, and does not signify that approval is a done deal.

Discussion shifted to what has been called the Prandini issue -- the idea that the negotiation of the substance of the proposed settlement and the negotiation of the attorney fees should be done separately. The ABA submission urged that proposed 23(e)(1)(B)(i) be amended to exclude attention at the 23(e)(1) stage to Rule 23(e)(2)(C)(iii) (the terms of any attorney fee award), in recognition of this practice.

The reaction to this idea was that the court should focus on attorney fees at the time it is deciding whether it is likely to approve the overall deal and that notice is therefore warranted. Whether or not that topic is the subject of combined or separate negotiation, it is an important part of the overall package that will be sent to the class if notice goes out. Objectors often focus on attorney's fees, so the court should too. Indeed, Rule 23(h) directs that the class receive notice of the attorney fee application, so that would ordinarily be included with the other notices required by Rules 23(c)(2) and (e)(1). The consensus was not to exclude that from (e)(1).

(3) Citing ALI § 3.07

Several comments raised questions about the sentence in the Note citing § 3.07 of the ALI Aggregate Litigation Principles. One possibility would be to cite cases that rely on that section rather than the section itself, but citing cases is generally not desirable in a Note because they may be superseded by other cases.

The question, then, was whether citing § 3.07 really added much. Courts seem to have found that section on their own; indeed, §3.07 may be the section of the Principles that is most frequently cited by courts. The consensus was to remove the sentence citing § 3.07.

Discussion shifted to the previous sentence. In the current Note, it is as follows:

And because some funds are frequently left unclaimed, it is often important for the settlement agreement to address the use of those funds.

For one thing, the word "use" seems unduly vague. In its place, "disposition" was suggested. Attention then focused on the word "often." Actually, this is a dynamic area but that qualifier seems not useful. There almost always are going to be funds left over, and we should not be saying this is only "often" a concern. It is virtually always a concern. If it is necessary to re-notice the class then regarding their disposition, that is hardly a positive. So that word should probably come out. But the idea is important, and it is important that this issue be included before notice is directed to the class.

(4) Claims rate

(5) Relative success of distribution

These two topics were combined for discussion. The starting point was that proposed 23(e)(2)(C)(ii) tells the court to take account of "the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required" when assessing the adequacy of the relief provided by the settlement. The concern was that this might become "an absolute." One suggestion was that the rule itself be revised to add the words "as compared to other, reasonably available methods of distribution under the circumstances" after "to the class."

The consensus was that adding this language to the rule itself was not justified. It should be clear that the rule does not require perfection. Indeed, that is why the Note emphasizes making provision for disposition of the residue. What the Note

says is that the parties should demonstrate to the court that they have employed a method of delivering relief to the class that is likely to deliver relief to the class. It does not say the method must result in 100% success on that score. But being attentive to being effective is worth emphasizing.

Instead of changing the rule, attention to the Note's treatment of the claims rate question seemed the right way to approach these concerns. The first point at which claims rate appears was in the Note about (e)(1):

If the notice to the class calls for submission of claims before the court decides whether to approve the proposal under Rule 23(e)(2), it may be important to provide that the parties will report back to the court on the actual claims experience.

This passage drew the observation that this is not how things usually happen. To the contrary, given the contingencies involved, it would be very unusual for the claims process to be completed before the approval decision under Rule 23(e)(2) occurs. Defendants will not be willing to fund the settlement until final approval has occurred. Indeed, they usually are not willing to fund the settlement until all objections and appeals are completely resolved. That's one of the reasons bad faith objectors can exert such pressure.

The reality, then, is that distribution usually does not occur until final approval has happened and all appeals are over. Then the question is whether or when the court learns about the results of that distribution effort. One witness urged that the courts should have a "fiduciary" obligation to follow up and ensure full distribution of relief. That requirement is not in this package.

The contemporary reality was described as regularly involving "continuing jurisdiction" for the district court during the administration of the claims process, something that might take quite a period of time. And reporting back about its success would normally be a feature of that continuing supervision. But that all had to come considerably later, and the Note material quoted above is about the Rule 26(e)(1) decision to send notice to the class. That's a premature discussion and the consensus was to delete the discussion at that point. That shortens the Note a little bit.

Another point at which "claims rate" appears in the 23(e)(1) Note is in regard to the proposed attorney's fees. That also seems premature at the point the decision to give notice must be made, and can be removed from the Note:

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In some cases, it will be important to relate the amount of an award of attorney's fees to the expected benefits to the class, ~~and to take account of the likely claims rate.~~

The court can have some justified expectation about the benefits to the class when the 23(e)(1) decision to give notice must be made, and it should consider the effectiveness of the method selected to give notice and, if necessary, to make claims. But beyond that it cannot sensibly forecast a likely claims rate. We do not want to make it seem necessary that the parties present expert evidence making such a forecast to support giving notice to the class.

Attention shifted to the reference to claims rate in the Note on final approval under Rule 23(e)(2). As published, that said:

Measuring the proposed relief may require evaluation of the proposed claims process and a prediction of how many claims will be made; if the notice to the class calls for pre-approval submission of claims, actual claims experience may be important.

An initial reaction was that this seems a balanced treatment of the situation. But the idea of focusing on "a prediction of how many claims will be made" might be troublesome. In a sense, that gets at the usual reality that the payout to the class happens only after final approval and exhaustion of all appeals. So a forecast might make sense. But asking for one in the Note is likely to do more harm than good. Trying to make such a forecast is extremely difficult, could cost a lot, and might readily be wrong instead of right.

As noted earlier, district courts usually retain jurisdiction over the administration of the settlement. That commonly involves reporting back to the court on the results of that distribution effort. It may lead to a revised distribution effort. That does not lead to a "retroactive disapproval" of the settlement because of a low claims rate. How could one undo the settlement -- by making all the class members who had received relief pay it back and resuming the litigation?

A different concern is that the claims process itself might be set up in a way that obviously will deter or defeat claims. That is illusory relief to the class. But the Note does admonish the court to evaluate the proposed claims process; that seems to cover the point in terms of what the court can do at that point.

Attention turned to a bracketed proposal to add language about distribution to the Note:

Because 100% success in distribution can very rarely be achieved, the court should not insist on a distribution method that promises such success; the court's focus should instead be on whether the method proposed is justified in light of other reasonably available methods.

This Note language might ensure that courts do not treat perfection in distribution as a requirement or an expected result. The reality is that "it never happens that everyone cashes the check." There is always some money left over. That's why some provision in the settlement agreement for disposition of the residue is important. But saying "100% success in distribution can very rarely be achieved" is not useful.

The question was raised whether this addition really would be useful. As published for comment, the Note says that the court should scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims. This does not seem to add usefully to that admonition already in the Note. This addition should be dropped.

(6) Objector issues

An initial question was whether proposed (e)(1)(A) should direct that objectors state whether they were objecting about their own assertedly unique problems, on behalf of a subset of the class, or on behalf of all class members. Objections to this provision have been that it (a) invites objections on behalf of others, and (b) should require that the objector satisfy something like Rule 23(a)(4) (on adequacy of representation) to represent anyone else.

The consensus was that these arguments do not present persuasive reasons for changing the amendment package. The rule already says that class members may object. It does not cabin what objections they make, and courts must consider those objections. It may well be that courts would look askance at objections by a class member who really had nothing at stake in regard to the matter raised by the objection. But if the objection is a cogent one, the court should consider it whether or not the objector has a direct stake in the resolution of the objection.

A second objection was that the rule does not state a standard for approving payment to an objector or objector counsel. It was noted that the Subcommittee discussed how to articulate such a standard in a useful way and did not find a good way to do so. The resolution of this objection to the text

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of the rule was that this is a place to "let judges be judges."

A related question arose, however, in regard to the comment in the Note that "class counsel sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or other consideration to these objectors." As pointed out during the public comment period, that statement might make it seem that this is a satisfactory reason to approve a payoff for such objectors. The redraft sought to prevent that interpretation and offered two ways of doing so. The consensus was to add the following to the Note after the material quoted above:

Although the payment may advance class interests in a particular case, allowing payments perpetuates a system that can encourage objections advanced for improper purposes.

A third question that arose during the public comment period was whether there was a major loophole in the amendment proposal because bad faith objectors or objector counsel might arrange that payments be made to organization with which they are affiliated, and contend that court approval is not required when they do that.

In response to this third problem, a change to proposed 23(e) (5) (B) deleted the words "to an objector or objector's counsel," and that phrase was eliminated from the tag line as well and replaced with the phrase "in connection with an objection." That would make the approval requirement apply no matter who was to get the payment so long as it was in connection with an objection.

Attention shifted to the Note material and there was consensus approval for addition of the following to the Note:

Although such payment is often made to objectors or their counsel, the rule also requires court approval if the payment is instead to an organization or other recipient, so long as it is made in connection with forgoing or withdrawing an objection or appeal.

A question was raised, however, about additional material that was included in the Note published for comment. Specifically, the following seemed to suggest a standard for approving a payment:

If the consideration involves a payment to counsel for an objector, the proper procedure is by motion under Rule 23(h) for an award of fees; the court may approve the fee if the objection assisted the court in understanding and evaluating the settlement even though the settlement was approved as proposed.

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This comment is about a Rule 23(h) motion, and Rule 23(h) has a Committee Note that addresses criteria for payments to objectors. There is no reason to get into that issue here, so the consensus was to delete the material after "award of fees."

### Other matters

The final subject for discussion was the added language about maintaining confidentiality of information about agreements in connection with the proposal. During the public comment period one witness expressed concern that the risk that saying the class would have access to everything that the court received could require revelation of sensitive materials including such things as the number of opt outs that would trigger a right for the defendant to withdraw from the agreement. That was addressed in the draft as follows:

That would give the court a full picture and make ~~this~~ appropriate information available to the members of the class[, while maintaining confidentiality of sensitive information such as agreements that defendant may withdraw if more than a certain number of class members opt out].

The consensus was that the bracketed material above was not useful. The question whether substituting "appropriate" for "this" is helpful remained open. It was noted that ordinarily these matters are handled by separate agreements and not part of the settlement agreement. On the other hand, they are to be "identified" to the court reviewing the proposal, and thus might be subject to review by class members if submitted pursuant to the frontloading provisions of proposed Rule 23(e) (1).

### Next steps

Prof. Marcus will attempt to make the changes agreed upon during this conference call and circulate by March 3 the next generation of the revisions of the published preliminary draft. The Subcommittee will attempt to confer by phone during the week of March 13 to resolve remaining matters. Ideally, many remaining issues can be resolved by email without the need to discuss in the next conference call. Final agenda materials will need to be at the A.O. by the first week of April.



### C. RULES 62, 65.1: STAYS OF EXECUTION

The proposed amendments of Rule 62 aimed at three changes, described more fully in the Committee Note. The automatic-stay provision is changed to eliminate the “gap” in the current rule, which ends the automatic stay after 14 days but allows the court to order a stay “pending disposition of” post-judgment motions that may be made as late as 28 days after judgment. The changes also expressly authorize the court to dissolve or supersede the automatic stay. Express provision is made for security in a form other than a bond, and a single security can be provided to last through the disposition of all proceedings after judgment and until final disposition on appeal. The former provision for securing a stay on posting a supersedeas bond is retained, without the word “supersedeas.” The right to obtain a stay on providing a bond or other security is maintained without departing from interpretations of present Rule 62(d), but with changes that allow the security to be provided before an appeal is taken and that allow any party, not only an appellant, to obtain the stay. Subdivisions (a) through (d) are also rearranged, carrying forward with only a minor change the provisions for staying judgments in an action for an injunction or a receivership, or directing an accounting in an action for patent infringement.

The changes in Rule 65.1 are designed to reflect the expansion of Rule 62 to include forms of security other than a bond.

There was little comment, and no testimony, on Rule 62 or Rule 65.1. The summary of comments reflects only short and general statements approving the amendments. No one suggested the need for other changes.

The Committee recommends approval for adoption of amended Rules 62 and 65.1 substantially as published. One change is recommended to conform Rule 65.1 to proposed Appellate Rule 8(b), which is being amended to reflect the changes in Rules 62 and 65.1. These changes remove all references to “bond,” “undertaking,” and “surety” from Rule 65.1 (“bond” remains in Rule 62, in keeping with strong tradition). Focusing Rule 65.1 only on “security” and “security provider” is clean, and avoids any possible implication that a surety is not a security provider.

#### Rule 62 as Published

##### 1 **Rule 62. Stay of Proceedings to Enforce a Judgment**

- 2
- 3 (a) ~~AUTOMATIC STAY.;~~ ~~Exceptions for Injunctions, Receiverships, and Patent Accountings.~~  
4 Except as provided in Rule 62(c) and (d), stated in this rule, ~~no execution may issue on a~~  
5 ~~judgment, nor may and proceedings be taken to enforce it; are stayed for 30 days until 14~~  
6 ~~days have passed after its entry, unless the court orders otherwise. But unless the court~~  
7 ~~orders otherwise, the following are not stayed after being entered, even if an appeal is~~  
8 ~~taken:~~  
9 (1) ~~an interlocutory or final judgment in an action for an injunction or a receivership; or~~  
10 (2) ~~a judgment or order that directs an accounting in an action for patent infringement.~~

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11  
12 ~~(b) Stay Pending the Disposition of a Motion.~~ On appropriate terms for the opposing party's  
13 security, the court may stay the execution of a judgment—or any proceedings to enforce  
14 it—pending disposition of any of the following motions:

- 15 (1) under Rule 50, for judgment as a matter of law;  
16 (2) under Rule 52(b), to amend the findings or for additional findings;  
17 (3) under Rule 59, for a new trial or to alter or amend a judgment; or  
18 (4) under Rule 60, for relief from a judgment or order.

19  
20 (b) STAY BY BOND OR OTHER SECURITY. At any time after judgment is entered, a party may  
21 obtain a stay by providing a bond or other security. The stay takes effect when the court  
22 approves the bond or other security and remains in effect for the time specified in the  
23 bond or security.

24  
25 (c) STAY OF AN INJUNCTION, RECEIVERSHIP, OR PATENT ACCOUNTING ORDER. Unless the court  
26 orders otherwise, the following are not stayed after being entered, even if an appeal is  
27 taken:

- 28 (1) an interlocutory or final judgment in an action for an injunction or receivership; or  
29 (2) a judgment or order that directs an accounting in an action for patent infringement.

30  
31 (de) INJUNCTION PENDING AN APPEAL. While an appeal is pending from an interlocutory order or  
32 final judgment that grants, continues, modifies, refuses, dissolves, or ~~denies~~ refuses to  
33 dissolve or modify an injunction, the court may suspend, modify, restore, or grant an  
34 injunction on terms for bond or other terms that secure the opposing party's rights. If the  
35 judgment appealed from is rendered by a statutory three-judge district court, the order  
36 must be made either:

- 37 (1) by that court sitting in open session; or  
38 (2) by the assent of all its judges, as evidenced by their signatures.

39  
40 ~~(d) STAY WITH BOND ON APPEAL.~~ If an appeal is taken, the appellant may obtain a stay by  
41 supersedeas bond, except in an action described in Rule 62(a)(1) or (2). The bond may be  
42 given upon or after filing the notice of appeal or after obtaining the order allowing the  
43 appeal. The stay takes effect when the court approves the bond.

44  
45 \* \* \* \* \*

COMMITTEE NOTE

Subdivisions (a), (b), (c), and (d) of former Rule 62 are reorganized and the provisions for staying a judgment are revised.

The provisions for staying an injunction, receivership, or order for a patent accounting are reorganized by consolidating them in new subdivisions (c) and (d). There is no change in meaning. The language is revised to include all of the words used in 28 U.S.C. § 1292(a)(1) to describe the right to appeal from interlocutory actions with respect to an injunction, but subdivisions (c) and (d) apply both to interlocutory injunction orders and to final judgments that grant, refuse, or otherwise deal with an injunction.

New Rule 62(a) extends the period of the automatic stay to 30 days. Former Rule 62(a) set the period at 14 days, while former Rule 62(b) provided for a court-ordered stay “pending disposition of” motions under Rules 50, 52, 59, and 60. The time for making motions under Rules 50, 52, and 59, however, was later extended to 28 days, leaving an apparent gap between expiration of the automatic stay and any of those motions (or a Rule 60 motion) made more than 14 days after entry of judgment. The revised rule eliminates any need to rely on inherent power to issue a stay during this period. Setting the period at 30 days coincides with the time for filing most appeals in civil actions, providing a would-be appellant the full period of appeal time to arrange a stay by other means. A 30-day automatic stay also suffices in cases governed by a 60-day appeal period.

Amended Rule 62(a) expressly recognizes the court’s authority to dissolve the automatic stay or supersede it by a court-ordered stay. One reason for dissolving the automatic stay may be a risk that the judgment debtor’s assets will be dissipated. Similarly, it may be important to allow immediate enforcement of a judgment that does not involve a payment of money. The court may address the risks of immediate execution by ordering dissolution of the stay only on condition that security be posted by the judgment creditor. Rather than dissolve the stay, the court may choose to supersede it by ordering a stay that lasts longer or requires security.

Subdivision 62(b) carries forward in modified form the supersedeas bond provisions of former Rule 62(d). A stay may be obtained under subdivision (b) at any time after judgment is entered. Thus a stay may be obtained before the automatic stay has expired, or after the automatic stay has been lifted by the court. The new rule’s text makes explicit the opportunity to post security in a form other than a bond. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security—a party may find it convenient to arrange a single bond or other security that persists through completion of post-judgment proceedings in the trial court and on through completion of all proceedings on appeal by issuance of the appellate mandate. This provision does not supersede the opportunity for a stay under 28 U.S.C. § 2101(f) pending review by the Supreme Court on certiorari. Finally, subdivision (b) changes the provision in former subdivision (d) that “an appellant” may obtain a stay. Under new subdivision (b), “a party” may obtain a stay. For example, a party may wish to

- 44 secure a stay pending disposition of post-judgment proceedings after expiration of the automatic  
45 stay, not yet knowing whether it will want to appeal.

**RULE 62 CLEAN TEXT**

**Rule 62. Stay of Proceedings to Enforce a Judgment**

- (a) **AUTOMATIC STAY.**; Exceptions for Injunctions, Receiverships, and Patent Accountings. Except as provided in Rule 62(c) and (d), execution on a judgment and proceedings to enforce it are stayed for 30 days after its entry, unless the court orders otherwise.
- (b) **STAY BY BOND OR OTHER SECURITY.** At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security.
- (c) **STAY OF AN INJUNCTION, RECEIVERSHIP, OR PATENT ACCOUNTING ORDER.** Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:
- (1) an interlocutory or final judgment in an action for an injunction or receivership; or
  - (2) a judgment or order that directs an accounting in an action for patent infringement.
- (d) **INJUNCTION PENDING AN APPEAL.** While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:
- (1) by that court sitting in open session; or
  - (2) by the assent of all its judges, as evidenced by their signatures.

\* \* \* \* \*

Gap Report

No changes have been made in the Rule and Committee Note as published.

**Rule 65.1 as Published**

**Rule 65.1. Proceedings Against a Surety or Other Security Provider**

Whenever these rules (including the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions) require or allow a party to give security, and security is given through a bond, other security, or other undertaking, with one or more sureties or other security providers, each ~~surety~~ surety provider submits to the court's jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the bond, ~~or~~ undertaking, or other security. The ~~surety's~~ security provider's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly mail a copy of each to every ~~surety~~ security provider whose address is known.

COMMITTEE NOTE

Rule 65.1 is amended to reflect the amendments of Rule 62. Rule 62 allows a party to obtain a stay of a judgment "by providing a bond or other security." Limiting Rule 65.1 enforcement procedures to sureties might exclude use of those procedures against a security provider that is not a surety. All security providers are brought into Rule 65.1 by these amendments.

*Revising Rule 65.1 as Published*

The Committee recommends Rule 65.1 for adoption with changes designed to establish uniformity with Appellate Rule 8(b). The changes remove all references to "bond," "undertaking," and "surety." "Security" and "security provider" include these forms of security and sureties.

**Rule 65.1. Proceedings Against a Surety ~~or Other Security Provider~~**

Whenever these rules (including the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions) require or allow a party to give security, and security is given ~~through a bond, other security, or other undertaking,~~ with one or more ~~sureties or other~~ security providers, each ~~surety~~ surety provider submits to the court's jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the ~~bond, or undertaking, or other security~~. The ~~surety's~~ security provider's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly mail a copy of each to every ~~surety~~ security provider whose address is known.

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COMMITTEE NOTE

Rule 65.1 is amended to reflect the amendments of Rule 62. Rule 62 allows a party to obtain a stay of a judgment “by providing a bond or other security.” Limiting Rule 65.1 enforcement procedures to sureties might exclude use of those procedures against a security provider that is not a surety. All security providers, including sureties, are brought into Rule 65.1 by these amendments. But the reference to “bond” is retained in Rule 62 because it has a long history.

**RULE 65.1 CLEAN TEXT**

**Rule 65.1. Proceedings Against a Security Provider**

Whenever these rules (including the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions) require or allow a party to give security, and security is given with one or more security providers, each provider submits to the court’s jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the security. The security provider’s liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly mail a copy of each to every security provider whose address is known.

COMMITTEE NOTE

Rule 65.1 is amended to reflect the amendments of Rule 62. Rule 62 allows a party to obtain a stay of a judgment “by providing a bond or other security.” Limiting Rule 65.1 enforcement procedures to sureties might exclude use of those procedures against a security provider that is not a surety. All security providers, including sureties, are brought into Rule 65.1 by these amendments. But the reference to “bond” is retained in Rule 62 because it has a long history.

Gap Report

The rule text was changed to eliminate references to “bond,” “undertaking,” and “surety.” An explanation was added to the Committee Note.

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SUMMARY OF COMMENTS

RULE 62

*In General*

Hon. Benjamin C. Mizer, CV-2016-0004-0037: Says simply that the Department of Justice supports these amendments.

Cheryl L. Siler, Esq., Aderant CompuLaw, CV-2016-0004-0058: The proposed revisions are reasonable.

Pennsylvania Bar Association, CV-0064: Changing Rule 62(a) to provide a 30-day automatic stay “makes sense, since that would be the appeal period in most matters.” The stay power established by Rule 62(a) makes present Rule 62(b) redundant; it is properly deleted. Adoption of the Rule 62 amendments is recommended.

RULE 65.1

*In General*

Hon. Benjamin C. Mizer, CV-2016-0004-0037: Says simply that the Department of Justice supports these amendments.

Cheryl L. Siler, Esq., Aderant CompuLaw, CV-2016-0004-0058: The proposed revisions are reasonable.

Pennsylvania Bar Association, CV-0064: The amendments conform to the changes in Rule 62. Adoption is recommended.

\* \* \* \* \*

April 26, 2018

Honorable Paul D. Ryan  
Speaker of the House of Representatives  
Washington, DC 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 that were 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 4, 2017; a redline version of the rules with committee notes; an excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2017 Report of the Advisory Committee on Criminal Rules.

Sincerely,



April 26, 2018

Honorable Michael R. Pence  
President, United States Senate  
Washington, DC 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 that were 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 4, 2017; a redline version of the rules with committee notes; an excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2017 Report of the Advisory Committee on Criminal Rules.

Sincerely,

April 26, 2018

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 12.4, 45, and 49.

[*See infra* pp. — — —.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2018, and shall govern in all proceedings 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 2074 of Title 28, United States Code.

**PROPOSED AMENDMENTS TO THE FEDERAL  
RULES OF CRIMINAL PROCEDURE**

**Rule 12.4. Disclosure Statement**

**(a) Who Must File.**

(1) *Nongovernmental Corporate Party.* Any nongovernmental corporate party to a proceeding in a district court must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(2) *Organizational Victim.* Unless the government shows good cause, it must file a statement identifying any organizational victim of the alleged criminal activity. If the organizational victim is a corporation, the statement must also disclose the information required by

2 FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 12.4(a)(1) to the extent it can be obtained through due diligence.

**(b) Time to File; Later Filing.** A party must:

- (1)** file the Rule 12.4(a) statement within 28 days after the defendant's initial appearance; and
- (2)** promptly file a later statement if any required information changes.

**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 Rule 49(a)(4)(C), (D), and (E), 3 days are added after the period would otherwise expire under subdivision (a).

**Rule 49. Serving and Filing Papers**

**(a) Service on a Party.**

(1) *What is Required.* Each of the following must be served on every party: any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.

(2) *Serving a Party's Attorney.* Unless the court orders otherwise, when these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party.

**(3) Service by Electronic Means.**

(A) *Using the Court's Electronic-Filing System.*

A party represented by an attorney may serve a paper on a registered user by filing it with the court's electronic-filing system.

A party not represented by an attorney may do so only if allowed by court order or local rule. Service is complete upon filing, but is not effective if the serving party learns that it did not reach the person to be served.

(B) *Using Other Electronic Means.* A paper may be served by any other electronic means that the person consented to in writing. Service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served.

(4) *Service by Nonelectronic Means.* A paper may be served by:

(A) handing it to the person;

(B) leaving it:

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- (i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or
  - (ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;
- (C) mailing it to the person's last known address—in which event service is complete upon mailing;
- (D) leaving it with the court clerk if the person has no known address; or
- (E) delivering it by any other means that the person consented to in writing—in which event service is complete when the person



making service delivers it to the agency designated to make delivery.

**(b) Filing.**

(1) *When Required; Certificate of Service.* Any paper that is required to be served must be filed no later than a reasonable time after service. No certificate of service is required when a paper is served by filing it with the court's electronic-filing system. When a paper is served by other means, a certificate of service must be filed with it or within a reasonable time after service or filing.

(2) *Means of Filing.*

(A) *Electronically.* A paper is filed electronically by filing it with the court's electronic-filing system. A filing made through a person's electronic-filing account

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and authorized by that person, together with the person's name on a signature block, constitutes the person's signature. A paper filed electronically is written or in writing under these rules.

(B) *Nonelectronically.* A paper not filed electronically is filed by delivering it:

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

(3) ***Means Used by Represented and Unrepresented Parties.***

(A) *Represented Party.* A party represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court

for good cause or is allowed or required by local rule.

(B) *Unrepresented Party.* A party not represented by an attorney must file nonelectronically, unless allowed to file electronically by court order or local rule.

(4) *Signature.* Every written motion and other paper must be signed by at least one attorney of record in the attorney's name—or by a person filing a paper if the person is not represented by an attorney. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is

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promptly corrected after being called to the attorney's or person's attention.

(5) ***Acceptance by the Clerk.*** The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

(c) **Service and Filing by Nonparties.** A nonparty may serve and file a paper only if doing so is required or permitted by law. A nonparty must serve every party as required by Rule 49(a), but may use the court's electronic-filing system only if allowed by court order or local rule.

(d) **Notice of a Court Order.** When the court issues an order on any post-arraignment motion, the clerk must serve notice of the entry on each party as required by Rule 49(a). A party also may serve notice of the entry by the same means. Except as Federal Rule of

Appellate Procedure 4(b) provides otherwise, the clerk's failure to give notice does not affect the time to appeal, or relieve—or authorize the court to relieve—a party's failure to appeal within the allowed time.



# JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

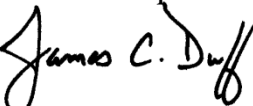
THE CHIEF JUSTICE  
OF THE UNITED STATES  
*Presiding*

JAMES C. DUFF  
*Secretary*

October 4, 2017

## MEMORANDUM

To: Chief Justice of the United States  
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 12.4, 45, and 49 of the Federal Rules of Criminal Procedure, which were approved by the Judicial Conference at its September 2017 session. The Judicial Conference recommends that the amendments be adopted by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) a copy 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 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the May 2017 Report of the Advisory Committee on Criminal Rules.

Attachments

**PROPOSED AMENDMENTS TO THE FEDERAL  
RULES OF CRIMINAL PROCEDURE<sup>1</sup>**

1 **Rule 12.4. Disclosure Statement**

2 **(a) Who Must File.**

3       **(1) *Nongovernmental Corporate Party.*** Any  
4               nongovernmental corporate party to a proceeding  
5               in a district court must file a statement that  
6               identifies any parent corporation and any  
7               publicly held corporation that owns 10% or more  
8               of its stock or states that there is no such  
9               corporation.

10       **(2) *Organizational Victim.*** Unless the government  
11               shows good cause, it must file a statement  
12               identifying any organizational victim of the  
13               alleged criminal activity.~~If an organization is a~~  
14               ~~victim of the alleged criminal activity, the~~

---

<sup>1</sup> New material is underlined; matter to be omitted is lined through.

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15 ~~government must file a statement identifying the~~  
16 ~~victim.~~ If the organizational victim is a  
17 corporation, the statement must also disclose the  
18 information required by Rule 12.4(a)(1) to the  
19 extent it can be obtained through due diligence.

20 **(b) Time ~~for~~to Filing; ~~Supplemental~~Later Filing.** A  
21 party must:

- 22 (1) file the Rule 12.4(a) statement within 28 days  
23 after~~upon~~ the defendant's initial appearance; and  
24 (2) promptly file a ~~later~~supplemental statement if  
25 any required information changes~~upon any~~  
26 ~~change in the information that the statement~~  
27 ~~requires.~~

**Committee Note**

**Subdivision (a).** Rule 12.4 requires the government to identify organizational victims to assist judges in complying with their obligations under the Code of Conduct for United States Judges. The 2009 amendments to Canon 3(C)(1)(c) of the Code require recusal only when a judge has an “interest that could be affected substantially



by the outcome of the proceeding.” In some cases, there are numerous organizational victims, but the impact of the crime on each is relatively small. In such cases, the amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations’ interests could not be “affected substantially by the outcome of the proceeding.”

**Subdivision (b).** The amendment specifies that the time for making the disclosures is within 28 days after the initial appearance.

Because a filing made after the 28-day period may disclose organizational victims in cases in which none were previously known or disclosed, the caption and text have been revised to refer to a later, rather than a supplemental, filing. The text was also revised to be more concise and to parallel Civil Rule 7.1(b)(2).

1 **Rule 45. Computing and Extending Time**

2 \* \* \* \* \*

3 **(c) Additional Time After Certain Kinds of Service.**

4 Whenever a party must or may act within a specified  
5 time after being served and service is made under  
6 ~~Federal Rule of Civil Procedure 49(a)(4)(C), (D), and~~  
7 ~~(E)5(b)(2)(C) (mailing), (D) (leaving with the clerk),~~  
8 ~~or (F) (other means consented to)~~, 3 days are added  
9 after the period would otherwise expire under  
10 subdivision (a).

**Committee Note**

Rule 49 previously required service and filing in a “manner provided” in the Civil Rules, and the time counting provisions in Criminal Rule 45(c) referred to certain means of service under Civil Rule 5. A contemporaneous amendment moves the instructions for filing and service in criminal cases from Civil Rule 5 into Criminal Rule 49. This amendment revises the cross references in Rule 45(c) to reflect this change.

1 **Rule 49. Serving and Filing Papers**

2 **(a) Service on a Party.**

3 **(1) *What is*When Required.** ~~A party must serve on~~  
4 ~~every other party~~Each of the following must be  
5 served on every party: any written motion (other  
6 than one to be heard ex parte), written notice,  
7 designation of the record on appeal, or similar  
8 paper.

9 ~~**(b) How Made.** Service must be made in the manner~~  
10 ~~provided for a civil action.~~

11 **(2) *Serving a Party's Attorney.*** Unless the court  
12 orders otherwise, ~~W~~when these rules or a court  
13 order requires or permits service on a party  
14 represented by an attorney, service must be made  
15 on the attorney instead of the party, ~~unless the~~  
16 ~~court orders otherwise.~~

17 **(3) Service by Electronic Means.**

18 (A) Using the Court's Electronic-Filing System.

19 A party represented by an attorney may  
20 serve a paper on a registered user by filing  
21 it with the court's electronic-filing system.

22 A party not represented by an attorney may  
23 do so only if allowed by court order or local  
24 rule. Service is complete upon filing, but is  
25 not effective if the serving party learns that  
26 it did not reach the person to be served.

27 (B) Using Other Electronic Means. A paper

28 may be served by any other electronic  
29 means that the person consented to in  
30 writing. Service is complete upon  
31 transmission, but is not effective if the  
32 serving party learns that it did not reach the  
33 person to be served.

- 34        **(4) Service by Nonelectronic Means.** A paper may  
35            be served by:  
36            (A) handing it to the person;  
37            (B) leaving it:  
38                    (i) at the person's office with a clerk or  
39                    other person in charge or, if no one is  
40                    in charge, in a conspicuous place in  
41                    the office; or  
42                    (ii) if the person has no office or the office  
43                    is closed, at the person's dwelling or  
44                    usual place of abode with someone of  
45                    suitable age and discretion who  
46                    resides there;  
47            (C) mailing it to the person's last known  
48            address—in which event service is  
49            complete upon mailing;

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50 (D) leaving it with the court clerk if the person  
51 has no known address; or  
52 (E) delivering it by any other means that the  
53 person consented to in writing—in which  
54 event service is complete when the person  
55 making service delivers it to the agency  
56 designated to make delivery.

57 **(b) Filing.**

58 **(1) *When Required; Certificate of Service.* Any**  
59 **paper that is required to be served must be filed**  
60 **no later than a reasonable time after service. No**  
61 **certificate of service is required when a paper is**  
62 **served by filing it with the court’s electronic-**  
63 **filing system. When a paper is served by other**  
64 **means, a certificate of service must be filed with**  
65 **it or within a reasonable time after service or**  
66 **filing.**

67 **(2) Means of Filing.**

68 (A) Electronically. A paper is filed  
69 electronically by filing it with the court's  
70 electronic-filing system. A filing made  
71 through a person's electronic-filing account  
72 and authorized by that person, together with  
73 the person's name on a signature block,  
74 constitutes the person's signature. A paper  
75 filed electronically is written or in writing  
76 under these rules.

77 (B) Nonelectronically. A paper not filed  
78 electronically is filed by delivering it:  
79 (i) to the clerk; or  
80 (ii) to a judge who agrees to accept it for  
81 filing, and who must then note the  
82 filing date on the paper and promptly  
83 send it to the clerk.

84 **(3) Means Used by Represented and Unrepresented**

85 **Parties.**

86 (A) Represented Party. A party represented by  
87 an attorney must file electronically, unless  
88 nonelectronic filing is allowed by the court  
89 for good cause or is allowed or required by  
90 local rule.

91 (B) Unrepresented Party. A party not  
92 represented by an attorney must file  
93 nonelectronically, unless allowed to file  
94 electronically by court order or local rule.

95 **(4) Signature.** Every written motion and other  
96 paper must be signed by at least one attorney of  
97 record in the attorney's name—or by a person  
98 filing a paper if the person is not represented by  
99 an attorney. The paper must state the signer's  
100 address, e-mail address, and telephone number.



101 Unless a rule or statute specifically states  
102 otherwise, a pleading need not be verified or  
103 accompanied by an affidavit. The court must  
104 strike an unsigned paper unless the omission is  
105 promptly corrected after being called to the  
106 attorney's or person's attention.

107 **(5) Acceptance by the Clerk.** The clerk must not  
108 refuse to file a paper solely because it is not in  
109 the form prescribed by these rules or by a local  
110 rule or practice.

111 **(c) Service and Filing by Nonparties.** A nonparty may  
112 serve and file a paper only if doing so is required or  
113 permitted by law. A nonparty must serve every party  
114 as required by Rule 49(a), but may use the court's  
115 electronic-filing system only if allowed by court order  
116 or local rule.

117 ~~(e)~~**(d) Notice of a Court Order.** When the court issues an  
118 order on any post-arraignment motion, the clerk  
119 must ~~provide notice in a manner provided for in a~~  
120 ~~civil action~~serve notice of the entry on each party as  
121 required by Rule 49(a). A party also may serve  
122 notice of the entry by the same means. Except as  
123 Federal Rule of Appellate Procedure 4(b) provides  
124 otherwise, the clerk's failure to give notice does not  
125 affect the time to appeal, or relieve—or authorize the  
126 court to relieve—a party's failure to appeal within  
127 the allowed time.

128 ~~(d) Filing.~~ A party must file with the court a copy of any  
129 paper the party is required to serve. A paper must be  
130 filed in a manner provided for in a civil action.

131 ~~(e) Electronic Service and Filing.~~ A court may, by local  
132 rule, allow papers to be filed, signed, or verified by  
133 electronic means that are consistent with any technical

134 ~~standards established by the Judicial Conference of~~  
135 ~~the United States. A local rule may require electronic~~  
136 ~~filing only if reasonable exceptions are allowed. A~~  
137 ~~paper filed electronically in compliance with a local~~  
138 ~~rule is written or in writing under these rules.~~

#### **Committee Note**

Rule 49 previously required service and filing in a “manner provided” in “a civil action.” The amendments to Rule 49 move the instructions for filing and service from the Civil Rules into Rule 49. Placing instructions for filing and service in the criminal rule avoids the need to refer to two sets of rules, and permits independent development of those rules. Except where specifically noted, the amendments are intended to carry over the existing law on filing and service and to preserve parallelism with the Civil Rules.

Additionally, the amendments eliminate the provision permitting electronic filing only when authorized by local rules, moving—with the Rules governing Appellate, Civil, and Bankruptcy proceedings—to a national rule that mandates electronic filing for parties represented by an attorney with certain exceptions. Electronic filing has matured. Most districts have adopted local rules that require electronic filing by represented parties, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts for a party

represented by an attorney, except that nonelectronic filing may be allowed by the court for good cause, or allowed or required by local rule.

**Rule 49(a)(1).** The language from former Rule 49(a) is retained in new Rule 49(a)(1), except for one change. The new phrase, “Each of the following must be served on every party” restores to this part of the rule the passive construction that it had prior to restyling in 2002. That restyling revised the language to apply to parties only, inadvertently ending its application to nonparties who, on occasion, file motions in criminal cases. Additional guidance for nonparties appears in new subdivision (c).

**Rule 49(a)(2).** The language from former Rule 49(b) concerning service on the attorney of a represented party is retained here, with the “unless” clause moved to the beginning for reasons of style only.

**Rule 49(a)(3) and (4).** Subsections (a)(3) and (4) list the permissible means of service. These new provisions duplicate the description of permissible means from Civil Rule 5, carrying them into the criminal rule.

By listing service by filing with the court’s electronic-filing system first, in (3)(A), the rule now recognizes the advantages of electronic filing and service and its widespread use in criminal cases by represented defendants and government attorneys.

But the e-filing system is designed for attorneys, and its use can pose many challenges for pro se parties. In the criminal context, the rules must ensure ready access to the courts by all pro se defendants and incarcerated individuals,

filers who often lack reliable access to the internet or email. Although access to electronic-filing systems may expand with time, presently many districts do not allow e-filing by unrepresented defendants or prisoners. Accordingly, subsection (3)(A) provides that represented parties may serve registered users by filing with the court's electronic-filing system, but unrepresented parties may do so only if allowed by court order or local rule.

Subparagraph (3)(B) permits service by "other electronic means," such as email, that the person served consented to in writing.

Both subparagraphs (3)(A) and (B) include the direction from Civil Rule 5 that service is complete upon e-filing or transmission, but is not effective if the serving party learns that the person to be served did not receive the notice of e-filing or the paper transmitted by other electronic means. The language mirrors Civil Rule 5(b)(2)(E). But unlike Civil Rule 5, Criminal Rule 49 contains a separate provision for service by use of the court's electronic-filing system. The rule does not make the court responsible for notifying a person who filed the paper with the court's electronic-filing system that an attempted transmission by the court's system failed.

Subsection (a)(4) lists a number of traditional, nonelectronic means of serving papers, identical to those provided in Civil Rule 5.

**Rule 49(b)(1).** Filing rules in former Rule 49 appeared in subdivision (d), which provided that a party must file a copy of any paper the party is required to serve,

and required filing in a manner provided in a civil action. These requirements now appear in subdivision (b).

The language requiring filing of papers that must be served is retained from former subdivision (d), but has been moved to subsection (1) of subdivision (b), and revised to restore the passive phrasing prior to the restyling in 2002. That restyling departed from the phrasing in Civil Rule 5(d)(1) and inadvertently limited this requirement to filing by parties.

The language in former subdivision (d) that required filing “in a manner provided for in a civil action” has been replaced in new subsection (b)(1) by language drawn from Civil Rule 5(d)(1). That provision used to state “Any paper . . . that is required to be served—together with a certificate of service—must be filed within a reasonable time after service.” A contemporaneous amendment to Civil Rule 5(d)(1) has subdivided this provision into two parts, one of which addresses the Certificate of Service. Although the Criminal Rules version is not subdivided in the same way, it parallels the Civil Rules provision from which it was drawn. Because “within” might be read as barring filing before the paper is served, “no later than” is substituted to ensure that it is proper to file a paper before it is served.

The second sentence of subsection (b)(1), which states that no certificate of service is required when service is made using the court’s electronic-filing system, mirrors the contemporaneous amendment to Civil Rule 5. When service is not made by filing with the court’s electronic-filing system, a certificate of service must be filed.

**Rule 49(b)(2).** New subsection (b)(2) lists the three ways papers can be filed. (A) provides for electronic filing using the court’s electronic-filing system and includes a provision, drawn from the Civil Rule, stating that a filing made through a person’s electronic-filing account and authorized by that person, together with the person’s name on a signature block, constitutes the person’s signature. The last sentence of subsection (b)(2)(A) contains the language of former Rule 49(e), providing that e-filed papers are “written or in writing,” deleting the words “in compliance with a local rule” as no longer necessary.

Subsection (b)(2)(B) carries over from the Civil Rule two nonelectronic methods of filing a paper: delivery to the court clerk and delivery to a judge who agrees to accept it for filing.

**Rule 49(b)(3).** New subsection (b)(3) provides instructions for parties regarding the means of filing to be used, depending upon whether the party is represented by an attorney. Subsection (b)(3)(A) requires represented parties to use the court’s electronic-filing system, but provides that nonelectronic filing may be allowed for good cause, and may be required or allowed for other reasons by local rule. This language is identical to that adopted in the contemporaneous amendment to Civil Rule 5.

Subsection (b)(3)(B) requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule. This language differs from that of the amended Civil Rule, which provides that an unrepresented party may be “required” to file electronically by a court order or local rule that allows reasonable exceptions. A different approach to electronic filing by

unrepresented parties is needed in criminal cases, where electronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic confirmations, yet must be provided access to the courts under the Constitution.

**Rule 49(b)(4).** This new language requiring a signature and additional information was drawn from Civil Rule 11(a). The language has been restyled (with no intent to change the meaning) and the word “party” changed to “person” in order to accommodate filings by nonparties.

**Rule 49(b)(5).** This new language prohibiting a clerk from refusing a filing for improper form was drawn from Civil Rule 5(d)(4).

**Rule 49(c).** This provision is new. It recognizes that in limited circumstances nonparties may file motions in criminal cases. Examples include representatives of the media challenging the closure of proceedings, material witnesses requesting to be deposed under Rule 15, or victims asserting rights under Rule 60. Subdivision (c) permits nonparties to file a paper in a criminal case, but only when required or permitted by law to do so. It also requires nonparties who file to serve every party and to use means authorized by subdivision (a).

The rule provides that nonparties, like unrepresented parties, may use the court’s electronic-filing system only when permitted to do so by court order or local rule.

**Rule 49(d).** This provision carries over the language formerly in Rule 49(c) with one change. The former



language requiring that notice be provided “in a manner provided for in a civil action” has been replaced by a requirement that notice be served as required by Rule 49(a). This parallels Civil Rule 77(d)(1), which requires that the clerk give notice as provided in Civil Rule 5(b).

**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 Criminal Rules 12.4, 45, and 49, 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 2016.

Rule 12.4 (Disclosure Statement)

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

When Rule 12.4 was promulgated, the Code of Conduct for United States Judges treated all victims entitled to restitution as parties. As amended in 2009, the Code no longer treats any victim who may be entitled to restitution as a party, and requires disclosure only when the judge has an "interest that could be affected substantially by the outcome of the proceeding." The proposed amendment to Rule 12.4(a) aims to make the scope of the required disclosures under Rule 12.4 consistent with the 2009 amendments. The proposed amendment allows the court to relieve the government's burden of making the required disclosures upon a showing of "good cause." The amendment will avoid the need for burdensome disclosures when numerous organizational victims exist, but the impact of the crime on each is relatively small.

## **Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure**

Rule 12.4(b) would also be amended. First, the proposed amendments specify that the time for making the disclosures is within 28 days after the defendant's initial appearance. Second, it revises the rule to refer to "later" (rather than "supplemental") filings. As published, the proposal included a third amendment adding language to make clear that a later filing is required not only when information that has been disclosed changes, but also when a party learns of additional information that is subject to the disclosure requirements.

Two public comments were submitted. One stated that the proposed changes were unobjectionable. The other suggested that the phrase "good cause" should be limited to "good cause related to judicial disqualification." The advisory committee fully considered this suggestion, but concluded that in context the amendment was clear as published.

Following the public comment period, the advisory committee learned that the proposed clarifying language in subsection (b) would be inconsistent with language used in Civil Rule 7.1(b)(2). To make the language in the parallel rules consistent, the advisory committee revised its proposed amendment to Rule 12.4(b)(2) to require a party to "promptly file a later statement if any required information changes."

### Rules 49 (Serving and Filing Papers) and 45 (Computing and Extending Time)

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

## **Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure**

In its consideration of the issue, the advisory committee concluded that the default rule of electronic filing and service proposed by the Advisory Committee on Civil Rules could be problematic in criminal cases. Therefore, with the approval of the Standing Committee, the advisory committee drafted and published a stand-alone criminal rule for filing and service that included provisions for electronic filing and service.

Substantive differences between proposed Criminal Rule 49 and proposed Civil Rule 5 include the provisions regarding unrepresented parties—under proposed Rule 49, an unrepresented party must file non-electronically, unless permitted to file electronically by court order or local rule. In contrast, under proposed Civil Rule 5, an unrepresented party may be required to file electronically by a court order or local rule that allows reasonable exceptions. Proposed Rule 49 also contains two provisions that do not appear in Civil Rule 5, but were imported from other civil rules: it incorporates the signature provision of Civil Rule 11(a); and substitutes the language from Civil Rule 77(d)(1), governing the clerk’s duty to serve notice of orders, for the direction in current Rule 49 that the clerk serve notice “in a manner provided for in a civil action.”

Proposed Rule 49 also requires all nonparties, represented or not, to file and serve non-electronically in the absence of a court order or local rule to the contrary. If a district decides that it would prefer to adopt procedures that would allow all represented media, victims, or other filers to use its electronic filing system, that remains an option by local rule.

A conforming amendment to Rule 45 eliminates cross-references to Civil Rule 5 that would be made obsolete by the proposed amendments to Rule 49. The proposed conforming amendment replaces those references to Civil Rule 5 with references to the corresponding new subsections in Rule 49(a).

## **Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure**

Following the public comment period, the advisory committee reviewed both the public comments on Rule 49 specifically, as well as the comments that implicated the common provisions of the electronic service and filing across the federal rule sets. In response to those comments, the advisory committee revised two subsections in the published rule and added a clarifying section to another portion of the committee note.

The first changes after publication concern subsection (b)(1), which governs when service of papers is required, as well as certificates of service. These changes responded to comments addressed to the proposed amendment to Civil Rule 5 and to other issues raised during inter-committee discussions. The published criminal rule, which was based on Civil Rule 5(d)(1), stated that a paper that is required to be served must be filed “within a reasonable time after service.” Because “within” might be read as barring filing before the paper is served, “no later than” was substituted to ensure that it is proper to file a paper before it is served. Subsection (b)(1) was also revised to state explicitly that no certificate of service is required when the service is made using the court’s electronic filing system. Finally, the published rule stated that when a paper is served by means other than the court’s electronic filing system, the certificate must be filed “within a reasonable time after service or filing, whichever is later.” Because that might be read as barring filing of the certificate with the paper, subsection (b)(1) was revised to state that the certificate must be filed “with it or within a reasonable time after service or filing.”

The second change revised the language of the signature provision in proposed Rule 49(b)(2) to respond to public comments expressing concern that the published provisions on electronic signatures were unclear and could be misunderstood to require inappropriate disclosures. In consultation with the other advisory committees, minor revisions were made to clarify this provision.

**Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure**

In response to concerns expressed by clerks of court, a clarifying sentence was added to the committee note to Rule 49(a)(3) and (4) stating that “[t]he rule does not make the court responsible for notifying a person who filed the paper with the court’s electronic filing system that an attempted transmission by the court’s system failed.”

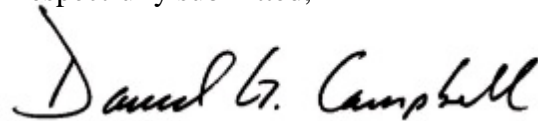
The advisory committee also considered, but declined to adopt, recommendations by some commentators that it extend the default of electronic filing to inmates, nonparties, or all pro se filers other than inmates. The policy decision to limit presumptive access to electronic filing was considered extensively during the drafting process and after publication. The advisory committee adhered to its policy decision and made no further changes following publication.

The Standing Committee voted unanimously to support the recommendations of the advisory committee.

**Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rules 12.4, 45, and 49 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,



David G. Campbell, Chair

Jesse M. Furman  
Gregory G. Garre  
Daniel C. Girard  
Susan P. Graber  
Frank M. Hull  
Peter D. Keisler

William K. Kelley  
Rod J. Rosenstein  
Amy J. St. Eve  
Larry D. Thompson  
Richard C. Wesley  
Jack Zouhary

**Excerpt from the May 19, 2017 Report of the Advisory Committee on Criminal Rules**

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

**DAVID G. CAMPBELL**  
CHAIR

**REBECCA A. WOMELDORF**  
SECRETARY

**CHAIRS OF ADVISORY COMMITTEES**

**MICHAEL A. CHAGARES**  
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BANKRUPTCY RULES

**JOHN D. BATES**  
CIVIL RULES

**DONALD W. MOLLOY**  
CRIMINAL RULES

**WILLIAM K. SESSIONS III**  
EVIDENCE RULES

**MEMORANDUM**

**TO:** Hon. David G. Campbell, Chair  
Committee on Rules of Practice and Procedure

**FROM:** Hon. Donald W. Molloy, Chair  
Advisory Committee on Criminal Rules

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

**DATE:** May 19, 2017

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**I. Introduction**

The Advisory Committee on Criminal Rules met on April 28, 2017, in Washington, D.C. This report presents five action items. The Committee unanimously recommends that the Standing Committee approve and transmit to the Judicial Conference the following proposed amendments that were previously published for public comment:

- (1) Rule 49 (filing and service),
- (2) Rule 45(c) (conforming amendment), and
- (3) Rule 12.4 (government disclosure of organizational victims).

\* \* \* \* \*

## II. Action Item: Rule 49

The proposed amendments to Criminal Rule 49 grew out of a Standing Committee initiative to adapt the rules of procedure to the modernization of the courts' electronic filing system. Because Rule 49(b) and (d) currently provide that service and filing be made in the "manner provided for a civil action," the threshold question facing the Criminal Rules Committee was whether to retain this linkage to the Civil Rules or to draft a comprehensive Criminal Rule on filing and service. With the approval of the Standing Committee, the Advisory Committee drafted and published a stand-alone Criminal Rule for filing and service that included provisions for e-filing and service. Parallel amendments providing for e-filing and service are before the Standing Committee from the Civil, Bankruptcy, and Appellate Rules Committees. All were published for public comment in August of 2016.

The Committee reviewed the public comments received on the Criminal Rules, as well as comments that implicated common provisions. In response, the Committee revised two subsections in the published rule, and added a clarifying section to another portion of the Committee Note.

The first changes after publication concern subsection (b)(1), which governs when service of papers is required and certificates of service. These changes responded to comments addressed to the proposed amendment to Civil Rule 5 and to other issues raised by the reporters and Advisory Committees. The published Criminal Rule, which was based on Civil Rule 5(d)(1), stated that a paper that is required to be served must be filed "within a reasonable time after service." Because "within" might be read as barring filing before the paper is served, "no later than" was substituted to ensure that it is proper to file a paper before it is served. Subsection (b)(1) was also revised to state explicitly that no certificate of service is required when the service is made using the court's electronic filing system. Finally, the published rule stated that when a paper is served by means other than the court's electronic filing system the certificate must be filed "within a reasonable time after service of filing, whichever is later." Because that might be read as barring filing of the certificate with the paper, (d)(1) was revised to state that the certificate must be filed "with it or within a reasonable time after service or filing." Parallel changes have been recommended for Civil Rule 5(d).

The second change revised the language of (b)(2) to respond to public comments expressing concern that the published provisions on electronic signatures were unclear and could be misunderstood to require inappropriate disclosures. The revised language, which is also proposed for Civil Rule 5, states:

An authorized filing made through a person's electronic-filing account, together with the person's name on a signature block, serves as the person's signature.



One clarifying change was made to the Committee Notes to Rule 49(a)(3) and (4) and Civil Rule 5. In response to concerns expressed by clerks of court, a sentence was added to the Note stating that “The rule does not make the court responsible for notifying a person who filed the paper with the court’s electronic filing system that an attempted transmission by the court’s system failed.”

The Committee also considered, but declined to adopt, public comments recommending that it extend presumptive e-filing to inmates, nonparties, or all pro se filers other than inmates. The policy decision to limit presumptive access to e-filing was considered extensively during the drafting process, and the Committee was not persuaded that the comments warranted a change.

**The Committee unanimously recommends that the Standing Committee approve the proposed amendments to Rule 49 governing service and filing in criminal cases, and the Committee Note, for submission to the Judicial Conference.**

### **III. Action Item: Conforming Amendment to Rule 45**

No comments were received on the published amendment revising cross references that would be made obsolete by the proposed amendment of Rule 49. Although this is a technical and conforming amendment, it was published with Rule 49 to avoid any concern that might arise. The Committee made no changes following publication.

**The Committee unanimously recommends that the Standing Committee approve the proposed conforming amendment to Rule 45 governing computing and extending time, and the Committee Note, for submission to the Judicial Conference.**

### **IV. Action Item: Rule 12.4**

The proposed amendment to Rule 12.4, which governs the parties’ disclosure statements, was initially recommended by the Department of Justice. Rule 12.4(a)(2) requires the government to identify organizational victims to assist judges in complying with their obligations under the Judicial Code of Conduct. Prior to 2009, the Code of Judicial Conduct treated any victim entitled to restitution as a party, and the Committee Note stated that the purpose of the disclosures required by Rule 12.4 was to assist judges in determining whether to recuse. In 2009, however, the Code of Judicial Conduct was amended. It no longer treats any victim who may be entitled to restitution as a party, and it requires disclosure only when the judge has an interest “that could be substantially affected by the outcome of the proceedings.”

The proposed amendment to Rule 12.4(a) brings the scope of the required disclosures in line with the 2009 amendments, allowing the court to relieve the government of the burden of making the required disclosures upon a showing of “good cause.” The amendment will avoid the need for burdensome disclosures when there are numerous organizational victims, but the impact of the crime on each is relatively small. The published amendment also made changes in

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Rule 12.4(b): (1) specifying that the time for making the disclosures is within 28 days after the initial appearance; (2) revising the rule to refer to “later” (rather than “supplemental”) filings; and (3) making clear that a later filing is required not only when information that has been disclosed changes, but also when a party learns of additional information that is subject to the disclosure requirements.

Two public comments were received. One stated that the proposed changes were unobjectionable. The other suggested that the phrase “good cause” should be limited to “good cause related to judicial disqualification.” The Committee declined to make that change, concluding that in context the amendment was clear.

The Committee was also made aware of concerns that its proposed clarifying language in 12.4(b) would be inconsistent with the language in Civil Rule 7.2(b)(1). The Committee concluded that clarification was not necessary, and that it would be desirable to track the language now in the Civil Rule. A motion to revise the published amendment to adopt the language drawn from Civil Rule 7.2(b)(1) was approved unanimously. As revised, Criminal Rule 12.4(b)(2) requires a party to “promptly file a later statement if any required information changes.”

**The Committee unanimously recommends that the Standing Committee approve the proposed amendments to Rule 12.4 governing disclosure statements in criminal cases, and the Committee Note, for submission to the Judicial Conference.**

\* \* \* \* \*