Agenda E-19 (Summary)
Rules
September 2022

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed amendments to Appellate Rules 2, 4, 26, and 45, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 4-6

2. a. Approve the proposed amendments to Bankruptcy Rules 3011, 8003, and 9006, and proposed new Bankruptcy Rule 9038, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

   b. Approve, effective December 1, 2022, the proposed amendments to Bankruptcy Official Forms 101, 309E1, and 309E2, and effective December 1, 2023, the proposed amendment to Bankruptcy Official Form 417A, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date..... pp. 7-10

3. Approve the proposed amendments to Civil Rules 6, 15, and 72, and proposed new Civil Rule 87, as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 14-17

4. Approve the proposed amendments to Criminal Rules 16, 45, and 56, and proposed new Criminal Rule 62, as set forth in Appendix D, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 18-21

5. Approve the proposed amendments to Evidence Rules 106, 615, and 702, as set forth in Appendix E, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 22-24

6. Approve the proposed 2022 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002, as set forth in Appendix F, and ask the Administrative Office Director to transmit it to Congress in accordance with the law ..... pp. 28-29

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

Agenda E-19
Rules
September 2022

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 7, 2022. All members participated.

Representing the advisory committees were Judge Jay S. Bybee, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robert M. Dow, Jr., Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, Advisory Committee on Civil Rules; Judge Raymond M. Kethledge, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Allison Bruff, Bridget Healy, and Scott Myers, Rules Committee Staff Counsel; Burton S. DeWitt, Law Clerk to the Standing Committee; Dr. Tim Reagan and Dr. Emery Lee, Senior Research Associates, Federal Judicial Center (FJC); and Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, and Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives,

representing the Department of Justice (DOJ) on behalf of Deputy Attorney General Lisa O. Monaco.

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Standing Committee received and responded to reports from the five advisory committees. Among other things, the advisory committee reports discussed two items that affect multiple rule sets: (1) recommendations from the Appellate, Bankruptcy, Civil, and Criminal Rules Committees for final approval of rules addressing future emergencies; and (2) recommended technical amendments to those four rule sets addressing Juneteenth National Independence Day.

The Committee also received an update on two items of coordinated work among the Appellate, Bankruptcy, Civil, and Criminal Rules Committees: (1) consideration of suggestions to allow electronic filing by pro se litigants; and (2) consideration of suggestions to change the presumptive deadline for electronic filing. Finally, the Committee approved the proposed 2022 Report on the Adequacy of the Privacy Rules Prescribed Under the E-Government Act of 2002, was briefed on the judiciary's ongoing response to the COVID-19 pandemic, and approved a draft report regarding judiciary strategic planning.

PROPOSED EMERGENCY RULES

The proposals recommended for the Judicial Conference's approval include a package of rules for use in emergency situations that substantially impair the courts' ability to function in compliance with the existing rules of procedure. These rules were developed in response to Congress's directive in the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") that rules be considered, under the Rules Enabling Act, to address future emergencies. The set of proposed amendments and new rules developed in response to this charge includes an

amendment to Appellate Rule 2 (and a related amendment to Appellate Rule 4); new Bankruptcy Rule 9038; new Civil Rule 87; and new Criminal Rule 62. The proposed amendments and new rules were published for public comment in August 2021.

Although there are some differences in the four proposed emergency rules – the Appellate rule is much more flexible, and the Bankruptcy, Civil, and Criminal rules provide for different types of rule deviations in a declared emergency – they share some overarching, uniform features. Each rule places the authority to declare a rules emergency solely in the hands of the Judicial Conference. Each rule uses the same basic definition of a "rules emergency" – namely, when "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules." The Bankruptcy, Civil, and Criminal rules take a roughly similar approach to the content of the emergency declaration, setting ground rules to make clear the scope of the declaration. Each emergency rule limits the duration of the declaration; provides for additional declarations; and accords the Judicial Conference discretion to terminate an emergency declaration before the declaration's stated termination date. The Bankruptcy, Civil, and Criminal rules each address what will happen when a proceeding that has been conducted under an emergency rule continues after the emergency has terminated, though each rule does so with provision(s) tailored to take account of the different contexts and subject matters addressed by the respective emergency provisions.

To the extent that public comments touched on uniform aspects of the emergency rules, those comments focused on the role of the Judicial Conference. Some commentators criticized the decision to place in the hands of the Judicial Conference the authority to declare or terminate a rules emergency, though another commentator specifically supported the decision to centralize authority in the Judicial Conference. One commentator argued that there should be a backup

plan in case the emergency prevents the Judicial Conference from acting. The Advisory Committees reviewed these comments and uniformly concluded that the Judicial Conference was fully capable of responding to rules emergencies, and that the uniform approach of the Judicial Conference was preferable to other approaches involving more decisionmakers. Accordingly, the Advisory Committees voted to retain, as published, the substance of all of the uniform features of the set of proposed emergency rules. A few post-publication changes to the Appellate Rule's text, the Civil Rule's text and note, and the Criminal Rule's text and note are discussed below in connection with the recommendations of the respective Advisory Committees.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Appellate Rules 2, 4, 26, and 45.

Rule 2 (Suspension of Rules)

The proposed amendment to Appellate Rule 2 is part of the set of proposed rules, mentioned above, that resulted from the CARES Act directive that rules be considered to address future emergencies. The proposal adds a new subdivision (b) to Appellate Rule 2. Existing Rule 2, which would become Rule 2(a), empowers the courts of appeals to suspend the provisions in the Appellate Rules "in a particular case," except "as otherwise provided in Rule 26(b)." (Rule 26(b) provides that "the court may not extend the time to file: (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or (2) a notice of appeal from or a [petition to review an order of a federal administrative body], unless specifically authorized by law.") New Rule 2(b) would come into operation when the Judicial Conference declares an Appellate Rules emergency and would empower the court of appeals to "suspend in

all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2)."

In the event of a Judicial Conference declaration of an Appellate Rules emergency, a court of appeals' authority under Rule 2(b) would be broader in two ways than a court of appeals' everyday authority under Rule 2(a). First, the suspension power under Rule 2(b) reaches beyond a particular case. Second, the Rule 2(b) suspension power reaches time limits to appeal or petition for review, so long as those time limits are established only by rule. (Rule 2(b) does not purport to empower the court to suspend time limits to appeal or petition for review set by statute.)

Rule 4 (Appeal as of Right—When Taken)

The proposed amendment to Appellate Rule 4 is designed to make Appellate Rule 4 operate smoothly with Emergency Civil Rule 6(b)(2) (discussed below) if that Emergency Civil Rule is ever in effect, while not making any change to the operation of Appellate Rule 4 at any other time.

It does this by replacing the phrase "no later than 28 days after the judgment is entered" in Rule 4(a)(4)(A)(vi) with the phrase "within the time allowed for filing a motion under Rule 59." When Emergency Civil Rule 6(b)(2) is not in effect, this amendment makes no change at all. But if Emergency Civil Rule 6(b)(2) is ever in effect, a district court might extend the time to file a motion under Rule 59. If that happens, the amendment to Appellate Rule 4(a)(4)(A)(vi) would allow Appellate Rule 4 to properly take that extension into account.

Rule 26 (Computing and Extending Time) and Rule 45 (Clerk's Duties)

In response to the enactment of the Juneteenth National Independence Day Act (Juneteenth Act), Pub. L. No. 117-17 (2021), the Advisory Committee made technical amendments to Rules 26(a)(6)(A) and 45(a)(2) to insert "Juneteenth National Independence

Day" immediately following "Memorial Day" in the Rules' lists of legal holidays. Because of the technical and conforming nature of the amendments, the Advisory Committee recommended final approval without publication.

The Standing Committee unanimously approved the Advisory Committee's recommendations, after making a stylistic change to Appellate Rule 2(b)(4) to conform that Rule's language to the language used in the other Emergency Rules.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 2, 4, 26, and 45, as set forth in Appendix A, 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.

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments to the Appendix of Length Limits Stated in the Federal Rules of Appellate Procedure with a recommendation that they be published for public comment in August 2022. The proposed amendments to the Appendix would conform with proposed amendments to Rules 35 and 40, which were approved for publication for public comment. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Information Items

The Advisory Committee met on March 30, 2022. In addition to the matters noted above, the Advisory Committee discussed whether to propose an amendment to Rule 39 clarifying the process for challenging the allocation of costs on appeal and whether to propose amending Form 4 to simplify the disclosures required in connection with a request for in forma pauperis status. It referred to a subcommittee a new suggestion that Rule 29 be amended to require identification of any amicus or counsel whose involvement triggered the striking of an amicus brief. The Advisory Committee also continued its discussion of whether to propose amendments to Rule 29

with respect to disclosures concerning the relationship between an amicus and either parties or nonparties.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules recommended for final approval the following proposals: Restyled Bankruptcy Rules for the 3000-6000 series; amendments to Bankruptcy Rules 3011, 8003, and 9006; new Bankruptcy Rule 9038; and amendments to Official Forms 101, 309E1, 309E2, and 417A. The Advisory Committee also recommended all of the foregoing for transmission to the Judicial Conference other than the restyled rules; the latter will be held for later transmission once all the bankruptcy rules have been restyled.

Restyled Rules Parts III, IV, V, and VI (the 3000-6000 series of Bankruptcy Rules)

The National Bankruptcy Conference submitted extensive comments on the restyled rules, and several others submitted comments as well. After discussion with the style consultants and consideration by the Restyling Subcommittee, the Advisory Committee incorporated some of those suggested changes into the revised rules and rejected others. (Some of the rejected suggestions were previously considered in connection with the 1000-2000 series of restyled rules, and the Advisory Committee adhered to its prior conclusions about those suggestions as noted at pages 10-11 in the Standing Committee's September 2021 report to the Judicial Conference.)

The Advisory Committee recommended final approval for this second set of restyled rules, but, as with the first set, suggested that the Standing Committee not submit the rules to the Judicial Conference until all remaining parts of the Bankruptcy Rules have been restyled, published, and given final approval, so that all restyled rules can go into effect at the same time.

Rule 3011 (Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases)

The proposed amendment, which was suggested by the Committee on the Administration of the Bankruptcy System, redesignates the existing text of Rule 3011 as subdivision (a) and adds a new subdivision (b) requiring the clerk of court to provide searchable access on the court's website to information about funds deposited pursuant to § 347 of the Bankruptcy Code (Unclaimed Property). There was one comment on the proposed amendment, and the language of subdivision (b) was restyled and modified to reflect the comment. The Advisory Committee recommended final approval as amended.

Rule 8003 (Appeal as of Right – How Taken; Docketing the Appeal)

The proposed amendments to Rule 8003 conform to amendments recently made to Federal Rule of Appellate Procedure 3, which stress the simplicity of the Rule's requirements for the contents of the notice of appeal and which disapprove some courts' "expressio unius est exclusio alterius" approach to interpreting a notice of appeal. No comments were submitted, and the Advisory Committee gave its final approval to the rule as published.

Rule 9006 (Computing and Extending Time; Time for Motion Papers)

In response to the enactment of the Juneteenth Act, the Advisory Committee proposed a technical amendment to Rule 9006(a)(6)(A) to include Juneteenth National Independence Day in the list of legal public holidays in the rule. The Advisory Committee recommended final approval without publication because this is a technical and conforming amendment.

Rule 9038 (Bankruptcy Rules Emergency)

New Rule 9038 is part of the package of proposed emergency rules drafted in response to the CARES Act directive. Subdivisions (a) and (b) of the rule are similar to the Appellate, Civil, and Criminal Emergency Rules in the way they define a rules emergency, provide authority to

the Judicial Conference to declare such an emergency, and prescribe the content and duration of a declaration.

Rule 9038(c) expands existing Bankruptcy Rule 9006(b), which authorizes an individual bankruptcy judge to enlarge time periods for cause. Although many courts relied on Rule 9006(b) to grant extensions of time during the COVID-19 pandemic, the rule does not fully meet the needs of an emergency situation. First, it has some exceptions—time limits that cannot be expanded. Also, it arguably does not authorize an extension order applicable to all cases in a district. Rule 9038 is intended to fill in these gaps for situations in which the Judicial Conference declares a rules emergency. The chief bankruptcy judge can grant a district-wide extension for any time periods specified in the rules, and individual judges can do the same in specific cases. There were no negative comments addressing Rule 9038, and the Advisory Committee recommended final approval as published.

Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy)

The amendments to Questions 2 and 4 in Part 1 of Form 101 clarify how and where to report business names used by the debtor. These changes clarify that the only names to be listed are names that were used by the debtor personally in conducting business, not names used by other legal entities. The changes also bring Form 101 into conformity with the approach taken in Forms 105, 201, and 205 in involuntary bankruptcy cases and in non-individual cases. A suggestion unrelated to the proposed change was rejected, and the Advisory Committee recommended final approval as published.[1]

[1] The version of Official Form 101 in Appendix B includes an unrelated technical conforming change to line 13 which went into effect on June 21, 2022, after the Standing Committee's meeting. The change was approved by the Advisory Committee on Bankruptcy Rules pursuant to its authority to make such changes subject to subsequent approval by the Standing Committee and notice to the Judicial Conference. It conforms the form to the Bankruptcy Threshold Adjustment and Technical Corrections Act (the "BTATC" Act), Pub. L. No. 117-151, which went into effect on the same date. The Standing Committee will review the BTATC Act changes to Official Form 101 and another form at its January 2023 meeting, and will update the Judicial Conference on the changes in its report of that meeting.

Official Forms 309E1 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)) and 309E2 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors under Subchapter V))

The amendments clarify the deadline for objecting to a debtor's discharge and distinguish it from the deadline to object to discharging a particular debt. There were no comments, and the Advisory Committee recommended final approval as published with minor changes to punctuation.

Official Form 417A (Notice of Appeal and Statement of Election)

The amendments conform the form to proposed changes to Rule 8003. No comments were submitted, and the Advisory Committee recommended final approval with a proposed effective date of December 1, 2023, to coincide with the Rule 8003 amendment.

The Standing Committee unanimously approved the Advisory Committee's recommendations.

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 3011, 8003, and 9006, and proposed new Bankruptcy Rule 9038, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

b. Approve, effective December 1, 2022, the proposed amendments to Bankruptcy Official Forms 101, 309E1, and 309E2, and effective December 1, 2023, the proposed amendment to Bankruptcy Official Form 417A, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Rules and Forms Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted the proposed restyled Bankruptcy Rules for the 7000-9000 Series; proposed amendments to Rules 1007, 4004, 5009, and 9006; proposed new Rule 8023.1; and a proposed amendment to Official Form 410A with a

recommendation that they be published for public comment in August 2022. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Restyled Rules Parts VII, VIII, and IX

The Advisory Committee sought approval for publication of Restyled Rules Parts VII, VIII, and IX (the 7000-9000 series Bankruptcy Rules). This is the third and final set of restyled rules recommended for publication.

Rule 1007(b)(7) (Lists, Schedules, Statements, and Other Documents; Time Limits) and conforming amendments to Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3), and 9006(c)(2)

The amendments to Rule 1007(b)(7) would eliminate the requirement that the debtor file a "statement" on Official Form 423 upon completion of an approved debtor education course, and instead require filing the certificate of completion provided by the approved course provider. The six other rules would be amended to replace references to a "statement" required by Rule 1007(b)(7) with references to a "certificate."

Rule 8023.1 (Substitution of Parties)

Proposed new Rule 8023.1, addressing the substitution of parties, is modeled on Appellate Rule 43, and would be applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel.

Official Form 410A (Mortgage Proof of Claim Attachment)

Amendments are made to Part 3 (Arrearage as of Date of the Petition) of the form, replacing the first line (which currently asks for "Principal & Interest") with two lines, one for "Principal" and one for "Interest." Because under 11 U.S.C. § 1322(e) the amount necessary to cure a default is "determined in accordance with the underlying agreement and applicable nonbankruptcy law," it may be necessary for a debtor who is curing arrearages to know which portion of the total arrearages is principal and which is interest.

Information Items

The Advisory Committee met on March 31, 2022. In addition to the recommendations discussed above, the Advisory Committee considered (among other matters) a proposed amendment to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence) and five related forms that were published for comment. It also considered a suggestion from the Court Administration and Case Management (CACM) Committee concerning electronic signatures.

Rule 3002.1

The proposed amendments to Rule 3002.1 were designed to encourage a greater degree of compliance with the rule and to provide a new midcase assessment of the mortgage claim's status in order to give a chapter 13 debtor an opportunity to cure any postpetition defaults that may have occurred.

Twenty-seven comments were submitted on the proposed amendments. Some of the comments were lengthy and detailed; others briefly stated an opinion in support of or opposition to the amendments. The comments generally fell into three categories: (1) comments opposing the amendments, or at least the midcase review, submitted by some chapter 13 trustees; (2) comments favoring the amendments, submitted by some consumer debtor attorneys; and (3) comments favoring the amendments but giving suggestions for improvement, submitted by trustees, debtors, judges, and an association of mortgage lenders.

The Consumer Subcommittee concluded that there is a need for amendments to Rule 3002.1, and that there is authority to promulgate them. The Advisory Committee agreed. The Consumer Subcommittee was sympathetic, however, with the desire expressed in several comments for simplification, and it has begun to sketch out revisions. It hopes to present a revised draft to the Advisory Committee at the fall meeting. The Forms Subcommittee will

await decisions about Rule 3002.1 before considering any changes to the proposed implementing forms.

Electronic Signatures

The Advisory Committee has been considering a suggestion by the CACM Committee regarding the use of electronic signatures in bankruptcy cases by individuals who do not have a CM/ECF account. At the fall 2021 meeting, the Technology Subcommittee presented for discussion a draft amendment to Rule 5005(a)(2)(C) that would have permitted a person other than the electronic filer of a document to authorize the person's signature on an electronically filed document. The discussion raised several questions and concerns. Among the issues raised were how the proposed rule would apply to documents, such as stipulations, that are filed by one attorney but bear the signature of other attorneys; how it would apply if a CM/ECF account includes several subaccounts; and whether there is really a perception among attorneys that the retention of wet signatures presents a problem that needs solving.

After the fall 2021 meeting, the Advisory Committee's Reporter followed up with the bankruptcy judge who had raised the issue of electronic signatures with the CACM Committee, and learned that this judge is working on a possible local rule for his district modeled on a state-court rule that allows for electronic signatures rather than requiring the retention of wet signatures. In its suggestion, the CACM Committee had questioned whether the lack of a provision in Rule 5005 addressing electronic signatures of individuals without CM/ECF accounts may make courts "hesitant to make such a change without clarification in the rules that use of electronic signature products is sufficient for evidentiary purposes." The Technology Subcommittee concluded that current Rule 5005 does not address the issue of the use of electronic signatures by individuals who are not registered users of CM/ECF and that it therefore does not preclude local rulemaking on the subject. The Bankruptcy Court for the District of

Nebraska already has such a rule (L.B.R. 9011-1). The Technology Subcommittee concluded that a period of experience under local rules allowing the use of e-signature products would help inform any later decision to promulgate a national rule. Electronic signature technology will also likely develop and improve in the interim. The Advisory Committee agreed with the Technology Subcommittee's recommendation and voted not to take further action on the suggestion.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules recommended for final approval proposed amendments to Civil Rules 6, 15, and 72, and new Civil Rule 87.

Rule 6 (Computing and Extending Time; Time for Motion Papers)

In response to the enactment of the Juneteenth Act, the Advisory Committee made a technical amendment to Rule 6(a)(6)(A) to include the Juneteenth National Independence Day in the list of legal public holidays in the rule. The Advisory Committee recommended final approval without publication because this is a technical and conforming amendment.

Rule 15 (Amended and Supplemental Pleadings)

The amendment to Rule 15(a)(1) would substitute "no later than" for "within" to measure the time allowed to amend a pleading once as a matter of course. Paragraph (a)(1) currently provides, in part, that "[a] party may amend its pleading once as a matter of course *within* (A) 21 days after serving it or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier" (emphasis added).

A literal reading of the existing rule could suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion, creating an

unintended gap period (prior to service of the responsive pleading or pre-answer motion) during which amendment as of right is not permitted. The proposed amendment is intended to remove that possibility by replacing "within" with "no later than."

After public comment, the Advisory Committee made no changes to the proposed amendment to Rule 15(a)(1) as published. The Advisory Committee made one change to the committee note after publication, deleting an unnecessary sentence that was published in brackets. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 72 (Magistrate Judges: Pretrial Order)

Rule 72(b)(1) directs that the clerk "mail" a copy of a magistrate judge's recommended disposition. This requirement is out of step with recent amendments to the rules that recognize service by electronic means. The proposed amendment to Rule 72(b)(1) would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).

After public comment, the Advisory Committee made no changes to the proposed amendment to Rule 72(b)(1) as published. The Advisory Committee made one change to the committee note, deleting an unnecessary sentence that was published in brackets. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 87 (Civil Rules Emergency)

Proposed Civil Rule 87 is part of the package of proposed emergency rules drafted in response to the CARES Act directive. Subdivisions (a) and (b) of Rule 87 contain uniform provisions shared by the Appellate, Bankruptcy, and Criminal Emergency Rules. The uniform provisions address (1) who declares an emergency; (2) the definition of a rules emergency; (3) limitations in the declaration; and (4) early termination of declarations.

In form, Civil Rule 87(b)(1) diverges from the Bankruptcy and Criminal Rules with regard to the Judicial Conference declaration of a rules emergency; but in function, Rule 87(b)(1) takes a similar approach to those other rules. While the Bankruptcy and Criminal Rules provide that the declaration must "state any restrictions on the authority granted in" their emergency provisions, Rule 87(b)(1)(B) provides that the declaration "adopts all the emergency rules in Rule 87(c) unless it excepts one or more of them." The character of the different emergency rules provisions accounts for the difference. Rule 87 authorizes Emergency Rules 4(e), (h)(1), (i), (j)(2), and for serving a minor or incompetent person (referred to as "Emergency Rules 4"), each of which allows the court to order service of process by a means reasonably calculated to give notice. Rule 87 also authorizes Emergency Rule 6(b)(2), which displaces the prohibition on the extension of the deadlines for making post-judgment motions and instead permits extension of such deadlines. The Advisory Committee determined that, while it makes sense for the Judicial Conference to have the flexibility to decide not to adopt a particular Civil Emergency Rule when declaring a rules emergency, it would not make sense to invite other, undefined, "restrictions" on the Civil Emergency Rules. Accordingly, the Advisory Committee's proposed language in Civil Rule 87(b)(1)(B) stated that the Judicial Conference's emergency declaration "must … adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them." (The inclusion of the word "must" was the result of a stylistic decision concerning the location of "must" within Rule 87(b)(1).)

At the Standing Committee's June 2022 meeting, a member suggested that it would be preferable to create a clear default rule that would provide for the adoption of all the Civil Emergency Rules in the event that a Judicial Conference declaration failed to specify whether it was adopting all or some of those rules. Accordingly, the Standing Committee voted to relocate the word "must" to Civil Rules 87(b)(1)(A) and (C), so that Civil Rule 87(b)(1)(B) provides

simply that the declaration "adopts all the emergency rules in Rule 87(c) unless it excepts one or more of them." The resulting Rule will operate roughly the same way as the Bankruptcy and Criminal Emergency Rules – that is, a Judicial Conference declaration of a rules emergency will put into effect all of the authorities granted in the relevant emergency provisions, unless the Judicial Conference specifies otherwise.

After public comment, the Advisory Committee deleted from the committee note two unnecessary sentences that had been published in brackets, and augmented the committee note's discussion of considerations that pertain to service by an alternative means under Emergency Rules 4(e), (h)(1), (i), and (j)(2). Based on suggestions by a member of the Standing Committee, the committee note was further revised at the Standing Committee meeting to reflect the possibility of multiple extensions under Emergency Rule 6(b)(2) and to delete one sentence that had suggested that the court ensure that the parties understand the effect of a Rule 6(b)(2) extension on the time to appeal.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Civil Rules 6, 15, and 72, and proposed new Civil Rule 87, as set forth in Appendix C, 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.

Information Items

The Advisory Committee met on March 29, 2022. In addition to the matters discussed above, the Advisory Committee considered various information items, including a possible rule on multidistrict litigation (MDL). The Advisory Committee's MDL Subcommittee is considering amendments to Rules 16(b) or Rule 26(f), or a new Rule 16.1, to address the court's role in managing the MDL pretrial process. The drafts developed for initial discussion would simply focus the court and parties' attention on relevant issues without greater direction or detail.

The MDL Subcommittee has collected extensive comments from interested bar groups on some possible approaches.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules recommended for final approval proposed amendments to Criminal Rules 16, 45, and 56, and new Criminal Rule 62.

Rule 16 (Discovery and Inspection)

The proposed amendment to Rule 16, the principal rule that governs discovery in criminal cases, would correct a typographical error in the Rule 16 amendments that are currently pending before Congress. Those amendments, expected to take effect on December 1, 2022, revise both the provisions governing expert witness disclosures by the government – contained in Rule 16(a)(1)(G) – and the provisions governing expert witness disclosures by the defense – contained in Rule 16(b)(1)(C). Subject to exceptions, both Rule 16(a)(1)(G)(v) and Rule 16(b)(1)(C)(v) require the disclosure to be signed by the expert witness. One exception applies if, under another subdivision of the rule (concerning reports of examinations and tests), the disclosing party has previously provided the required information in a report signed by the witness. This exception cross-references the subdivision concerning reports of examinations and tests.

In Rule 16(a)(1), the relevant subdivision is Rule 16(a)(1)(F), and Rule 16(a)(1)(G)(v) duly cross-references that subdivision (applying the exception if the government "has previously provided under (F) a report, signed by the witness, that contains" the required information). In Rule 16(b)(1), the relevant subdivision is Rule 16(b)(1)(B); however, Rule 16(b)(1)(C)(v) as reported to Congress cross-references not "(B)" (as it should) but "(F)" (applying the exception if the defendant "has previously provided under (F) a report, signed by the witness, that contains"

the required information). The proposed amendment would correct Rule 16(b)(1)(C)(v)'s cross-reference from (F) to (B). The Advisory Committee recommended this proposal for approval without publication because it is a technical amendment. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 45 (Computing and Extending Time) and Rule 56 (When Court is Open)

In response to the enactment of the Juneteenth Act, the Advisory Committee made technical amendments to Rules 45 and 56 to include Juneteenth National Independence Day in the list of legal public holidays in those rules. The Advisory Committee recommended final approval without publication because these are technical and conforming amendments. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 62 (Criminal Rules Emergency)

New Rule 62 is part of the package of proposed emergency rules drafted in response to Congress's directive in the CARES Act. Subdivisions (a) and (b) of Rule 62 contain uniform provisions shared by the Appellate, Bankruptcy, and Civil Emergency Rules. The uniform provisions address (1) who declares an emergency; (2) the definition of a rules emergency; (3) limitations in the declaration; and (4) early termination of declarations. Under the uniform provisions, the Judicial Conference has the sole authority to declare a rules emergency, which is defined as when "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with" the relevant set of rules.

Rule 62 includes an additional requirement not present in the Appellate, Bankruptcy, or Civil Emergency Rules. That provision is (a)(2), which – for Criminal Rules emergencies – requires a determination that "no feasible alternative measures would sufficiently address the impairment within a reasonable time." This provision ensures that the emergency provisions in

subdivisions (d) and (e) of Rule 62 would be invoked only as a last resort, and reflects the importance of the rights protected by the Criminal Rules that would be affected in a rules emergency.

Subdivision (c) of Rule 62 addresses the effect of the termination of a rules emergency declaration. For proceedings that have been conducted under a declaration of emergency but that are not yet completed when the declaration terminates, the rule permits completion of the proceeding as if the declaration had not terminated if (1) resuming compliance with the ordinary rules would not be feasible or would work an injustice and (2) the defendant consents. This provision recognizes the need for some flexibility during the transition period at the end of an emergency declaration, while also recognizing the importance of returning promptly to compliance with the non-emergency rules.

Subdivisions (d) and (e) of Rule 62 address the court's authority to depart from the Criminal Rules once a Criminal Rules emergency is declared. These subdivisions would allow specified departures from the existing rules with respect to public access, a defendant's signature or consent, the number of alternate jurors, the time for acting under Rule 35, and the use of videoconferencing or teleconferencing in certain proceedings.

Paragraph (d)(1) specifically addresses the court's obligation to provide reasonable alternative access to public proceedings during a rules emergency if the emergency substantially impairs the public's in-person attendance. Following the public comment period, the Advisory Committee considered several submissions commenting on the reference to "victims" in the committee note discussing (d)(1). The Advisory Committee revised the committee note to direct courts' attention to the constitutional guarantees of public access and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771. The Standing Committee

made a minor wording change to this portion of the committee note (directing courts to "comply with" rather than merely "be mindful of" the applicable constitutional and statutory provisions).

As published, subparagraph (e)(3)(B) provided that a court may use videoconferencing for a felony plea or sentencing proceeding if, among other requirements, "the defendant, after consulting with counsel, requests in a writing signed by the defendant that the proceeding be conducted by videoconferencing." Public comments raised practical concerns about the requirement of an advance writing by the defendant requesting the use of videoconferencing. The Advisory Committee considered these comments as they pertained to the "request" language and the timing of the request, and ultimately elected to retain the language as published.

The Standing Committee made three changes relating to Rule 62(e)(3)(B). First, the Standing Committee voted (10 to 3) to insert "before the proceeding and" in subparagraph (e)(3)(B) to clarify the temporal requirement. Second, the Standing Committee voted (7 to 6) to substitute "consent" for "request" in subparagraph (e)(3)(B). The net result of these two changes is to require that the defendant, "before the proceeding and after consulting with counsel, consents in a writing signed by the defendant that the proceeding be conducted by videoconferencing." Third, the Standing Committee authorized the Advisory Committee Chair and Reporters to draft conforming changes to the committee note. After these deliberations, the Standing Committee voted unanimously to recommend final approval of new Criminal Rule 62.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rules 16, 45, and 56, and proposed new Criminal Rule 62, as set forth in Appendix D, 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.

Information Items

The Advisory Committee on Criminal Rules met on April 28, 2022. In addition to the matters discussed above, the Advisory Committee considered several information items,

including proposals to amend Rule 49.1 to address a concern about the committee note's language regarding public access to certain financial affidavits and to amend Rule 17 to address the scope of and procedure for subpoenas.

FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules recommended for final approval proposed amendments to Evidence Rules 106, 615, and 702.

Rule 106 (Remainder of or Related Writings or Recorded Statements)

The proposed amendment to Rule 106 – the rule of completeness – would allow any completing statement to be admitted over a hearsay objection and would cover all statements, whether or not recorded. The overriding goal of the amendment is to treat all questions of completeness in a single rule. That is particularly important because completeness questions often arise at trial, and so it is important for the parties and the court to be able to refer to a single rule to govern admissibility. The amendment is intended to displace the common law, just as the common law has been displaced by all of the other Federal Rules of Evidence.

The Advisory Committee received only a few public comments on the proposed changes to Rule 106. As published, the amendment would have inserted the words "written or oral" before "statement" so as to address the rule's applicability to unrecorded oral statements. After public comment, the Advisory Committee deleted the phrase "written or oral" to make clear that Rule 106 applies to all statements, including statements – such as those made through conduct or through sign language – that are neither written nor oral.

Rule 615 (Excluding Witnesses)

The proposed amendments to Rule 615 would limit an exclusion order under the existing rule (which would be re-numbered Rule 615(a)) to exclusion of witnesses from the courtroom,

and would add a new subdivision (b) that would provide that the court has discretion to issue further orders to "(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony." Under the proposed amendments, if a court wants to do more than exclude witnesses from the courtroom, the court must so order. In addition, the proposed amendments would clarify that the existing provision that allows an entity-party to designate "an officer or employee" to be exempt from exclusion is limited to one officer or employee. The rationale is that the exemption is intended to put entities on par with individual parties, who cannot be excluded under Rule 615. Allowing the entity more than one exemption is inconsistent with that rationale. In response to public comments, the Advisory Committee made two minor changes to the committee note (replacing the word "agent" with the word "representative" and deleting a case citation). The Standing Committee, in turn, revised three sentences in the committee note (including the sentence addressing orders governing counsel's disclosure of testimony for witness preparation).

Rule 702 (Testimony by Expert Witnesses)

The proposed amendments to Rule 702's first paragraph and to Rule 702(d) are the product of Advisory Committee work dating back to 2016. As amended, Rule 702(d) would require the proponent to demonstrate to the court that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." This language would more clearly empower the court to pass judgment on the conclusion that the expert has drawn from the methodology. In addition, the proposed amendments as published would have required that "the proponent has demonstrated by a preponderance of the evidence" that the requirements in Rule 702(a) – (d) have been met. This language was designed to reject the view of some courts that the reliability requirements set forth in Rule 702(b) and (d) – that the expert has relied on sufficient facts or data and has reliably applied a reliable methodology to the facts – are

questions of weight and not admissibility, and more broadly that expert testimony is presumed to be admissible. With this language, the Advisory Committee sought to explicitly weave the Rule 104(a) standard into the text of Rule 702.

More than 500 comments were received on the proposed amendments to Rule 702. In addition, a number of comments were received at a public hearing. Many of the comments opposed the amendment, and the opposition was especially directed toward the phrase "preponderance of the evidence." Another suggestion in the public comment was that the rule should clarify that it is the court and not the jury that must decide whether it is more likely than not that the reliability requirements of the rule have been met. The Advisory Committee carefully considered the public comments and determined to replace "the proponent has demonstrated by a preponderance of the evidence" with "the proponent demonstrates to the court that it is more likely than not" that the reliability requirements are met. The Advisory Committee also made a number of changes to the committee note, and the Standing Committee, in its turn, made one minor edit to the committee note.

After making the changes, noted above, to the committee notes for Rules 615 and 702, the Standing Committee unanimously approved the proposed amendments to Rules 106, 615, and 702.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Evidence Rules 106, 615, and 702, as set forth in Appendix E, 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.

Rules Approved for Publication and Comment

The Advisory Committee on Evidence Rules submitted proposed amendments to Rules 611, 613, 801, 804, and 1006 with a recommendation that they be published for public comment in August 2022. The Standing Committee unanimously approved for publication for

public comment the proposed new Rule 611(d) and the proposed amendments to Rules 613, 801, 804, and 1006, but did not approve for publication proposed new Rule 611(e). The Advisory Committee will further consider the proposed new Rule 611(e) in the light of the Standing Committee's discussion.

Rule 611(d) (Illustrative Aids)

The proposed amendment would amend Rule 611 ("Mode and Order of Examining Witnesses and Presenting Evidence") by adding a new Rule 611(d) to regulate the use of illustrative aids at trial. The distinction between "demonstrative evidence" (admitted into evidence and used substantively to prove disputed issues at trial) and "illustrative aids" (not admitted into evidence but used solely to assist the jury in understanding the evidence) is sometimes a difficult one to draw and is a point of confusion in the courts. The proposed amendment would set forth uniform standards to regulate the use of illustrative aids, and in doing so, would clarify the distinction between illustrative aids and demonstrative evidence. In addition, because illustrative aids are not evidence and adverse parties do not receive pretrial discovery of such aids, the proposed amendment would require notice and an opportunity to object before an illustrative aid is used, unless the court for good cause orders otherwise.

Rule 611(e) (Juror Questions for Witnesses)

Proposed new Rule 611(e) was not approved for publication. That proposed rule would set forth a single set of safeguards that should be applied if the trial court decides to allow jurors to submit questions for witnesses. The proposed new Rule 611(e) requires the court to instruct jurors, among other things, that if they wish to ask a question, they must submit it in writing; that they are not to draw inferences if their question is rephrased or does not get asked; and that they must maintain their neutrality. The proposed rule also provides that the court must consult with counsel when jurors submit questions, and that counsel must be allowed to object to such

questions outside the jury's hearing. The committee note to proposed Rule 611(e) emphasizes that the rule is agnostic about whether a court decides to permit jurors to submit questions. During the Standing Committee meeting, members expressed differing views concerning this proposal, and the Advisory Committee has been asked to develop the proposal further in the light of that discussion.

Rule 613 (Witness's Prior Statement)

Current Rule 613(b) rejects the "prior presentation" requirement from the common law that before a witness could be impeached with extrinsic evidence of a prior inconsistent statement, the adverse party was required to give the witness an opportunity to explain or deny the statement. The current rule provides that extrinsic evidence of the inconsistent statement is admissible so long as the witness is given an opportunity to explain or deny the statement at some point in the trial. The proposed amendment to Rule 613(b) would require a prior opportunity to explain or deny the statement, with the court having discretion to allow a later opportunity. This would bring the rule into alignment with what the Advisory Committee believes to be the practice of most trial judges.

Rule 801(d)(2) (An Opposing Party's Statement)

Current Rule 801(d)(2) provides a hearsay exemption for statements of a party opponent. Courts are split about the applicability of this exemption in the following situation: a declarant makes a statement that would have been admissible against him as a party-opponent, but he is not the party-opponent because his claim or potential liability has been transferred to another (either by agreement or by operation of law), and it is the transferee that is the party-opponent.

The proposed amendment to Rule 801(d)(2) would provide that such a statement is admissible against the successor-in-interest. The Advisory Committee reasoned that

admissibility is fair when the successor-in-interest is standing in the shoes of the declarant because the declarant is in substance the party-opponent.

Rule 804 (Hearsay Exceptions; Declarant Unavailable)

Current Rule 804(b)(3) provides a hearsay exception for declarations against interest. In a criminal case in which a declaration against penal interest is offered, the rule requires that the proponent provide "corroborating circumstances that clearly indicate [the] trustworthiness" of the statement. There is a dispute in the courts about the meaning of the "corroborating circumstances" requirement. The proposed amendment to Rule 804(b)(3) would parallel the language in Rule 807 and require the court to consider the presence or absence of corroborating evidence in determining whether "corroborating circumstances" exist.

Rule 1006 (Summaries to Prove Content)

The proposed amendment to Rule 1006 would provide greater guidance to the courts on the admissibility and proper use of summary evidence under Rule 1006. The proposed amendment to Rule 1006 fits together with proposed new Rule 611(d) on illustrative aids. Rule 1006 provides that a summary can be admitted as evidence if the underlying records are admissible and too voluminous to be conveniently examined in court. Courts are in dispute about a number of issues regarding admissibility of summaries of evidence under Rule 1006, and some courts do not properly distinguish between summaries of evidence under Rule 1006 (which are themselves admitted into evidence) and summaries that are illustrative aids (which are not evidence at all). The proposed amendment to Rule 1006 would clarify that a summary is admissible whether or not the underlying evidence has been admitted, and would provide a cross-reference to Rule 611(d) on illustrative aids.

Information Items

The Advisory Committee on Evidence Rules met on May 6, 2022. The Advisory Committee discussed the matters listed above.

PROPOSED 2022 REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADEQUACY OF PRIVACY RULES PRESCRIBED UNDER THE E-GOVERNMENT ACT OF 2002

The E-Government Act of 2002 directed that rules be promulgated, under the Rules Enabling Act, "to protect privacy and security concerns relating to electronic filing of documents and the public availability … of documents filed electronically." Pub. L. No. 107-347, § 205(c)(3)(A)(i). Pursuant to this mandate, the "privacy rules" – Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1 – took effect on December 1, 2007. Section 205(c)(3)(C) of the E-Government Act directs that, every two years, "the Judicial Conference shall submit to Congress a report on the adequacy of [the privacy rules] to protect privacy and security." Pursuant to that directive, the Judicial Conference submitted reports to Congress in 2009 and 2011. The Committee recommends that the Judicial Conference approve this third report (the "2022 Report"), which covers the period from 2011 to date. Future reports will be submitted beginning in 2024 and every two years thereafter.

The 2022 Report discusses rule and form amendments relevant to privacy issues that were adopted since the 2011 report. There have been changes to then-Bankruptcy Forms 9 and 21 in 2012; Appellate Form 4 in 2013 and 2018; Bankruptcy Rule 9037 in 2019; and Appellate Rule 25(a)(5) (this amendment is on track to take effect on December 1, 2022, absent contrary action by Congress). In addition, privacy concerns also shaped the content of Rule 2 in the new set of Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g) (which is on track to take effect on December 1, 2022, absent contrary action by Congress).

The 2022 Report also discusses privacy-related topics currently pending on the Rules Committees' dockets, and deliberations in which the Rules Committees considered but rejected additional privacy-related rule amendments.

> **Recommendation:** That the Judicial Conference approve the proposed 2022 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002, as set forth in Appendix F, and ask the Administrative Office Director to transmit it to Congress in accordance with the law.

JUDICIARY STRATEGIC PLANNING

The Committee was asked to consider the Executive Committee's request for a report on the strategic initiatives that the Standing Committee is pursuing to implement the *Strategic Plan for the Federal Judiciary*. The Committee's views were communicated to Chief Judge Scott Coogler, judiciary planning coordinator.

Respectfully submitted,

John D. Bates, Chair

Elizabeth J. Cabraser	Troy A. McKenzie
Jesse M. Furman	Patricia Ann Millett
Robert J. Giuffra, Jr.	Lisa O. Monaco
Frank Mays Hull	Gene E.K. Pratter
William J. Kayatta, Jr.	Kosta Stojilkovic
Peter D. Keisler	Jennifer G. Zipps
Carolyn B. Kuhl	

Appendix A – Federal Rules of Appellate Procedure (proposed amendments and supporting report excerpts)

Appendix B – Federal Rules of Bankruptcy Procedure and Official Bankruptcy Forms (proposed amendments and supporting report excerpts)

Appendix C – Federal Rules of Civil Procedure (proposed amendments and supporting report excerpts)

Appendix D – Federal Rules of Criminal Procedure (proposed amendments and supporting report excerpts)

Appendix E – Federal Rules of Evidence (proposed amendments and supporting report excerpt)

Appendix F – 2022 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002 (proposed report)

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

Rule 2. Suspension of Rules

(a) In a Particular Case. On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

(b) In an Appellate Rules Emergency.

(1) **Conditions for an Emergency.** The Judicial Conference of the United States may declare an Appellate Rules emergency if it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to

[1] New material is underlined.

perform its functions in compliance with these rules.

(2) **Content.** The declaration must:

(A) designate the circuit or circuits affected; and

(B) be limited to a stated period of no more than 90 days.

(3) **Early Termination.** The Judicial Conference may terminate a declaration for one or more circuits before the termination date.

(4) **Additional Declarations.** The Judicial Conference may issue additional declarations under this rule.

(5) **Proceedings in a Rules Emergency.** When a rules emergency is declared, the court may:

(A) suspend in all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2); and

(B) order proceedings as it directs.

Committee Note

Flexible application of the Federal Rules of Appellate Procedure, including Rule 2, has enabled the courts of appeals to continue their operations despite the coronavirus pandemic. Future emergencies, however, may pose problems that call for broader authority to suspend provisions of the Federal Rules of Appellate Procedure. For that reason, the amendment adds a new subdivision authorizing broader suspension authority when the Judicial Conference of the United States declares an Appellate Rules emergency. The amendment is designed to add to the authority of courts of appeals; it should not be interpreted to restrict the authority previously exercised by the courts of appeals.

The circumstances warranting the declaration of an Appellate Rules emergency mirror those warranting a declaration of a Civil Rules emergency and a Bankruptcy Rules emergency: extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, that substantially impair the court's ability

to perform its functions in compliance with these rules. A declaration must designate the circuit or circuits affected. It must also have a sunset provision so that the declaration is in effect for no more than 90 days unless the Judicial Conference makes an additional declaration. The Judicial Conference may also terminate the declaration for one or more circuits before the termination date.

When a rules emergency is declared, the court of appeals may suspend in all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2). This enables the court of appeals to suspend the time to appeal or seek review set only by a rule, but it does not authorize the court of appeals to suspend jurisdictional time limits imposed by statute. Sometimes when a rule is suspended, there is no need to provide any alternative to the suspended rule. For example, if the requirement of submitting paper copies of briefs is suspended, it may be enough to rely on electronic submissions. However, to deal with situations in which an alternative is required, the amendment empowers the court to "order proceedings as it directs," the same language that existed in Rule 2—now Rule 2(a)—before this amendment.

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

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) **Time for Filing a Notice of Appeal.**

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

* * * * *

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

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed

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

by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed ~~no later than 28 days after the judgment is entered~~ within the time allowed for filing a motion under Rule 59.

* * * * *

Committee Note

The amendment is designed to make Rule 4 operate smoothly with Emergency Civil Rule 6(b)(2) if that emergency Civil Rule is ever in effect, while not making any change to the operation of Rule 4 at any other time. It does this by replacing the phrase "no later than 28 days after the judgment is entered" in Rule 4(a)(4)(A)(vi) with the phrase "within the time allowed for filing a motion under Rule 59."

Certain post-judgment motions—for example, a renewed motion for judgment as a matter of law under Civil Rule 50(b) and a motion for a new trial under Civil Rule 59—may be made in the district court shortly after judgment is entered. Recognizing that it makes sense to await the district court's decision on these motions before pursuing an appeal, Rule 4(a)(4)(A) resets the time to appeal

from the judgment so that it does not run until entry of an order disposing of the last such motion.

Rule 4 gives this resetting effect only to motions that are filed within the time allowed by the Civil Rules. For most of these motions, the Civil Rules require that the motion be filed within 28 days of the judgment. See Civil Rules 50(b) and (d), 52(b), 59(b), (d), and (e). The time requirements for a Civil Rule 60(b) motion, however, are notably different. It must be filed "within a reasonable time," and for certain Civil Rule 60(b) motions, no more than a year after judgment. For this reason, Rule 4 does not give resetting effect to all Civil Rule 60(b) motions that are filed within the time allowed by the Civil Rules, but only to those Civil Rule 60(b) motions that are filed within 28 days of the entry of judgment. That is why most of the motions listed in Rule 4(a)(4)(A) are governed simply by the general requirement that they be filed within the time allowed by the Civil Rules, but Rule 4(a)(4)(A)(vi) adds the requirement that a Civil Rule 60(b) motion has resetting effect only if "filed no later than 28 days after the judgment is entered."

Significantly, Civil Rule 6(b)(2) prohibits the district court from extending the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). That means that when Rule 4 requires that a motion be filed within the time allowed by the Civil Rules, the time allowed by those Rules for motions under Rules 50(b) and (d), 52(b), 59(b), (d), and (e) will be 28 days—matching the 28-day requirement in Rule 4(a)(4)(A)(vi) applicable to Rule 60(b) motions.

However, Emergency Civil Rule 6(b)(2)—which would be operative only if the Judicial Conference of the United States were to declare a Civil Rules emergency under Civil Rule 87—authorizes district courts to grant extensions that they are otherwise prohibited from granting. If that

emergency Civil Rule is in effect, district courts may grant extensions to file motions under Civil Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). For all these motions except Civil Rule 60(b) motions, Rule 4 works seamlessly. Rule 4 requires only that those motions be filed "within the time allowed by" the Civil Rules, and a motion filed within a properly granted extension is filed "within the time allowed by" those rules. An emergency Civil Rule is no less a Civil Rule simply because it is operative only in a Civil Rules emergency.

Without amendment, Rule 4 would not work seamlessly with the Emergency Civil Rule for Rule 60(b) motions because the 28-day requirement in Rule 4(a)(4)(A)(vi) would not correspond to the extended time to file other resetting motions. For this reason, the amendment replaces the phrase "if the motion is filed no later than 28 days after the judgment is entered" with the phrase "within the time allowed for filing a motion under Rule 59."

At all times that no Civil Rules emergency has been declared, the amended Rule 4 functions exactly as it did prior to the amendment. A Civil Rule 60(b) motion has resetting effect only if it is filed within the time allowed for filing a motion under Civil Rule 59—which is 28 days.

When a Civil Rules emergency has been declared, however, if a district court grants an extension of time to file a Civil Rule 59 motion and a party files a Civil Rule 60(b) motion, that Civil Rule 60(b) motion has resetting effect so long as it is filed within the extended time set for filing a Civil Rule 59 motion. The Civil Rule 60(b) motion has this resetting effect even if no Civil Rule 59 motion is filed.

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

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.

* * * * *

(6) **"Legal Holiday" Defined.** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Juneteenth National Independence Day, Independence Day, Labor Day, Columbus Day,

[1] New material is underlined.

Veterans Day, Thanksgiving Day, or Christmas Day;

* * * * *

Committee Note

The amendment adds "Juneteenth National Independence Day" to the list of legal holidays. See Juneteenth National Independence Day Act, P.L. 117-17 (2021) (amending 5 U.S.C. § 6103(a)).

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

Rule 45. Clerk's Duties

(a) General Provisions.

(1) **Qualifications.** The circuit clerk must take the oath and post any bond required by law. Neither the clerk nor any deputy clerk may practice as an attorney or counselor in any court while in office.

(2) **When Court Is Open.** The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King~~,~~ Jr.'s Birthday, Washington's Birthday,

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

Memorial Day, Juneteenth National Independence Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

* * * * *

Committee Note

The amendment adds "Juneteenth National Independence Day" to the list of legal holidays. See Juneteenth National Independence Day Act, P.L. 117-17 (2021) (amending 5 U.S.C. § 6103(a)). A stylistic change was made.

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

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Judge Jay Bybee, Chair
Advisory Committee on Appellate Rules

RE: Report of the Advisory Committee on Appellate Rules

DATE: May 13, 2022

I. Introduction

* * * * *

The Advisory Committee seeks final approval of two matters.

First, it seeks final approval of proposed amendments to Appellate Rule 2 and Appellate Rule 4. These proposed amendments are discussed in a separate memo contained in the agenda book as part of the package of CARES Act amendments.

Second, it seeks final approval of proposed amendments to Appellate Rule 26 and Appellate Rule 45 to reflect a new federal holiday, Juneteenth National

Independence Day, June 19. These proposed amendments have not been published for public notice and comment. The Advisory Committee does not believe that publication and comment are necessary, because these amendments simply conform to a new statute. (Part II of this report.)

* * * * *

II. Action Item for Final Approval

Juneteenth

On June 17, 2021, President Biden signed into law the Juneteenth National Independence Day Act, P.L. 117-17 (2021) which amends 5 U.S.C. § 6103(a) to add to the list of public legal holidays "Juneteenth National Independence Day, June 19."

To reflect the new public legal holiday, the Advisory Committee approved an amendment to Federal Rule of Appellate Procedure 26(a)(6)(A) to insert the words "Juneteenth National Independence Day," immediately following the words "Memorial Day." The Advisory Committee further recommends that this amendment be given final approval without publication. See Procedures for Committees on Rules of Practice and Procedure § 440.20.40 ("The Standing Committee may also eliminate public notice and comment for a technical or conforming amendment if the Committee determines that they are unnecessary.").

After the meeting, the Advisory Committee noticed that the list of holidays is repeated in Federal Rule of Appellate Procedure 45(a)(2) and voted by email to add Juneteenth to that Rule as well.

Other Advisory Committees have considered parallel amendments. Here is the proposed amended text of Rule 26(a)(6):

Rule 26. Computing and Extending Time

(a) Computing Time. * * *

*** * * * ***

(6) **"Legal Holiday" Defined.** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Juneteenth National Independence Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where either of the following is located: the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

* * * * *

Committee Note

The amendment adds "Juneteenth National Independence Day" to the list of legal holidays. See Juneteenth National Independence Day Act, P.L. 117-17 (2021) (amending 5 U.S.C. § 6103(a)).

And here is the proposed amended text of Rule 45(a)(2):

Rule 45. Clerk's Duties

(a) General Provisions.

* * * * *

(2) **When Court Is Open.** The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King~~,~~ Jr.'s Birthday, Washington's Birthday, Memorial Day, Juneteenth National Independence Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

* * * * *

Committee Note

The amendment adds "Juneteenth National Independence Day" to the list of legal holidays. See Juneteenth National Independence Day Act, P.L. 117-17 (2021) (amending 5 U.S.C. § 6103(a)). A stylistic change was made.

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

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Judge Jay Bybee, Chair
Advisory Committee on Appellate Rules

RE: Appellate Rule 2 and Appellate Rule 4 (CARES Act)

DATE: May 13, 2022

At its June 2021 meeting, the Standing Committee approved for publication proposed amendments to Appellate Rule 2 and Appellate Rule 4. The text of each of those proposed amendments as published with accompanying Committee Note is attached to this report.

The Advisory Committee now seeks final approval of these proposed amendments without change.

Appellate Rule 2. Existing Appellate Rule 2 broadly empowers a court of appeals to suspend virtually any provision of the Appellate Rules in a particular case and order proceedings as it directs. This power does not reach the time to file a notice of appeal or petition for review. *See* Appellate Rule 26(b).

The proposed amendment to Appellate Rule 2 would modestly broaden this power when the Judicial Conference declares an Appellate Rules emergency. In such a declared emergency, the court of appeals would be empowered to "suspend in all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2)."

The power is broadened in two ways. First, the suspension power reaches beyond a particular case. Second, the suspension power reaches time limits to appeal or petition for review that are established only by rule. It does not purport to empower the court to suspend time limits to appeal or petition for review set by statute.

As detailed in the cover memo by Professors Capra and Struve, the standards and process for declaring an Appellate Rules emergency parallel that proposed by other Advisory Committees.

Appellate Rule 4. The proposed amendment to Appellate Rule 4 is designed to make Appellate Rule 4 operate smoothly with Emergency Civil Rule 6(b)(2) if that Emergency Civil Rule is ever in effect, while not making any change to the operation of Appellate Rule 4 at any other time.

It does this by replacing the phrase "no later than 28 days after the judgment is entered" in Rule 4(a)(4)(A)(vi) with the phrase "within the time allowed for filing a motion under Rule 59."

When Emergency Civil Rule 6(b)(2) is not in effect, this amendment makes no change at all. That's because the time allowed for filing a motion under Rule 59 is 28 days after the judgment is entered.

But if Emergency Civil Rule 6(b)(2) is ever in effect, a district court might extend the time to file a motion under Rule 59. If that happens, the amendment to Appellate Rule 4(a)(4)(A)(vi) would allow Appellate Rule 4 to properly take that extension into account.

As a refresher on how that works, here is the relevant passage from the Advisory Committee's June 2021 report:

> Certain post-judgment motions—for example, a renewed motion for judgment as a matter of law under Civil Rule 50(b) and a motion for a new trial under Civil Rule 59—may be made in the district court shortly after judgment is entered. Recognizing that it makes sense to await the district court's decision on these motions before pursuing an appeal, Appellate Rule 4(a)(4)(A) resets the time to appeal from the judgment so that it does not run until entry of an order disposing of the last such motion.

Appellate Rule 4 gives this resetting effect only to motions that are filed within the time allowed by the Civil Rules. For most of these motions, the Civil Rules require that the motion be filed within 28 days of the judgment. See Civil Rules 50(b) and (d); 52(b); and 59(b), (d), and (e). The time requirements for a Civil Rule 60(b) motion, however, are notably different. It must be filed "within a reasonable time," and for certain Civil Rule 60(b) motions, no more than a year after judgment. See Civil Rule 60(c)(1) ("A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.").

For this reason, Appellate Rule 4 does not give resetting effect to all Civil Rule 60(b) motions that are filed within the time allowed by the Civil Rules, but only to those Civil Rule 60(b) motions that are filed within 28 days of the entry of judgment. That is why most of the motions listed in Appellate Rule 4(a)(4)(A) are governed simply by the general requirement that they be filed within the time allowed by the Civil Rules, but Appellate Rule 4(a)(4)(A)(vi) adds the requirement that a Civil Rule 60(b) motion has resetting effect only if "filed no later than 28 days after the judgment is entered."

Significantly, Civil Rule 6(b)(2) prohibits the district court from extending the time to act under Rules 50(b) and (d); 52(b); 59(b), (d), and (e); and 60(b). That means that when Appellate Rule 4 requires that a motion be filed within the time allowed by the Civil Rules, the time allowed by those Rules for motions under Rules 50(b) and (d); 52(b); and 59(b), (d), and (e) will be 28 days—matching the 28-day requirement in Appellate Rule 4(a)(4)(A)(vi) applicable to Rule 60(b) motions.

Enter proposed Emergency Civil Rule 6(b)(2). That emergency rule would authorize district courts to grant extensions that they are otherwise prohibited from granting. Under it, district courts would be able to grant extensions to file motions under Civil Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). For all these motions except Civil Rule 60(b) motions, Appellate Rule 4 would continue to work seamlessly. Appellate Rule 4 requires only that those motions be filed "within the time allowed by" the Civil Rules, and a motion filed within a properly granted extension is filed "within the time allowed by" those rules. An emergency Civil Rule is no less a Civil Rule simply because it is operative only in a Civil Rules emergency.

But if Appellate Rule 4 were not amended, Appellate Rule 4 would not work seamlessly with the Emergency Civil Rule for Rule 60(b) motions because the 28-day requirement in Rule 4(a)(4)(A)(vi) would not correspond to the extended time to file other resetting motions. For this

reason, the proposed amendment to Appellate Rule 4 replaces the phrase "if the motion is filed no later than 28 days after the judgment is entered" with the phrase "within the time allowed for filing a motion under Rule 59."

Significantly, this proposed amendment to Appellate Rule 4 is not itself an emergency rule, but instead would be a regular, ordinary part of the Appellate Rules. At all times that no Civil Rules Emergency has been declared, the amended Rule 4 would function exactly as it has without the proposed amendment. A Civil Rule 60(b) motion would have resetting effect only if it were filed within the time allowed for filing a motion under Civil Rule 59—which is 28 days.

When a Civil Rules Emergency has been declared, however, if a district court grants an extension of time to file a Civil Rule 59 motion and a party files a Civil Rule 60(b) motion, that Civil Rule 60(b) motion has resetting effect so long as it is filed within the extended time set for filing a Civil Rule 59 motion. The Civil Rule 60(b) motion has this resetting effect even if no Civil Rule 59 motion is filed. It does this by replacing the phrase "no later than 28 days after the judgment is entered" in Rule 4(a)(4)(A)(vi) with the phrase "within the time allowed for filing a motion under Rule 59."

Discussion of Comments Received

The Advisory Committee received a total of six comments. Two were fully supportive. Two were broadly critical. One was irrelevant. One raised issues that the Advisory Committee had considered. The Advisory Committee did not make any changes in response to the public comment.

Fully supportive

The Federal Bar Association (comment 0009) "supports each of the revised and new rules developed . . . in response to . . . the CARES Act," noting that they "provide important flexibility . . . in future unforeseen situations." The Federal Bar Association "agrees that the Judicial Conference exclusively, rather than specific circuits, districts, or judges, should be permitted to declare a rules emergency. Conferring this authority to the Judicial Conference alone should help prevent a disjointed or balkanized response to unusual circumstances, including emergencies affecting only particular regions or other subsets of federal courts." It also "applauds the Rules Committee's success in achieving relative uniformity across all four emergency rules."

Louis Koerner (comment 0003) thinks the proposed amendments are "entirely appropriate, well drafted, and even overdue."

Broadly critical

Irvan Moritzky (comment 0004) opposes the emergency rules as impractical, complex, and centralized. He urges that issues be left to local district judges, noting that if large retailers are open, local judges should run their courts. He included the Supreme Court's decision in *Duncan v Kahanamoku*, 327 U.S. 304 (1946), which held that Congress had not authorized the supplanting of courts in Hawaii with military tribunals.

Matthew Deinhardt (comment 0006) believes that the proposed amendments create an unequal playing field and lean heavily towards the government side. He urges notice to any defendant who is adversely affected by a suspension of the rules and the opportunity to postpone the proceeding, He also urges that the Judicial Conference not be empowered to terminate an emergency without input from the judge "presiding over that specific court."

Neither of these critical comments convinced the Advisory Committee to make any changes. The Advisory Committee is confident that the Judicial Conference (or its executive committee) will consult as appropriate with the courts affected by any declaration of a rules emergency.

Irrelevant

Andrew Straw (comment 0005) states that no court of appeals should "hire an appellee who is before a panel of the Court to be a federal bankruptcy judge."

Raised issues

Jane Castro, Chief Deputy Clerk, United States Court of Appeals for the Tenth Circuit (comment 0010) raised several thoughtful issues.

FRAP 2. Ms. Castro suggests that the proposed amendment to Rule 2 is "largely unnecessary" because courts, under the current rules, can enter form orders suspending a rule in individual cases. There is some power to the critique; the proposed amendment to Rule 2 does not add a lot. But it would provide clear authority for across-the-board actions. Some might question whether current Rule 2, which limits the suspension authority to "a particular case," permits identical orders entered in every case.

She also suggests that perhaps "the circuits should be authorized to extend nonstatutory deadlines for good cause even without a declared emergency." This suggestion is sufficiently broader than the current proposal that it would require republication. And current Rule 26(b) already imposes few limits on the court's power to extend nonstatutory deadlines.

FRAP 4. Ms. Castro questions how the proposed amendment to Rule 4 will work in the context of Civil Rule 60 motions, noting that the proposed amendment "pegs the suspending effect of a Rule 60 motion to the time allowed for filing a motion under Rule 59." She is concerned that if a party seeks, and the district court grants, a motion to extend only the time to file a Civil Rule 60(b) motion, the party will not get the benefit of the Rules Emergency declaration.

The reason for drafting the proposed amendment this way is that the non-emergency deadlines for Civil Rule 59 and Civil Rule 60(b) motions are quite different. A Rule 59 motion must be filed within 28 days of the judgment. FRCP 59(b). A Rule 60(b) motion, on the other hand, must be made "within a reasonable time." FRCP 60(c)(1). It would seem unnecessary to allow an extension beyond a "reasonable time"; any emergency circumstances can be considered in determining what is reasonable. Motions made under FRCP 60(b)(1), (2), and (3) face the additional requirement that they must be brought no more than one year after judgment, FRCP 60(c)(1), so it is possible that an extension of this one-year deadline might be necessary in an emergency. But if the one-year deadline is the one that needs to be relaxed, the time to appeal the underlying judgment should not be reset.

FRCP 6. Finally, Ms. Castro noted that it is odd for a Civil Rule, rather than an Appellate Rule, to state the effect of an extension on the time to appeal. She added that "consistency and clarity for the public, courts, and practitioners" would seem to call for this to be included in FRAP 4, not FRCP 6.

In the abstract, there is much to be said for this critique. But drafting in this area proved daunting, and the placement in Emergency Civil Rule 6 resulted in the clearest drafting that could be found.

The provision is applicable only in a declared rules emergency, so all should know to look to the emergency rules. In addition, the effect on time to appeal in such an emergency arises in the context of extensions that are available only under Emergency Civil Rule 6, so anyone dealing with such an extension must already engage with Emergency Civil Rule 6. Having the relevant provisions in a single emergency rule—rather than spread over two sets of emergency rules—should promote ease of use.

In the end, the Advisory Committee was reassured by Ms. Castro's careful submission. That is because such a thoughtful comment did not reveal that the Advisory Committee had overlooked important concerns, but instead pointed to issues that the Advisory Committee had grappled with earlier.

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

Rule 3011. Unclaimed Funds in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13[2]

(a) The trustee shall file a list of all known names and addresses of the entities and the amounts which they are entitled to be paid from remaining property of the estate that is paid into court pursuant to § 347 of the Code.

(b) On the court's website, the clerk must provide searchable access to information about funds deposited under § 347(a). The court may, for cause, limit access to information about funds in a specific case.

Committee Note

Rule 3011 is amended to require the clerk to provide searchable access (as by providing a link to the U.S. Bankruptcy Unclaimed Funds Locator) on the court's website to information about unclaimed funds deposited pursuant to § 347(a). The court may limit access to

[1] New material is underlined.

[2] The title of Rule 3011 reflects amendments currently proposed to take effect on December 1, 2022, barring any contrary action by Congress.

information about such funds in a specific case for cause, including, for example, if such access risks disclosing the identity of claimants whose privacy should be protected, or if the information about the unclaimed funds is so old as to be unreliable.

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

Rule 8003. Appeal as of Right—How Taken; Docketing the Appeal

(a) FILING THE NOTICE OF APPEAL.

* * * * *

(3) *Contents.* The notice of appeal must:

(A) conform substantially to the appropriate Official Form;

(B) be accompanied by the judgment~~,~~ or the appealable order~~,~~ or decree~~,~~ from which the appeal is taken ~~or the part of it, being appealed~~; and

(C) be accompanied by the prescribed fee.

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

(4) *Merger.* The notice of appeal encompasses all orders that, for purposes of appeal, merge into the identified judgment or appealable order or decree. It is not necessary to identify those orders in the notice of appeal.

(5) *Final Judgment.* The notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Rule 7058, if the notice identifies:

(A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or

(B) an order described in Rule 8002(b)(1).

(6) *Limited Appeal.* An appellant may identify only part of a judgment or appealable order or decree by expressly stating that the notice of appeal is so limited. Without such an express statement, specific identifications do not limit the scope of the notice of appeal.

(7) *Impermissible Ground for Dismissal.* An appeal must not be dismissed for failure to properly identify the judgment or appealable order or decree if the notice of appeal was filed after entry of the judgment or appealable order or decree and identifies an order that merged into that judgment or appealable order or decree.

~~(4)~~ (8) *Additional Copies.* * * * * *

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Committee Note

Subdivision (a) is amended to conform to recent amendments to Fed. R. App. P. 3(c), which clarified that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment or appealable order or decree. These amendments reflect that a notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the appellate court. It therefore must state who is appealing, what is being appealed, and to what court the appeal is being taken. It is the role of the briefs, not the notice of appeal, to focus the issues on appeal.

Subdivision (a)(3)(B) is amended in an effort to avoid the misconception that it is necessary or appropriate to identify each and every order of the bankruptcy court that the appellant may wish to challenge on appeal. It requires the attachment of "the judgment—or the appealable order or decree—from which the appeal is taken"—and the phrase "or part thereof" is deleted. In most cases, because of the merger principle, it is appropriate to identify and attach only the judgment or the appealable order or decree from which the appeal as of right is taken.

Subdivision (a)(4) now calls attention to the merger principle. The general merger rule can be stated simply: an appeal from a final judgment or appealable order or decree permits review of all rulings that led up to the judgment, order, or decree. Because this general rule is subject to some exceptions and complications, the amendment does not attempt to codify the merger principle but instead leaves its details to case law. The amendment does not change the principle established in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988), that "a decision on the merits

is a 'final decision' . . . whether or not there remains for adjudication a request for attorney's fees attributable to the case."

Sometimes a party who is aggrieved by a final judgment will make a motion in the bankruptcy court instead of immediately filing a notice of appeal. Rule 8002(b)(1) permits a party who makes certain motions to await disposition of those motions before appealing. But some courts treat a notice of appeal that identifies only the order disposing of such a motion as limited to that order, rather than bringing the final judgment before the appellate court for review. To reduce the unintended loss of appellate rights in this situation, subdivision (a)(5) is added. This amendment does not alter the requirement of Rule 8002(b)(3) (requiring a notice of appeal or an amended notice of appeal if a party intends to challenge an order disposing of certain motions).

Subdivision (a)(6) is added to enable deliberate limitations of the notice of appeal. It allows an appellant to identify only part of a judgment or appealable order or decree by expressly stating that the notice of appeal is so limited. Without such an express statement, however, specific identifications do not limit the scope of the notice of appeal.

On occasion, a party may file a notice of appeal after a judgment or appealable order or decree but identify only a previously nonappealable order that merged into that judgment or appealable order or decree. To deal with this situation, subdivision (a)(7) is added to provide that an appeal must not be dismissed for failure to properly identify the judgment or appealable order or decree if the notice of appeal was filed after entry of the judgment or appealable order or decree and identifies an order that merged into the

judgment, order, or decree from which the appeal is taken. In this situation, a court should act as if the notice had properly identified the judgment or appealable order or decree. In determining whether a notice of appeal was filed after the entry of judgment, Rules 8002(a)(2) and (b)(2) apply.

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

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

(a) COMPUTING TIME. The following rules apply in computing any time period specified in these rules, in the Federal Rules of Civil Procedure, in any local rule or court order, or in any statute that does not specify a method of computing time.

* * * * *

(6) "*Legal Holiday" Defined.* "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Juneteenth National Independence Day, Independence Day,

[1] New material is underlined.

Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where the district court is located. (In this rule, "state" includes the District of Columbia and any United States commonwealth or territory.)

* * * * *

Committee Note

The amendment adds "Juneteenth National Independence Day" to the list of legal holidays. See Juneteenth National Independence Day Act, P.L. 117-17 (2021) (amending 5 U.S.C. § 6103(a)).

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

Rule 9038. Bankruptcy Rules Emergency

(a) CONDITIONS FOR AN EMERGENCY. The Judicial Conference of the United States may declare a Bankruptcy Rules emergency if it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a bankruptcy court, substantially impair the court's ability to perform its functions in compliance with these rules.

(b) DECLARING AN EMERGENCY.

(1) *Content.* The declaration must:

(A) designate the bankruptcy court or courts affected;

(B) state any restrictions on the authority granted in (c); and

[1] New material is underlined.

(C) be limited to a stated period of no more than 90 days.

(2) *Early Termination.* The Judicial Conference may terminate a declaration for one or more bankruptcy courts before the termination date.

(3) *Additional Declarations.* The Judicial Conference may issue additional declarations under this rule.

(c) TOLLING AND EXTENDING TIME LIMITS.

(1) *In an Entire District or Division.* When an emergency is in effect for a bankruptcy court, the chief bankruptcy judge may, for all cases and proceedings in the district or in a division:

(A) order the extension or tolling of a Bankruptcy Rule, local rule, or order that requires or allows a court, a clerk, a party in interest, or the United States trustee, by a

specified deadline, to commence a proceeding, file or send a document, hold or conclude a hearing, or take any other action, despite any other Bankruptcy Rule, local rule, or order; or

(B) order that, when a Bankruptcy Rule, local rule, or order requires that an action be taken "promptly," "forthwith," "immediately," or "without delay," it be taken as soon as is practicable or by a date set by the court in a specific case or proceeding.

(2) *In a Specific Case or Proceeding.* When an emergency is in effect for a bankruptcy court, a presiding judge may take the action described in (1) in a specific case or proceeding.

(3) *When an Extension or Tolling Ends.* A period extended or tolled under (1) or (2) terminates on the later of:

(A) the last day of the time period as extended or tolled or 30 days after the emergency declaration terminates, whichever is earlier; or

(B) the last day of the time period originally required, imposed, or allowed by the relevant Bankruptcy Rule, local rule, or order that was extended or tolled.

(4) *Further Extensions or Shortenings.* A presiding judge may lengthen or shorten an extension or tolling in a specific case or proceeding. The judge may do so only for good cause after notice and a hearing and only on the judge's own motion or on motion of a party in interest or the United States trustee.

(5) *Exception.* A time period imposed by statute may not be extended or tolled.

Committee Note

The rule is new. It provides authority to extend or toll the time limits in these rules during times of major emergencies affecting the bankruptcy courts. The continuing operation of the bankruptcy courts during the COVID-19 pandemic showed that the existing rules are flexible enough to accommodate remote proceedings, service by mail, and electronic transmission of documents. Nevertheless, it appeared that greater flexibility than Rule 9006(b) provides might be needed to allow the extension of certain time periods in specific cases or any extension on a district-wide basis in response to an emergency.

Emergency rule provisions have also been added to the Civil, Criminal, and Appellate Rules. Along with the Bankruptcy Rule, these rules have been made as uniform as possible. But each set of rules serves distinctive purposes, shaped by different origins, traditions, functions, and needs. Different provisions were compelled by these different purposes.

Subdivision (a) specifies the limited circumstances under which the authority conferred by this rule may be exercised. The Judicial Conference of the United States has the exclusive authority to declare a Bankruptcy Rules emergency, and it may do so only under extraordinary circumstances. Those circumstances must relate to public health or safety or affect physical or electronic access to a bankruptcy court. And, importantly, the court's ability to operate in compliance with the Bankruptcy Rules must be substantially impaired.

Under subdivision (b)(1), a Bankruptcy Rules emergency declaration must specify the bankruptcy courts to which it applies because, instead of being nationwide, an emergency might be limited to one area of the country or even to a particular state. The declaration must also specify

a termination date that is no later than 90 days from the declaration's issuance. Under subdivisions (b)(2) and (b)(3), however, that time period may be extended by the issuance of additional declarations or reduced by early termination if circumstances change. The declaration must also specify any limitations placed on the authority granted in subdivision (c) to modify time periods.

Subdivisions (c)(1) and (c)(2) grant the authority, during declared Bankruptcy Rules emergencies, to extend or toll deadlines to the chief bankruptcy judge of a district on a district- or division-wide basis or to the presiding judge in specific cases. Unless limited by the emergency declaration, this authority extends to all time periods in the rules that are not also imposed by statute. It also applies to directives to take quick action, such as rule provisions that require action to be taken "promptly," "forthwith," "immediately," or "without delay."

Subdivision (c)(3), which addresses the termination of extensions and tolling, provides a "soft landing" upon the termination of a Bankruptcy Rules emergency. It looks to three possible dates for a time period to expire. An extended or tolled time period will terminate either 30 days after the rules-emergency declaration terminates or when the original time period would have expired, whichever is later—unless the extension or tolling itself expires sooner than 30 days after the declaration's termination. In that case, the extended expiration date will apply.

Subdivision (c)(4) allows fine tuning in individual cases of extensions of time or tollings that have been granted.

Subdivision (c)(5) excepts from the authority to extend time periods any time provision imposed by statute. The Bankruptcy Rules Enabling Act, 28 U.S.C. § 2075, does not authorize the Bankruptcy Rules to supersede conflicting

laws. Accordingly, a time limit in a rule that is a restatement of a deadline imposed by statute or an incorporation by reference of such a deadline may not be extended under this rule. However, if a statute merely incorporates by reference a time period imposed by a rule, that period may be extended.

Fill in this information to identify your case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (*If known*): _____

Chapter you are filing under:

- ❑ Chapter 7
- ❑ Chapter 11
- ❑ Chapter 12
- ❑ Chapter 13

❑ Check if this is an amended filing

Official Form 101

Voluntary Petition for Individuals Filing for Bankruptcy

12/22

The bankruptcy forms use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. For example, if a form asks, "Do you own a car," the answer would be *yes* if either debtor owns a car. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Identify Yourself

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
1. Your full name Write the name that is on your government-issued picture identification (for example, your driver's license or passport). Bring your picture identification to your meeting with the trustee.	_____ First name _____ Middle name _____ Last name _____ Suffix (Sr., Jr., II, III)	_____ First name _____ Middle name _____ Last name _____ Suffix (Sr., Jr., II, III)
2. All other names you have used in the last 8 years Include your married or maiden names and any assumed, trade names and *doing business as* names. Do NOT list the name of any separate legal entity such as a corporation, partnership, or LLC that is not filing this petition.	_____ First name _____ Middle name _____ Last name _____ First name _____ Middle name _____ Last name _____ Business name (if applicable) _____ Business name (if applicable)	_____ First name _____ Middle name _____ Last name _____ First name _____ Middle name _____ Last name _____ Business name (if applicable) _____ Business name (if applicable)
3. Only the last 4 digits of your Social Security number or federal Individual Taxpayer Identification number (ITIN)	xxx – xx – ____ ____ ____ ____ OR **9** xx – xx –____ ____ ____ ____	xxx – xx – ____ ____ ____ ____ OR **9** xx – xx –____ ____ ____ ____

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
4. Your Employer Identification Number (EIN), if any.	__ __ – __ __ __ __ __ __ __ EIN __ __ – __ __ __ __ __ __ __ EIN	__ __ – __ __ __ __ __ __ __ EIN __ __ – __ __ __ __ __ __ __ EIN
5. Where you live	_____ Number Street _____ _____ City State ZIP Code _____ County **If your mailing address is different from the one above, fill it in here.** Note that the court will send any notices to you at this mailing address. _____ Number Street _____ P.O. Box _____ City State ZIP Code	**If Debtor 2 lives at a different address:** _____ Number Street _____ _____ City State ZIP Code _____ County **If Debtor 2's mailing address is different from yours, fill it in here.** Note that the court will send any notices to this mailing address. _____ Number Street _____ P.O. Box _____ City State ZIP Code
6. Why you are choosing *this district* to file for bankruptcy	*Check one:* ❑ Over the last 180 days before filing this petition, I have lived in this district longer than in any other district. ❑ I have another reason. Explain. (See 28 U.S.C. § 1408.) _____ _____ _____ _____	*Check one:* ❑ Over the last 180 days before filing this petition, I have lived in this district longer than in any other district. ❑ I have another reason. Explain. (See 28 U.S.C. § 1408.) _____ _____ _____ _____

Part 2: Tell the Court About Your Bankruptcy Case

7. The chapter of the Bankruptcy Code you are choosing to file under

Check one. (For a brief description of each, see *Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy* (Form 2010)). Also, go to the top of page 1 and check the appropriate box.

- ❑ Chapter 7
- ❑ Chapter 11
- ❑ Chapter 12
- ❑ Chapter 13

8. How you will pay the fee

- ❑ **I will pay the entire fee when I file my petition**. Please check with the clerk's office in your local court for more details about how you may pay. Typically, if you are paying the fee yourself, you may pay with cash, cashier's check, or money order. If your attorney is submitting your payment on your behalf, your attorney may pay with a credit card or check with a pre-printed address.
- ❑ **I need to pay the fee in installments**. If you choose this option, sign and attach the *Application for Individuals to Pay The Filing Fee in Installments* (Official Form 103A).
- ❑ **I request that my fee be waived** (You may request this option only if you are filing for Chapter 7. By law, a judge may, but is not required to, waive your fee, and may do so only if your income is less than 150% of the official poverty line that applies to your family size and you are unable to pay the fee in installments). If you choose this option, you must fill out the *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 103B) and file it with your petition.

9. Have you filed for bankruptcy within the last 8 years?

- ❑ No
- ❑ Yes. District _____ When _____ Case number _____
  MM / DD / YYYY
  District _____ When _____ Case number _____
  MM / DD / YYYY
  District _____ When _____ Case number _____
  MM / DD / YYYY

10. Are any bankruptcy cases pending or being filed by a spouse who is not filing this case with you, or by a business partner, or by an affiliate?

- ❑ No
- ❑ Yes. Debtor _____ Relationship to you _____
  District _____ When _____ Case number, if known_____
  MM / DD / YYYY
  Debtor _____ Relationship to you _____
  District _____ When _____ Case number, if known_____
  MM / DD / YYYY

11. Do you rent your residence?

- ❑ No. Go to line 12.
- ❑ Yes. Has your landlord obtained an eviction judgment against you?
  - ❑ No. Go to line 12.
  - ❑ Yes. Fill out *Initial Statement About an Eviction Judgment Against You* (Form 101A) and file it as part of this bankruptcy petition.

Part 3: Report About Any Businesses You Own as a Sole Proprietor

12. Are you a sole proprietor of any full- or part-time business?

A sole proprietorship is a business you operate as an individual, and is not a separate legal entity such as a corporation, partnership, or LLC.

If you have more than one sole proprietorship, use a separate sheet and attach it to this petition.

- ❑ No. Go to Part 4.
- ❑ Yes. Name and location of business

_____
Name of business, if any

_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Check the appropriate box to describe your business:

- ❑ Health Care Business (as defined in 11 U.S.C. § 101(27A))
- ❑ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- ❑ Stockbroker (as defined in 11 U.S.C. § 101(53A))
- ❑ Commodity Broker (as defined in 11 U.S.C. § 101(6))
- ❑ None of the above

13. Are you filing under Chapter 11 of the Bankruptcy Code, and are you a *small business debtor* or a debtor as defined by 11 U.S. C. § 1182(1)?

For a definition of *small business debtor*, see 11 U.S.C. § 101(51D).

If you are filing under Chapter 11, the court must know whether you are a small business debtor or a debtor choosing to proceed under Subchapter V so that it can set appropriate deadlines. If you indicate that you are a small business debtor or you are choosing to proceed under Subchapter V, you must attach your most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).

- ❑ No. I am not filing under Chapter 11.
- ❑ No. I am filing under Chapter 11, but I am NOT a small business debtor according to the definition in the Bankruptcy Code.
- ❑ Yes. I am filing under Chapter 11, I am a small business debtor according to the definition in the Bankruptcy Code, and I do not choose to proceed under Subchapter V of Chapter 11.
- ❑ Yes. I am filing under Chapter 11, I am a debtor according to the definition in § 1182(1) of the Bankruptcy Code, and I choose to proceed under Subchapter V of Chapter 11.

Part 4: Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention

14. Do you own or have any property that poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety? Or do you own any property that needs immediate attention?

For example, do you own perishable goods, or livestock that must be fed, or a building that needs urgent repairs?

- ❑ No
- ❑ Yes. What is the hazard? _____

_____

If immediate attention is needed, why is it needed? _____

_____

Where is the property? _____
Number Street

_____

_____ _____ _____
City State ZIP Code

Part 5: Explain Your Efforts to Receive a Briefing About Credit Counseling

15. Tell the court whether you have received a briefing about credit counseling.

The law requires that you receive a briefing about credit counseling before you file for bankruptcy. You must truthfully check one of the following choices. If you cannot do so, you are not eligible to file.

If you file anyway, the court can dismiss your case, you will lose whatever filing fee you paid, and your creditors can begin collection activities again.

About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
You must check one:	*You must check one:*
❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.** Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.	❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.** Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.
❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.** Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.	❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.** Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.
❑ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.** To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case. Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy. If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed. Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.	❑ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.** To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case. Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy. If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed. Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.
❑ **I am not required to receive a briefing about credit counseling because of:** ❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances. ❑ **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so. ❑ **Active duty.** I am currently on active military duty in a military combat zone. If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.	❑ **I am not required to receive a briefing about credit counseling because of:** ❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances. ❑ **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so. ❑ **Active duty.** I am currently on active military duty in a military combat zone. If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

Part 6: Answer These Questions for Reporting Purposes

16. What kind of debts do you have?

16a. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

- ❑ No. Go to line 16b.
- ❑ Yes. Go to line 17.

16b. **Are your debts primarily business debts?** *Business debts* are debts that you incurred to obtain money for a business or investment or through the operation of the business or investment.

- ❑ No. Go to line 16c.
- ❑ Yes. Go to line 17.

16c. State the type of debts you owe that are not consumer debts or business debts.

_____

17. Are you filing under Chapter 7?

Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available for distribution to unsecured creditors?

- ❑ No. I am not filing under Chapter 7. Go to line 18.
- ❑ Yes. I am filing under Chapter 7. Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available to distribute to unsecured creditors?
  - ❑ No
  - ❑ Yes

18. How many creditors do you estimate that you owe?

- ❑ 1-49
- ❑ 50-99
- ❑ 100-199
- ❑ 200-999
- ❑ 1,000-5,000
- ❑ 5,001-10,000
- ❑ 10,001-25,000
- ❑ 25,001-50,000
- ❑ 50,001-100,000
- ❑ More than 100,000

19. How much do you estimate your assets to be worth?

- ❑ $0-$50,000
- ❑ $50,001-$100,000
- ❑ $100,001-$500,000
- ❑ $500,001-$1 million
- ❑ $1,000,001-$10 million
- ❑ $10,000,001-$50 million
- ❑ $50,000,001-$100 million
- ❑ $100,000,001-$500 million
- ❑ $500,000,001-$1 billion
- ❑ $1,000,000,001-$10 billion
- ❑ $10,000,000,001-$50 billion
- ❑ More than $50 billion

20. How much do you estimate your liabilities to be?

- ❑ $0-$50,000
- ❑ $50,001-$100,000
- ❑ $100,001-$500,000
- ❑ $500,001-$1 million
- ❑ $1,000,001-$10 million
- ❑ $10,000,001-$50 million
- ❑ $50,000,001-$100 million
- ❑ $100,000,001-$500 million
- ❑ $500,000,001-$1 billion
- ❑ $1,000,000,001-$10 billion
- ❑ $10,000,000,001-$50 billion
- ❑ More than $50 billion

Part 7: Sign Below

For you

I have examined this petition, and I declare under penalty of perjury that the information provided is true and correct.

If I have chosen to file under Chapter 7, I am aware that I may proceed, if eligible, under Chapter 7, 11,12, or 13 of title 11, United States Code. I understand the relief available under each chapter, and I choose to proceed under Chapter 7.

If no attorney represents me and I did not pay or agree to pay someone who is not an attorney to help me fill out this document, I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I understand making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $250,000, or imprisonment for up to 20 years, or both.
18 U.S.C. §§ 152, 1341, 1519, and 3571.

✘ _____
Signature of Debtor 1

Executed on _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Executed on _____
MM / DD / YYYY

For your attorney, if you are represented by one

If you are not represented by an attorney, you do not need to file this page.

I, the attorney for the debtor(s) named in this petition, declare that I have informed the debtor(s) about eligibility to proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each chapter for which the person is eligible. I also certify that I have delivered to the debtor(s) the notice required by 11 U.S.C. § 342(b) and, in a case in which § 707(b)(4)(D) applies, certify that I have no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect.

✘ _____ Date _____
Signature of Attorney for Debtor MM / DD / YYYY

_____
Printed name

_____
Firm name

_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Contact phone _____ Email address _____

_____ _____
Bar number State

For you if you are filing this bankruptcy without an attorney

If you are represented by an attorney, you do not need to file this page.

The law allows you, as an individual, to represent yourself in bankruptcy court, but **you should understand that many people find it extremely difficult to represent themselves successfully. Because bankruptcy has long-term financial and legal consequences, you are strongly urged to hire a qualified attorney.**

To be successful, you must correctly file and handle your bankruptcy case. The rules are very technical, and a mistake or inaction may affect your rights. For example, your case may be dismissed because you did not file a required document, pay a fee on time, attend a meeting or hearing, or cooperate with the court, case trustee, U.S. trustee, bankruptcy administrator, or audit firm if your case is selected for audit. If that happens, you could lose your right to file another case, or you may lose protections, including the benefit of the automatic stay.

You must list all your property and debts in the schedules that you are required to file with the court. Even if you plan to pay a particular debt outside of your bankruptcy, you must list that debt in your schedules. If you do not list a debt, the debt may not be discharged. If you do not list property or properly claim it as exempt, you may not be able to keep the property. The judge can also deny you a discharge of all your debts if you do something dishonest in your bankruptcy case, such as destroying or hiding property, falsifying records, or lying. Individual bankruptcy cases are randomly audited to determine if debtors have been accurate, truthful, and complete. **Bankruptcy fraud is a serious crime; you could be fined and imprisoned.**

If you decide to file without an attorney, the court expects you to follow the rules as if you had hired an attorney. The court will not treat you differently because you are filing for yourself. To be successful, you must be familiar with the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the local rules of the court in which your case is filed. You must also be familiar with any state exemption laws that apply.

Are you aware that filing for bankruptcy is a serious action with long-term financial and legal consequences?

- ❑ No
- ❑ Yes

Are you aware that bankruptcy fraud is a serious crime and that if your bankruptcy forms are inaccurate or incomplete, you could be fined or imprisoned?

- ❑ No
- ❑ Yes

Did you pay or agree to pay someone who is not an attorney to help you fill out your bankruptcy forms?

- ❑ No
- ❑ Yes. Name of Person_____.
  Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

By signing here, I acknowledge that I understand the risks involved in filing without an attorney. I have read and understood this notice, and I am aware that filing a bankruptcy case without an attorney may cause me to lose my rights or property if I do not properly handle the case.

✘ _____	✘ _____
Signature of Debtor 1	Signature of Debtor 2
Date _____ MM / DD / YYYY	Date _____ MM / DD / YYYY
Contact phone _____	Contact phone _____
Cell phone _____	Cell phone _____
Email address _____	Email address _____

Committee Note

Form 101 is amended to eliminate language in former Part 1, Question 4, which asked for "any business names . . . you have used in the last 8 years." Instead, Part 1, Question 2, is modified to add to the direction with respect to "other names you have used in the last 8 years" – which currently directs the debtor to "Include your married and maiden names" – to ask the debtor to include "any assumed, trade names, or *doing business as* names," and to direct that the debtor should not include the names of separate legal entities that are not filing the petition. Many individual debtors erroneously believed that Question 4 was asking for the names of corporations or Limited Liability Corporations in which they held any interest in the past 8 years, and any names listed in response were then treated as additional debtors for purposes of noticing and reporting. By asking for the information in Question 2, the form now makes it clearer that the only names to be listed are names that were used by the debtor personally in conducting business, not names used by other legal entities. This amendment also conforms Form 101 to Forms 105, 201 and 205 with respect to the same information.

Information to identify the case:

Debtor 1 _____ (First Name / Middle Name / Last Name)

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ - __ __ __ __ __ __ __

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

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ - __ __ __ __ __ __ __

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

Case number: _____

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

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

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

Official Form 309E1 (For Individuals or Joint Debtors)

Notice of Chapter 11 Bankruptcy Case

12/22

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

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

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors or the debtors' property. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although debtors can ask the court to extend or impose a stay.

Confirmation of a chapter 11 plan may result in a discharge of debt. Creditors who assert that the debtors are not entitled to a discharge of any debts or who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadlines specified in this notice. (See line 10 below for more information.)

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

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

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

	About Debtor 1:	About Debtor 2:
1. **Debtor's full name**		
2. **All other names used in the last 8 years**		
3. **Address**		**If Debtor 2 lives at a different address:**
4. **Debtor's attorney** Name and address		Contact phone _____ Email _____
5. **Bankruptcy clerk's office** Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at https://pacer.uscourts.gov.		Hours open _____ Contact phone _____

For more information, see page 2 ▶

6. Meeting of creditors

Debtors must attend the meeting to be questioned under oath. In a joint case, both spouses must attend.

Creditors may attend, but are not required to do so.

_____ at _____ Location:
Date Time

The meeting may be continued or adjourned to a later date.
If so, the date will be on the court docket.

7. Deadlines

The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.

Deadline to file a complaint objecting to discharge or to challenge whether certain debts are dischargeable (see line 10 for more information):

- if you assert that the debtor is not entitled to receive a discharge of any debts under 11 U.S.C. § 1141(d)(3), the deadline is the first date set for hearing on confirmation of the plan. The court or its designee will send you notice of that date later.
- if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6), **the deadline is**:_____.

Deadline for filing proof of claim: [Not yet set. If a deadline is set, the court will send you another notice.] or

[date, if set by the court)]

A proof of claim is a signed statement describing a creditor's claim. A proof of claim form may be obtained at www.uscourts.gov or any bankruptcy clerk's office.

Your claim will be allowed in the amount scheduled unless:

- your claim is designated as *disputed*, *contingent*, or *unliquidated*;
- you file a proof of claim in a different amount; or
- you receive another notice.

If your claim is not scheduled or if your claim is designated as *disputed*, *contingent*, or *unliquidated*, you must file a proof of claim or you might not be paid on your claim and you might be unable to vote on a plan. You may file a proof of claim even if your claim is scheduled.

You may review the schedules at the bankruptcy clerk's office or online at https://pacer.uscourts.gov.

Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits a creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.

Deadline to object to exemptions:
The law permits debtors to keep certain property as exempt. If you believe that the law does not authorize an exemption claimed, you may file an objection.

Filing deadline: 30 days after the *conclusion* of the meeting of creditors

8. Creditors with a foreign address

If you are a creditor receiving mailed notice at a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.

9. Filing a Chapter 11 bankruptcy case

Chapter 11 allows debtors to reorganize or liquidate according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan and a disclosure statement telling you about the plan, and you may have the opportunity to vote on the plan. You will receive notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the property and may continue to operate the debtor's business.

10. Discharge of debts

Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of a debt. See 11 U.S.C. § 1141(d). However, unless the court orders otherwise, the debts will not be discharged until all payments under the plan are made. A discharge means that creditors may never try to collect the debt from the debtors personally except as provided in the plan. If you believe that a particular debt owed to you should be excepted from the discharge under 11 U.S.C. § 523 (a)(2), (4), or (6), you must file a complaint and pay the filing fee in the bankruptcy clerk's office by the deadline. If you believe that the debtors are not entitled to a discharge of any of their debts under 11 U.S.C. § 1141 (d)(3), you must file a complaint and pay the filing fee in the clerk's office by the first date set for the hearing on confirmation of the plan. The court will send you another notice telling you of that date.

11. Exempt property

The law allows debtors to keep certain property as exempt. Fully exempt property will not be sold and distributed to creditors, even if the case is converted to chapter 7. Debtors must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office or online at https://pacer.uscourts.gov. If you believe that the law does not authorize an exemption that the debtors claim, you may file an objection. The bankruptcy clerk's office must receive the objection by the deadline to object to exemptions in line 7.

Information to identify the case:

Debtor 1 _____ (First Name / Middle Name / Last Name)

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ – __ __ __ __ __ __ __

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

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ – __ __ __ __ __ __ __

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

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

Case number: _____

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

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

Official Form 309E2 (For Individuals or Joint Debtors under Subchapter V)

Notice of Chapter 11 Bankruptcy Case

12/22

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

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

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors or the debtors' property. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although debtors can ask the court to extend or impose a stay.

Confirmation of a chapter 11 plan may result in a discharge of debt. Creditors who assert that the debtors are not entitled to a discharge of any debts or who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadlines specified in this notice. (See line 11 below for more information.)

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

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

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

	About Debtor 1:	About Debtor 2:
1. **Debtor's full name**		
2. **All other names used in the last 8 years**		
3. **Address**		**If Debtor 2 lives at a different address:**
4. **Debtor's attorney** Name and address		Contact phone _____ Email _____
5. **Bankruptcy trustee** Name and address		Contact phone _____ Email _____

For more information, see page 2 ▶

6. Bankruptcy clerk's office

Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at https://pacer.uscourts.gov.

Hours open
_____

Contact phone
_____

7. Meeting of creditors

Debtors must attend the meeting to be questioned under oath. In a joint case, both spouses must attend.

Creditors may attend, but are not required to do so.

_____ at _____ Location:
Date Time

The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.

8. Deadlines

The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.

Deadline to file a complaint objecting to discharge or to challenge whether certain debts are dischargeable (see line 11 for more information):

- if you assert that the debtor is not entitled to receive a discharge of any debts under 11 U.S.C. § 1141(d)(3), the deadline is the first date set for hearing on confirmation of the plan. The court or its designee will send you notice of that date later.
- if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6), **the deadline is**:_____.

Deadline for filing proof of claim:

[Not yet set. If a deadline is set, the court will send you another notice.] or

[date, if set by the court)]

A proof of claim is a signed statement describing a creditor's claim. A proof of claim form may be obtained at www.uscourts.gov or any bankruptcy clerk's office.

Your claim will be allowed in the amount scheduled unless:

- your claim is designated as *disputed*, *contingent*, or *unliquidated*;
- you file a proof of claim in a different amount; or
- you receive another notice.

If your claim is not scheduled or if your claim is designated as *disputed*, *contingent*, or *unliquidated*, you must file a proof of claim or you might not be paid on your claim and you might be unable to vote on a plan. You may file a proof of claim even if your claim is scheduled.

You may review the schedules at the bankruptcy clerk's office or online at https://pacer.uscourts.gov.

Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits a creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.

Deadline to object to exemptions:

The law permits debtors to keep certain property as exempt.

If you believe that the law does not authorize an exemption claimed, you may file an objection.

Filing deadline: 30 days after the *conclusion* of the meeting of creditors

9. Creditors with a foreign address

If you are a creditor receiving mailed notice at a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.

10. Filing a Chapter 11 bankruptcy case

Chapter 11 allows debtors to reorganize or liquidate according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan and a disclosure statement telling you about the plan, and you may have the opportunity to vote on the plan. You will receive notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. The debtor will generally remain in possession of the property and may continue to operate the debtor's business.

For more information, see page 3 ▶

11. **Discharge of debts**	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of a debt. See 11 U.S.C. § 1141(d). A discharge means that creditors may never try to collect the debt from the debtors personally except as provided in the plan. If you believe that a particular debt owed to you should be excepted from the discharge under 11 U.S.C. § 523 (a)(2), (4), or (6), you must file a complaint and pay the filing fee in the bankruptcy clerk's office by the deadline. If you believe that the debtors are not entitled to a discharge of any of their debts under 11 U.S.C. § 1141 (d)(3), you must file a complaint and pay the filing fee in the clerk's office by the first date set for the hearing on confirmation of the plan. The court will send you another notice telling you of that date.
12. **Exempt property**	The law allows debtors to keep certain property as exempt. Fully exempt property will not be sold and distributed to creditors, even if the case is converted to chapter 7. Debtors must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office or online at https://pacer.uscourts.gov. If you believe that the law does not authorize an exemption that the debtors claim, you may file an objection. The bankruptcy clerk's office must receive the objection by the deadline to object to exemptions in line 8.

Committee Note

Official Form 309E1, line 7 and Official Form 309E2, line 8, are amended to clarify which deadline applies for filing complaints to deny the debtor a discharge and which applies for filing complaints seeking to except a particular debt from discharge.

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

NOTICE OF APPEAL AND STATEMENT OF ELECTION

Part 1: Identify the appellant(s)

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

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

   For appeals in an adversary proceeding.
   - ❑ Plaintiff
   - ❑ Defendant
   - ❑ Other (describe) _____

   For appeals in a bankruptcy case and not in an adversary proceeding.
   - ❑ Debtor
   - ❑ Creditor
   - ❑ Trustee
   - ❑ Other (describe) _____

Part 2: Identify the subject of this appeal

1. Describe the judgment—or the appealable order or decree—from which the appeal is taken:
   _____

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

Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment—or the appealable order or decree—from which the appeal is taken and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

1. Party: _____ Attorney: _____
   _____
   _____
   _____

2. Party: _____ Attorney: _____
   _____
   _____
   _____

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

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

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

Part 5: Sign below

_____ Date: _____

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

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

_____
_____
_____
_____

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

[**Note to inmate filers:** If you are an inmate filer in an institution and you seek the timing benefit of Fed. R. Bankr. P. 8002(c)(1), complete Director's Form 4170 (Declaration of Inmate Filing) and file that declaration along with the Notice of Appeal.]

Committee Note

Parts 2 and 3 of the form are amended to conform to wording in the simultaneously amended Rule 8003. The new wording is intended to remind appellants that appeals as of right from orders and decrees are limited to those that are "appealable"—that is, either deemed final or issued under § 1121(d). *See* 28 U.S.C. § 158(a)(2). It also seeks to avoid the misconception that it is necessary or appropriate to identify each and every order of the bankruptcy court that the appellant may wish to challenge on appeal. It requires identification of only "the judgment—or the appealable order or decree—from which the appeal is taken."

Excerpt from the May 10, 2022 Report of the Advisory Committee on Bankruptcy Rules

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

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Dennis R. Dow, Chair
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: May 10, 2022

I. Introduction

The Advisory Committee on Bankruptcy Rules met by videoconference on March 31, 2022. The draft minutes of that meeting are attached.

At the meeting, the Advisory Committee gave its final approval to rule and form amendments that were published for comment last August. They consist of (1) new Rule 9038 (Bankruptcy Rules Emergency); (2) amendments to Parts III, IV, V, and VI of the Bankruptcy Rules that are proposed as part of the rules restyling project; (3) amendments to Rule 3011 (Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases); (4) amendments to Rule 8003 (Appeal as of Right – How Taken; Docketing the Appeal); (5) amendments to Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy); (6) amendments to Official Forms 309E1 and

309E2 (Notice of Chapter 11 Bankruptcy Case); and (7) amendments to Official Form 417A (Notice of Appeal and Statement of Election). * * * * *.

Part II of this report presents those action items, other than Rule 9038. A discussion of Rule 9038, which is proposed for final approval, is included elsewhere in the agenda book, along with the other emergency rules and a memorandum from Professors Capra and Struve. Part II also includes a request for final approval without publication of an amendment to Rule 9006(a)(6)(A) to add Juneteenth as a legal holiday. The Advisory Committee approved that amendment at its fall 2021 meeting.

Part II is organized as follows:

A. Items for Final Approval

(1) Rules and forms published for comment in August 2021—

- Restyled Parts III, IV, V, and VI;
- Rule 3011;
- Rule 8003;
- Official Form 101;
- Official Forms 309E1 and 309E2; and
- Official Form 417A.

(2) An amendment to Rule 9006(a)(6)(A) approved by the Advisory Committee without publication.

* * * * *

II. Action Items from the Fall and Spring Meetings

A. Items for Final Approval

(1) The Advisory Committee recommends that the Standing Committee approve the proposed rule and form amendments that were published for public comment in August 2021 and are discussed below. Bankruptcy Appendix A includes the rules and form that are in this group.

Action Item 1. Restyled Parts III, IV, V, and VI. Extensive comments were submitted on the restyled rules from the National Bankruptcy Conference, and comments were also submitted by several others. After discussion with the style consultants and consideration by the Restyling Subcommittee, the Advisory Committee incorporated some of those suggested changes into the revised rules and rejected others. Comments and changes since publication are noted on the restyled rules in Appendix A.

The Advisory Committee seeks final approval of these restyled rules, but suggests that the Standing Committee not submit the rules to the Judicial Conference until all remaining parts

of the Bankruptcy Rules have been restyled, published, and given final approval, so that all restyled rules can go into effect at the same time.

Action Item 2. Rule 3011 (Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases). The proposed amendment, which was suggested by the Committee on the Administration of the Bankruptcy System, redesignates the existing text of Rule 3011 as subdivision (a) and adds a new subdivision (b) that requires the clerk of court to provide searchable access on the court's website to data about funds deposited pursuant to § 347 of the Bankruptcy Code (Unclaimed Property). There was one comment on the proposed amendment, and the language of subdivision (b) was restyled and modified to reflect the comment.

Action Item 3. Rule 8003 (Appeal as of Right – How Taken; Docketing the Appeal). Amendments to Rule 8003 were proposed to conform to amendments recently made to FRAP 3, which clarified that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment or appealable order or decree.

Rule 8003(a)(3)(B) is amended to avoid the misconception that it is necessary or appropriate to identify each order of the bankruptcy court that the appellant may wish to challenge on appeal. It merely requires the attachment of "the judgment—or the appealable order or decree—from which the appeal is taken," and the phrase "or part thereof" is deleted. Subdivision (a)(4) now calls attention to the merger principle without attempting to codify the principle. It states in part that the notice of appeal "encompasses all orders that, for purposes of appeal, merge into the identified judgment or appealable order or decree." Subdivision (a)(5) is added to make clear that the notice of appeal encompasses the final judgment if the notice identifies either an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties or a post-judgment order described in Rule 8002(b)(1). Subdivision (a)(6) is added to enable deliberate limitations of the notice of appeal. Subdivision (a)(7) is added to provide that an appeal must not be dismissed for failure to properly identify the judgment or appealable order or decree if the notice of appeal was filed after entry of the judgment or appealable order or decree and identifies an order that merged into the judgment, order, or decree from which the appeal is taken.

No comments were submitted on the proposed amendments, and the Advisory Committee give its final approval to the rule as published.

Action Item 4. Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy). The proposed amendment to Official Form 101 eliminates the portion of line 4 that asks for any business names the debtor has used in the last 8 years. Instead the form asks for additional similar information in Question 2, which is consistent with the treatment of that information in Official Forms 105, 201, and 205. There is also new language in the margin of Official Form 101, Part 1, Question 2, directing the debtor not to insert the names of LLCs, corporations, or partnerships that are not filing for bankruptcy. There was one comment on the proposed amendment, but no changes were made after publication.[1]

[1] * * * * *

Action Item 5. Official Forms 309E1 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)) and 309E2 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors under Subchapter V)). The amendments modify the language in line 7 of Official Form 309E1 (line 8 in Official Form 309E2) to clarify the deadline for objecting to discharge, as opposed to the deadline for seeking to have a particular debt excepted from discharge. The amendments also change the line that says "the court will send you notice of that date later" to add the words "or its designee" after the words "the court" because often the court itself does not send this notice. There were no comments on the proposed amendments. After publication a comma was inserted in line 7 of Form 309E1 and line 8 of Form 309E2 in two places, one after the words "§ 1141(d)(3)" in the first bullet and one after "or (6)" in the second bullet.

Action Item 6. Official Form 417A (Notice of Appeal and Statement of Election). Amendments to Official Form 417A were proposed to conform to the amendments proposed for Rule 8003, which are discussed at Action Item 3. The new wording in parts 2 and 3 of the form is intended to remind appellants that appeals as of right from orders and decrees are limited to those that are "appealable"—that is, either deemed final or issued under § 1121(d). It also seeks to avoid the misconception that it is necessary or appropriate to identify each order of the bankruptcy court that the appellant may wish to challenge on appeal.

No comments were submitted on the proposed amendments to the form, and the Advisory Committee give its final approval to Official Form 417A as published, with a proposed effective date of December 1, 2023.

(2) Action Item 7. The Advisory Committee recommends that the Standing Committee approve without publication an amendment to Rule 9006(a)(6)(A), which is included in Bankruptcy Appendix A. In response to the enactment of the Juneteenth National Independence Day Act, P.L. 117-17 (2021), the Advisory Committee approved an amendment to Rule 9006(a)(6)(A) to insert the words "Juneteenth National Independence Day" immediately following the words "Memorial Day."

* * * * *

May 5, 2022 Report of the Advisory Committee on Bankruptcy Rules

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

MEMORANDUM

TO: Honorable John D. Bates, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Dennis R. Dow, Chair
Advisory Committee on Bankruptcy Rules

RE: Bankruptcy Rule 9038 (Bankruptcy Rules Emergency)

DATE: May 5, 2022

At the Advisory Committee's spring meeting, members unanimously approved, as published, new Rule 9038, which would allow extensions of time limits in the Bankruptcy Rules to be granted if the Judicial Conference declared a bankruptcy rules emergency. As Professors Struve and Capra explain, subdivisions (a) and (b) of the rule are similar to the Civil and Criminal Emergency Rules in the way they define a rules emergency, provide authority to the Judicial Conference to declare such an emergency, and prescribe the content and duration of a declaration.

Rule 9038(c) is basically an expansion of existing Bankruptcy Rule 9006(b), which authorizes an individual bankruptcy judge to enlarge time periods for cause. During the COVID pandemic, many courts relied on this provision to grant extensions of time. The existing rule, however, does not fully meet the needs of an emergency situation. First, it has some exceptions—time limits that cannot be expanded. One of these is the time limit for holding meetings of creditors, a limitation that either caused problems for courts during the current

emergency or was honored in the breach. Also, it probably does not authorize an extension order applicable to all cases in a district. Rule 9038 is intended to fill in these gaps for situations in which the Judicial Conference declares a rules emergency. The chief bankruptcy judge can grant a district-wide extension for any time periods specified in the rules, and individual judges can do the same in specific cases.

Only one comment was submitted concerning Rule 9038. The Federal Bar Association submitted a comment (BK-2021-0002-0019) addressing all of the proposed emergency rules. It stated that it "supports each of the revised and new rules developed by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees in response to the rulemaking directive in Section 15002(b)(6) of the CARES Act." It noted in particular that "the judiciary is best suited to declare an emergency concerning court rules of practice and procedure" and that it "agrees that the Judicial Conference exclusively, rather than specific circuits, districts, or judges, should be permitted to declare a rules emergency." The Association also commended the "success in achieving relative uniformity across all four emergency rules."

The Advisory Committee recommends that the Standing Committee give final approval to Rule 9038 as published.

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

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

(a) Computing Time. * * *

* * * * *

(6) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing * * * Memorial Day, <u>Juneteenth National Independence Day,</u> Independence Day, * * *;

* * * * *

Committee Note

The amendment adds "Juneteenth National Independence Day" to the list of legal holidays. See Juneteenth National Independence Day Act, P.L. 117-17 (2021) (amending 5 U.S.C. § 6103(a)).

[1] New material is underlined.

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

Rule 15. Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(1) ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course ~~within~~ no later than:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

* * * * *

Committee Note

Rule 15(a)(1) is amended to substitute "no later than" for "within" to measure the time allowed to amend once as a

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

matter of course. A literal reading of "within" would lead to an untoward practice if a pleading is one to which a responsive pleading is required and neither a responsive pleading nor one of the Rule 12 motions has been served within 21 days after service of the pleading. Under this reading, the time to amend once as a matter of course lapses 21 days after the pleading is served and is revived only on the later service of a responsive pleading or one of the Rule 12 motions. There is no reason to suspend the right to amend in this way. "No later than" makes it clear that the right to amend continues without interruption until 21 days after the earlier of the events described in Rule 15(a)(1)(B).

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

Rule 72. Magistrate Judges: Pretrial Order

* * * * *

(b) Dispositive Motions and Prisoner Petitions.

(1) ***Findings and Recommendations.*** * * * The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must ~~promptly mail~~ immediately serve a copy ~~to~~ on each party as provided in Rule 5(b).

* * * * *

Committee Note

Rule 72(b)(1) is amended to permit the clerk to serve a copy of a magistrate judge's recommended disposition by any of the means provided in Rule 5(b).

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

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

Rule 87. Civil Rules Emergency

(a) Conditions for an Emergency. The Judicial Conference of the United States may declare a Civil Rules emergency if it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules.

(b) Declaring an Emergency.

(1) ***Content.*** The declaration:

(A) must designate the court or courts affected;

(B) adopts all the emergency rules in Rule 87(c) unless it excepts one or more of them; and

[1] New material is underlined.

(C) must be limited to a stated period of no more than 90 days.

(2) ***Early Termination.*** The Judicial Conference may terminate a declaration for one or more courts before the termination date.

(3) ***Additional Declarations.*** The Judicial Conference may issue additional declarations under this rule.

(c) Emergency Rules.

(1) ***Emergency Rules 4(e), (h)(1), (i), and (j)(2), and for serving a minor or incompetent person.*** The court may by order authorize service on a defendant described in Rule 4(e), (h)(1), (i), or (j)(2)—or on a minor or incompetent person in a judicial district of the United States—by a method that is reasonably calculated to give notice. A

method of service may be completed under the order after the declaration ends unless the court, after notice and an opportunity to be heard, modifies or rescinds the order.

(2) *Emergency Rule 6(b)(2).*

(A) *Extension of Time to File Certain Motions.* A court may, by order, apply Rule 6(b)(1)(A) to extend for a period of no more than 30 days after entry of the order the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).

(B) *Effect on Time to Appeal.* Unless the time to appeal would otherwise be longer:

(i) if the court denies an extension, the time to file an appeal runs for all parties

from the date the order denying the motion to extend is entered;

(ii) if the court grants an extension, a motion authorized by the court and filed within the extended period is, for purposes of Appellate Rule 4(a)(4)(A), filed "within the time allowed by" the Federal Rules of Civil Procedure; and

(iii) if the court grants an extension and no motion authorized by the court is made within the extended period, the time to file an appeal runs for all parties

from the expiration of the extended period.

(C) *Declaration Ends.* An act authorized by an order under this emergency rule may be completed under the order after the emergency declaration ends.

Committee Note

Subdivision (a). This rule addresses the prospect that extraordinary circumstances may so substantially interfere with the ability of the court and parties to act in compliance with a few of these rules as to substantially impair the court's ability to effectively perform its functions under these rules. The responses of the courts and parties to the COVID-19 pandemic provided the immediate occasion for adopting a formal rule authorizing departure from the ordinary constraints of a rule text that substantially impairs a court's ability to perform its functions. At the same time, these responses showed that almost all challenges can be effectively addressed through the general rules provisions. The emergency rules authorized by this rule allow departures only from a narrow range of rules that, in rare and extraordinary circumstances, may raise unreasonably high obstacles to effective performance of judicial functions.

The range of the extraordinary circumstances that might give rise to a rules emergency is wide, in both time and space. An emergency may be local—familiar examples include hurricanes, flooding, explosions, or civil unrest. The circumstance may be more widely regional, or national. The

emergency may be tangible or intangible, including such events as a pandemic or disruption of electronic communications. The concept is pragmatic and functional. The determination of what relates to public health or safety, or what affects physical or electronic access to a court, need not be literal. The ability of the court to perform its functions in compliance with these rules may be affected by the ability of the parties to comply with a rule in a particular emergency. A shutdown of interstate travel in response to an external threat, for example, might constitute a rules emergency even though there is no physical barrier that impedes access to the court or the parties.

Responsibility for declaring a rules emergency is vested exclusively in the Judicial Conference. But a court may, absent a declaration by the Judicial Conference, utilize all measures of discretion and all the flexibility already embedded in the character and structure of the Civil Rules.

A pragmatic and functional determination whether there is a Civil Rules emergency should be carefully limited to problems that cannot be resolved by construing, administering, and employing the flexibility deliberately incorporated in the structure of the Civil Rules. The rules rely extensively on sensible accommodations among the litigants and on wise management by judges when the litigants are unable to resolve particular problems. The effects of an emergency on the ability of the court and the parties to comply with a rule should be determined in light of the flexible responses to particular situations generally available under that rule. And even if a rules emergency is declared, the court and parties should explore the opportunities for flexible use of a rule before turning to rely on an emergency departure. Adoption of this rule, or a declaration of a rules emergency, does not imply any limitation of the courts' ability to respond to emergency

circumstances by wise use of the discretion and opportunities for effective adaptation that inhere in the Civil Rules themselves.

Subdivision (b). A declaration of a rules emergency must designate the court or courts affected by the emergency. An emergency may be so local that only a single court is designated. The declaration adopts all of the emergency rules listed in subdivision (c) unless it excepts one or more of them. An emergency rule supplements the Civil Rule for the period covered by the declaration.

A declaration must be limited to a stated period of no more than 90 days, but the Judicial Conference may terminate a declaration for one or more courts before the end of the stated period. A declaration may be succeeded by a new declaration made under this rule. And additional declarations may be made under this rule before an earlier declaration terminates. An additional declaration may modify an earlier declaration to respond to new emergencies or a better understanding of the original emergency. Changes may be made in the courts affected by the emergency or in the emergency rules adopted by the declaration.

Subdivision (c). Subdivision (c) lists the only Emergency Rules that may be authorized by a declaration of a rules emergency.

Emergency Rules 4. Each of the Emergency Rules 4 authorizes the court to order service by means not otherwise provided in Rule 4 by a method that is appropriate to the circumstances of the emergency declared by the Judicial Conference and that is reasonably calculated to give notice. The nature of some emergencies will make it appropriate to rely on case-specific orders tailored to the particular emergency and the identity of the parties. The court should

explore the opportunities to make effective service under the traditional methods provided by Rule 4, along with the difficulties that may impede effective service under Rule 4. Any means of service authorized by the court must be calculated to fulfill the fundamental role of serving the summons and complaint in providing notice of the action and the opportunity to respond. Other emergencies may make it appropriate for a court to adopt a general practice by entering a standing order that specifies one or possibly more than one means of service appropriate for most cases. Service by a commercial carrier requiring a return receipt might be an example.

The final sentence of Emergency Rule 4 addresses a situation in which a declaration of a civil rules emergency ends after an order for service is entered but before service is completed. Service may be completed under the order unless the court modifies or rescinds the order. A modification that continues to allow a method of service specified by the order but not within Rule 4, or rescission that requires service by a method within Rule 4, may provide for effective service. But it may be better to permit completion of service in compliance with the original order. For example, the summons and complaint may have been delivered to a commercial carrier that has not yet delivered them to the party to be served. Allowing completion and return of confirmation of delivery may be the most efficient course. Allowing completion of a method authorized by the order may be particularly important when a claim is governed by a statute of limitations that requires actual service within a stated period after the action is filed.

Emergency Rule 6(b)(2). Emergency Rule 6(b)(2) supersedes the flat prohibition in Rule 6(b)(2) of any extension of the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). The court may extend those

times under Rule 6(b)(1)(A). Rule 6(b)(1)(A) requires the court to find good cause. Some emergencies may justify a standing order that finds good cause in general terms, but the period allowed by the extension ordinarily will depend on case-specific factors as well.

Rule 6(b)(1)(A) authorizes the court to extend the time to act under Rules 50(b), 50(d), 52(b), 59(b), 59(d), 59(e), and 60(b) only if it acts, or if a request is made, before the original time allowed by those rules or an extension granted under Emergency Rule 6(b)(2) expires. For all but Rule 60(b), the time allowed by those rules is 28 days after the entry of judgment. For Rule 60(b), the time allowed is governed by Rule 60(c)(1), which requires that the motion be made within a reasonable time, and, for motions under Rule 60(b)(1), (2), or (3), no more than a year after the entry of judgment. The maximum extension is not more than 30 days after entry of the order granting an extension. If the court acts on its own, extensions for Rule 50, 52, and 59 motions can extend no later than 58 days after the entry of judgment unless the court acts before expiration of an earlier extension. If an extension is sought by motion, an extension can extend no later than 30 days after entry of the order granting the extension.

Appeal time must be reset to support an orderly determination whether to order an extension and, if an extension is ordered, to make and dispose of any motion authorized by the extension. Subparagraph 6(b)(2)(B) integrates the emergency rule with Appellate Rule 4(a)(4)(A) for four separate situations.

The first situation is governed by the initial text: "Unless the time to appeal would otherwise be longer." One example that illustrates this situation would be a motion by the plaintiff for a new trial within the time allowed by

Rule 59, followed by a timely motion by the defendant for an extension of time to file a renewed motion for judgment as a matter of law under Rule 50(b). The court denies the motion for an extension without yet ruling on the plaintiff's motion. The time to appeal after denial of the plaintiff's motion is longer for all parties than the time after denial of the defendant's motion for an extension.

Item (B)(i) resets appeal time to run for all parties from the date of entry of an order denying a motion to extend.

Items (B)(ii) and (iii) reset appeal time after the court grants an extended period to file a post-judgment motion. Appellate Rule 4(a)(4)(A) is incorporated, giving the authorized motion the effect of a motion filed "within the time allowed by" the Federal Rules of Civil Procedure. If more than one authorized motion is filed, appeal time is reset to run from the order "disposing of the last such remaining motion." If no authorized motion is made, appeal time runs from the expiration of the extended period.

These provisions for resetting appeal time are supported for the special timing provisions for Rule 60(b) motions by a parallel amendment of Appellate Rule 4(a)(4)(A)(vi) that resets appeal time on a timely motion "for relief under Rule 60 if the motion is filed within the time allowed for filing a motion under Rule 59." This Rule 4 provision, as amended, will assure that a Rule 60(b) motion resets appeal time for review of the final judgment only if it is filed within the 28 days ordinarily allowed for post-judgment motions under Rule 59 or any extended period for filing a Rule 59 motion that a court might authorize under Emergency Rule 6(b)(2). A timely Rule 60(b) motion filed after that period, whether it is timely under Rule 60(c)(1) or under an extension ordered under

Emergency Rule 6(b)(2), supports an appeal from disposition of the Rule 60(b) motion, but does not support an appeal from the original final judgment.

Emergency Rule 6(b)(2)(C) addresses a situation in which a declaration of a Civil Rules emergency ends after an order is entered, whether the order grants or denies an extension. This rule preserves the integration of Emergency Rule 6(b)(2) with the appeal time provisions of Appellate Rule 4(a)(4)(A). An act authorized by the order, which may be either a motion or an appeal, may be completed under the order. If the order denies a timely motion for an extension, the time to appeal runs from the order. If an extension is granted, a motion may be filed within the extended period. Appeal time starts to run from the order that disposes of the last remaining authorized motion. If no authorized motion is filed within the extended period, appeal time starts to run on expiration of the extended period. Any other approach would sacrifice opportunities for post-judgment relief or appeal that could have been preserved if no emergency rule motion had been made.

Emergency rules provisions were added to the Appellate, Bankruptcy, Civil, and Criminal Rules in the wake of the COVID-19 pandemic. They were made as uniform as possible. But each set of rules serves distinctive purposes, shaped by different origins, traditions, functions, and needs. Different provisions were compelled by these different purposes.

Excerpt from the May 13, 2022 Report of the Advisory Committee on Civil Rules

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

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Robert M. Dow, Jr., Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: May 13, 2022

Introduction

* * * * *

Part I of this report presents five items for action at this meeting. Amendments to Rules 15(a)(1) and 72(b)(1), and the addition of a new Rule 87, all published for comment in August 2021, are presented for a recommendation to adopt. An amendment of Rule 6(a)(6)(A) is presented for a recommendation to adopt without publication. A proposal to amend Rule 12(a)(4) that was published for comment in August 2020 is presented with a recommendation that it not be advanced for adoption.

* * * * *

I. Action Items

A. For Adoption: New Rule 87: Civil Rules Emergencies

The dedicated hard work to develop emergency rules provisions by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees is well known. Civil Rule 87 was published for comment in August 2021 and is now advanced for a recommendation that it be adopted as published, with minor changes in the Committee Note. This recommendation is elaborated in conjunction with the parallel recommendations of the other advisory committees.

* * * * *

C. Recommended for Adoption: Rule 15(a)(1): Mind the Gap

This proposal to amend Rule 15(a)(1) was published in August 2021. The Committee advances it for a recommendation for adoption as published, for the reasons described in the Committee Note. Public comments offer no reason to reconsider. The Committee voted to delete the sentence enclosed by brackets in the Committee Note as an unnecessary elaboration on the meaning of "within."

(a) Amendments Before Trial.

(1) ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course ~~within~~ no later than:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

COMMITTEE NOTE

Rule 15(a)(1) is amended to substitute "no later than" for "within" to measure the time allowed to amend once as a matter of course. A literal reading of "within" would lead to an untoward practice if a pleading is one to which a responsive pleading is required and neither a responsive pleading nor one of the Rule 12 motions has been served within 21 days after service of the pleading. Under this reading, the time to amend once as a matter of course lapses 21 days after the pleading is served and is revived only on the later service of a responsive pleading or one of the Rule 12 motions. ~~[The amendment could not come "within" 21 days after the event until the event had happened.]~~ There is no reason to suspend the right to amend in this way. "No later than" makes it clear that the right to amend continues without interruption until 21 days after the earlier of the events described in Rule 15(a)(1)(B).

SUMMARY OF COMMENTS

Andrew Straw, Disability Party, CV 2021-0003: "I have no problem with the minor change, but the rule must allow an amendment to the operative complaint when an appeal comes back down under certain conditions." (The balance of the comment complains, among other things, of mistreatment by two federal courts of appeals, dishonest actions by them, inappropriate use of the "frivolous" characterization, and "the 5 law licenses taken away from me with suspension for 54 months.")

Federal Magistrate Judges Association, CV 2021-0007: "Based on the explanation of the amendment, we foresee no unintended consequences from this modest change."

New York State Bar Association Commercial and Federal Litigation Section, 21-CV-0008: The proposal is "salutary and desirable."

Audrey Lessner, CV-2021-0004: It is not clear what proposed amendment this comment addresses, or whether it is intended as a suggestion for a new amendment of Rule 12(a): "I am strongly encouraging the Federal Courts to have a 90-day limit on time to answer a civil case concerning families."

Federal Bar Association, 21-CV-0013: The proposal is consistent with strengthening the federal judicial system. No objections.

Aaron Ahern, CV-2021-0015: Again, it is not clear which proposed rule amendment this comment addresses: "This must not e[sic]ffect victims of major crime including gross negligent domestic violence. Who haven't collected relief. In good faith."

Changes Since Publication

No changes are recommended in the text of Rule 15(a)(1) as published. The Committee Note is recommended for adoption with the change described above, deleting an unnecessary sentence that was published in brackets.

D. Recommended for Adoption: Rule 72(b)(1): Notice of Magistrate Judge Recommendations

This proposal to amend Rule 72(b)(1) was published for comment in August 2021. Public comments advance no reason for changing or withdrawing the proposal. The Committee voted to delete the sentence in the Committee Note published in brackets. The sentence offered reassurance to guide the comment process, and has served its purpose. The Committee advances the amendment for a recommendation for adoption as published:

(b) Dispositive Motions and Prisoner Petitions.

(1) ***Findings and Recommendations.*** * * * The magistrate judge must enter a recommended disposition, including, if appropriate,

proposed findings of fact. The clerk must ~~promptly mail~~ immediately serve a copy ~~to~~ on each party as provided in Rule 5(b).

COMMITTEE NOTE

Rule 72(b)(1) is amended to permit the clerk to serve a copy of a magistrate judge's recommended disposition by any of the means provided in Rule 5(b). ~~[Service of notice of entry of an order or judgment under Rule 5(b) is permitted by Rule 77(d)(1) and works well.]~~

SUMMARY OF COMMENTS

Federal Magistrate Judges Association, CV 2021-0007: "We endorse this update, which much more accurately reflects current expectations regarding service, and avoids confusion caused by the outdated mailing requirement."

New York State Bar Association Commercial and Federal Litigation Section, 21-CV-0008: The proposal is "salutary and desirable."

Shane Jeansonne, 21-CV-0010: This is a bad idea. Prisoners have no access to the CM/ECF system. If they do not have access to mailed copies of the recommendations, they will be unable to adequately object or appeal. (This comment seems to overlook the provision of Rule 5(b)(2)(E) that allows sending notice by filing with the court's electronic-filing system only as to a registered user.)

Federal Bar Association, 21-CV-0013: The proposal is consistent with strengthening the federal judicial system. No objections.

Changes Since Publication

No changes are recommended in the text of Rule 72(b)(1) as published. The Committee Note is recommended for adoption with the change described above, deleting an unnecessary sentence that was published in brackets.

E. Recommended for Adoption Without Publication: Rule 6(a)(6)(A): Juneteenth Holiday

The Committee advances for a recommendation to adopt without publication of an amendment of Rule 6(a)(6)(A) to include Juneteenth National Independence Day in the list of statutory holidays included in the definition of "legal holiday." The amendment reflects the Juneteenth National Independence Day Act, P.L. 117-17 (2021).

Adoption without publication will reduce the hiatus between establishment of this new legal holiday and its recognition in rule text. There is no reason for delay -- indeed Rule 6(a)(6)(B) already recognizes the holiday by including as a legal holiday "any day declared a holiday by the President or Congress." Amending Rule 6(a)(6)(A) serves only to make its enumeration of statutory holidays complete.

As amended, Rule 6(a)(6)(A) would read:

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

(a) Computing Time. * * *

(6) ***"Legal Holiday" Defined.*** "Legal Holiday" means:

(A) the day set aside by statute for observing * * * Memorial Day, Juneteenth National Independence Day, Independence Day, * * *.

COMMITTEE NOTE

Rule 6(a)(6) is amended to add Juneteenth National Independence Day to the days set aside by statute as legal holidays.

* * * * *

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

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Robert M. Dow, Jr., Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rule (Rule 87)

DATE: May 13, 2022

The dedicated hard work to develop emergency rules provisions by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees is well known. Civil Rule 87 was published for comment in August 2021 and is now advanced for a recommendation that it be adopted as published, with minor changes in the Committee Note.

Much of the work that went into the four published emergency rules was devoted to achieving as much uniformity as possible, accepting disuniformities only to the extent required by differences in the fundamental premises of the separate sets of rules. Rule 87 continues to differ from the other emergency rules in a few ways. The standard for declaration of a Civil Rules Emergency by the Judicial Conference is common to all four sets of rules, but does not include the "no feasible alternative measures" addition that is unique to Criminal Rule 62(a)(2). That difference has been discussed extensively and accepted as a response to the particularly sensitive concerns raised by the emergency criminal rules provisions.

Another disuniformity arises from Rule 87(b)(1)(B), which directs that the Judicial Conference declaration of a Civil Rules Emergency must "adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them." The parallel provisions in the Bankruptcy and Criminal Rules direct that the declaration must "state any restrictions on the authority granted in" their emergency provisions. This difference was accepted in careful discussions among the reporters after publication of the proposed rules and approved by the advisory committees. The character of the different emergency rules provisions accounts for the difference. Rule 87 authorizes adoption of five Emergency Rules 4, each of which allows the court to order service of process by a means reasonably calculated to give notice. In addition, it authorizes adoption of Emergency Rule 6(b)(2), which displaces the provision in Rule 6(b)(2) that absolutely prohibits any extension of the times set to make post-judgment motions by Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). It can make sense for the Conference to choose among the separate Emergency Rules 4 in declaring a Civil Rules Emergency. Authority to allow service by alternative means on corporations or other entities may seem appropriate, while it may not be appropriate to authorize alternative means of service on individual defendants. But it is not feasible to ask the Conference to identify categories of acceptable or unacceptable methods of service reasonably calculated to give notice. The circumstances of an emergency may be hard to predict, and appropriate alternative methods of service may depend on the nature of the litigation and of the parties. The provisions of Emergency Rule 6(b)(2) that establish discretion to allow no more than an additional 30 days for post-judgment motions are even less suitable for further refinement or "restrictions." Whether an extension is justified in the particular circumstances of case and parties, and how long any extension might be, cannot be guessed in advance. Emergency Rule 6(b)(2), moreover, presents intricate and carefully resolved questions of integration with the appeal time provisions of Appellate Rule 4. A parallel amendment of Rule 4 is being recommended to ensure effective integration for Rule 60(b) motions.

The provisions for completing acts authorized under Emergency Rules 4 or 6 after expiration of an emergency declaration also differ from the parallel provisions in other rules. These differences too are mandated by the distinctive function of these emergency rules.

Reporters Capra and Struve, who led the uniformity efforts, agree that -- in Professor Capra's words -- "We're in a good place on uniformity." The differences that remain "can be easily explained."

There were few public comments on Rule 87 as published. A few raised the "delegation" question, vigorously debated during the early development of the emergency rules by the advisory committees and in this committee. No new reasons were advanced to doubt the propriety of relying on the Judicial Conference to declare a rules emergency and to choose from the menu of specific emergency rules responses set out in each emergency rule. The American Association for Justice lauded Rule 87 as published, but suggested that other of the civil rules should be the subject of additional emergency rules to be specified in Rule 87(c) or should be directly amended to accommodate responses to emergency circumstances. The suggestions are cogent. Each of them, however, was carefully considered before Rule 87 was published, and as to each the CARES Act Subcommittee and the Committee concluded that the corresponding civil rules preserve sufficient flexibility and discretion to meet whatever needs may arise. The Committee Note encourages

courts to make the best use of these qualities as deliberately built into the rules over the course of many years. As much as has been learned about adaptations to the Covid-19 pandemic seems to confirm this confidence in the rules as they are.

Rule 87 did not stimulate extensive Committee discussion. One member asked whether the definition of an emergency is too narrow because it focuses on the court's ability to perform its functions in compliance with the rules. Should not account be taken of an emergency's impact on the parties? Examination of the way in which this problem is addressed in the second paragraph of the Committee Note was found to satisfy this concern.

The Committee Note was revised to respond to a public comment in one respect, adding additional language to reinforce the need to evaluate all opportunities for serving process under Rule 4 before a court orders service by an alternative means under one of the Emergency Rules 4.

The Committee Note was further revised to resolve questions raised by portions that were published in brackets to invite comments. No comments were made. The final and long sentence in the paragraph on Rule 6(b)(1)(A) was deleted as an accurate but unnecessary and potentially confusing reflection on one aspect of the complicated process of integrating Emergency Rule 6(b)(2) with the appeal time provisions of Appellate Rule 4. The final sentence in the paragraph on Emergency Rule 6(b)(2), item B(i), advising that a court should rule on a motion to extend the time for a post-judgment motion as promptly as possible was deleted as gratuitous advice on a point that all judges will understand without prompting. In the last line of the paragraph on resetting appeal time under Emergency Rule 6(b)(2), brackets around "original" will be removed, retaining "original." It seems useful to remind readers that an order finally resolving all issues raised by a Rule 60(b) motion is appealable as a final judgment that does not of itself support review of the earlier -- "original" -- final judgment challenged by the motion.

The Committee voted to advance Rule 87 for a recommendation to adopt as published, with the amendments of the Committee Note described above.

SUMMARY OF COMMENTS

Anonymous, 21-CV-0005: We have three branches of government. "Your job is to bring importance of a matter of emergency declaration then it should be evaluated between three branches of government with respect to our constitution. We can't respect a party that only has one point of you [sic] * * *."

Anonymous, CV-2021-0006: With an extensive quotation from Locke on delegating legislative powers, urges that "to leave any entity sole power over anything would be opposite of what our Constitution represents." So "changing any rule during a national emergency should be illegal. Emergency powers are clearly being abused and extended by many offenders in order to accommodate their agendas."

Federal Magistrate Judges Association, CV 2021-0007: Several members of the group thought the Committee might forgo any new rule for emergencies because the Civil Rules "already provide district courts with tools to address emergency circumstances." There is a great deal of flexibility.

But the consensus [apparently looking to Emergency Rule 6(b)(2)] was that the rule allows courts discretion to address unique challenges that might arise from different kinds of emergencies. "We did not identify any other areas of the Civil Rules where we thought emergency extensions would be required and are not already permitted by court Order."

New York State Bar Association Commercial and Federal Litigation Section, 21-CV-0008: Notes that comments it offered last year on possible Civil Rules amendments to respond to an emergency were based on assuming circumstances like the Covid-19 pandemic, "nationwide in scope, and of a sufficient severity to cause the closure of public access to the federal courts." Proposed Rule 87 does not require an Executive Branch determination of emergency. "Indeed, there is no expressed criteria by which the Judicial Conference can determine that such an emergency exists. We have concerns about such an approach." If adopted, Rule 87 "should contain explicit criteria under which the Judicial Conference may determine that an Emergency, either national or local, exists."

American Association for Justice, 21-CV-0012: This comment is detailed and provides strong support for Rule 87 as published, while suggesting additional provisions for Rule 87 and further rules changes to "facilitate flexibility in emergency situations." These suggestions cover issues that were considered at length in subcommittee and committee, often by other advisory committees, and at times by the Standing Committee. They are important and will be described in some detail, with brief statements of the reasons why they were not recommended while generating Rule 87. The fact that the issues have been considered in the past does not mean that further consideration is inappropriate. But the reasons that proved persuasive once may remain persuasive.

AAJ conducted a survey at the end of January, 2021 to gather information from its members about experience during the first year of the Covid-19 pandemic. Its proposals rest in part on the 112 responses, and in part on more a more general sense of experience during the pandemic.

AAJ strongly supports the provisions in Rule 87 as published. The definition of a rules emergency properly omits the "no feasible alternative measures" provision that appears in, and is appropriate for, Criminal Rule 62. Confiding authority to declare a rules emergency in the Judicial Conference is wise, although a "backup" provision should be added. The structure that provides that a declaration of a civil rules emergency adopts all the emergency rules in Rule 87(c) unless it excepts one or more of them "helps streamline the process and creates less work for the Judicial Conference." The provisions for completing proceedings begun under an emergency rule after the declaration terminates also are proper.

AAJ suggests there should be a backup plan to cover a situation in which the Judicial Conference is unable to meet to declare a rules emergency. This subject was discussed and put aside by each of the advisory committees. In January, 2021, the Standing Committee thought it deserved further consideration. The advisory committees deliberated further, and again recommended that any attempt to create such a provision for a "doomsday" scenario would be unwise, for reasons described at pages 80-81 of the June, 2021 Standing Committee agenda materials.

More specific recommendations suggest review of "several specific rules that would clarify what can be done virtually versus in-person during emergencies," noting that "a hybrid of in-person and virtual proceedings seems to be the direction courts are headed towards." Indeed, it

may be time to consider broader rules provisions to facilitate virtual trials. Several clarifications of "in-person court requirements" are suggested. It is not always clear whether the suggestions are for new emergency civil rules to be added to Rule 87(c); perhaps none of them are. Instead, the suggestions at times clearly contemplate adding provisions to the regular rules that are available only in emergency circumstances, without describing what constitutes an emergency or who -- most likely the trial judge -- decides whether there is an emergency. Some of the proposals suggest general amendment of a current rule without being limited to an emergency.

The three rules suggestions in the first set aim at allowing witnesses to appear by video conference in emergency situations. (1) Rule 32(a)(4)(C) allows a deposition to be used at trial if the witness is unable to attend because of age, illness, infirmity, or imprisonment. The suggestion is to permit court and parties to determine the best ways to ensure the safety of witnesses while protecting the rights of the parties "during a public health emergency." The suggestion seems to extend beyond allowing use of the witness's deposition at trial, perhaps in part because of other provisions in Rule 32(a) that allow a party's deposition to be used for any purpose and allow the court to permit use of a deposition in exceptional circumstances. (2) Rule 45(c) limits the geographic reach of a subpoena to command a person to attend a trial, hearing, or deposition. The rule is not qualified by conferring a right not to attend during an emergent event, or when travel is otherwise challenging or burdensome. It should be amended to permit appearance by video conference, or even telephone, for good cause. Rule 43(a) now permits testimony in open court by contemporaneous transmission from a different location, on terms that should be readily met in any circumstances that would qualify as an emergency. And see also the general protective order provisions of Rule 26(c). (3) Rule 77(b) directs that no hearing may be conducted outside the district unless all affected parties consent. This provision was considered by the subcommittee, by all advisory committees -- most especially the Criminal Rules Committee. 28 U.S.C. § 141(b)(1), which provides for special sessions outside the district, also was considered. The conclusion was that remote proceedings satisfy the current rule, at least as long as the judge is participating from a place within the district, and likely more broadly if an emergency forces a court's judges to leave the district. The question remains under consideration by other Judicial Conference committees.

The second set of three rules described by AAJ is more easily disposed of. (1) and (2): Rules 28 and 30(b)(5)(A) direct that a deposition be conducted "before" an officer. AAJ recognizes that courts have allowed remote connections to count as "before" during the pandemic, but suggests time and resources would be saved by avoiding litigation of the issue. "Before" should be clarified, they urge, to ensure that the reporter need not be in the same physical location as the witness or counsel during an emergency situation. Subcommittee consideration of this issue concluded that the present rule text meets the need. It seems likely that continuing practice during the pandemic will confirm this conclusion. (3): Rule 30(b)(4) allows a deposition "by telephone or other remote means." AAJ proposes an amendment to expressly include "video conference" as an appropriate remote means, and to make virtual hearings the default means "during certain emergencies." The present language suffices to authorize video conferencing. Defining "certain emergencies" could prove difficult.

Finally, AAJ suggests that "language should be used" to clarify that local rules adopted during an emergency may not conflict with Rule 87 and must conform to 28 U.S.C. §§ 2072 and 2075. 28 U.S.C. § 2071(a) and Rule 83(a)(2) suffice to ensure this proposition.

Federal Bar Association, CV-2021-0013: "[T]he FBA believes the judiciary is best suited to declare an emergency concerning court rules of practice and procedure. The proposed amendments * * * provide important flexibility for the U.S. Courts in unforeseen situations, some of which may not rise to the level of a national emergency." The FBA also "agrees that the Judicial Conference exclusively, rather than specific circuits, districts, or judges, should be permitted to declare a rules emergency." This will help prevent a disjointed or balkanized response, particularly in circumstances that affect only particular regions or subsets of federal courts. And the FBA "applauds the Rules Committee's success in achieving relative uniformity across all four emergency rules."

Lawyers for Civil Justice, CV-2021-0014: The need for any Emergency Rule 4 provisions should be carefully considered. "Rule 4 has functioned well during the pandemic." "Reasonably calculated to give notice" is a vague phrase that "could obviate established due process * * * by permitting courts to authorize alternative methods of service that will not necessarily ensure that actual notice occurs." e-mail or social media service might be authorized. "The potential alternative methods of service are without limit * * *." The risks of failure of notice are significant, particularly during an emergency situation. And the rule should provide that even if an alternative method of service is authorized, a default can be entered only after requiring service by a traditional method.

Changes Since Publication

No changes are recommended in the text of Rule 87 as published. The Committee Note is recommended for adoption with the changes described above, adding new language reinforcing the importance of considering the methods of service authorized by Rule 4 before ordering an alternative method under one of the Emergency Rules 4, removing two sentences published in brackets, and removing the brackets from a single word.

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

Rule 16. Discovery and Inspection[2]

* * * * *

(b) Defendant's Disclosure.

(1) ***Information Subject to Disclosure.***

* * * * *

(C) *Expert Witnesses.*

* * * * *

(v) Signing the Disclosure. The witness must approve and sign the disclosure, unless the defendant:

- states in the disclosure why the defendant could not obtain the

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

[2] The changes indicated are to the version of Rule 16 which is scheduled to go into effect on December 1, 2022 if Congress takes no contrary action.

witness's signature through reasonable efforts; or

- has previously provided under (~~F~~B) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).

* * * * *

Committee Note

The amendment corrects the cross reference in Rule 16(b)(1)(C)(v), which refers to expert reports previously provided by the defense under Rule 16(b)(1)(B).

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

Rule 45. 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.

* * * * *

(6) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Juneteenth National Independence Day, Independence Day, Labor Day, Columbus Day,

[1] New material is underlined.

Veterans' Day, Thanksgiving Day, or Christmas Day;

* * * * *

Committee Note

The amendment adds "Juneteenth National Independence Day" to the list of legal holidays. See Juneteenth National Independence Day Act, P.L. 117-17 (2021) (amending 5 U.S.C. § 6103(a)).

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

Rule 56. When Court is Open

* * * * *

(c) Special Hours. A court may provide by local rule or order that its clerk's office will be open for specified hours on Saturdays or legal holidays other than those set aside by statute for observing New Year's Day, Martin Luther King~~,~~ Jr.'s Birthday, Washington's Birthday, Memorial Day, Juneteenth National Independence Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

Committee Note

The amendment adds "Juneteenth National Independence Day" to the list of legal holidays. See Juneteenth National Independence Day Act, P.L. 117-17 (2021) (amending 5 U.S.C. § 6103(a)). A stylistic change was made.

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

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

Rule 62. Criminal Rules Emergency

(a) Conditions for an Emergency. The Judicial Conference of the United States may declare a Criminal Rules emergency if it determines that:

(1) extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules; and

(2) no feasible alternative measures would sufficiently address the impairment within a reasonable time.

(b) Declaring an Emergency.

(1) ***Content.*** The declaration must:

(A) designate the court or courts affected;

[1] New material is underlined.

(B) state any restrictions on the authority granted in (d) and (e); and

(C) be limited to a stated period of no more than 90 days.

(2) ***Early Termination.*** The Judicial Conference may terminate a declaration for one or more courts before the termination date.

(3) ***Additional Declarations.*** The Judicial Conference may issue additional declarations under this rule.

(c) Continuing a Proceeding After a Termination. Termination of a declaration for a court ends its authority under (d) and (e). But if a particular proceeding is already underway and resuming compliance with these rules for the rest of the proceeding would not be feasible or would work an injustice, it may be completed with the defendant's consent as if the declaration had not terminated.

(d) Authorized Departures from These Rules After a Declaration.

(1) ***Public Access to a Proceeding.*** If emergency conditions substantially impair the public's in-person attendance at a public proceeding, the court must provide reasonable alternative access, contemporaneous if feasible.

(2) ***Signing or Consenting for a Defendant.*** If any rule, including this rule, requires a defendant's signature, written consent, or written waiver—and emergency conditions limit a defendant's ability to sign—defense counsel may sign for the defendant if the defendant consents on the record. Otherwise, defense counsel must file an affidavit attesting to the defendant's consent. If the defendant is pro se, the court may sign for the

defendant if the defendant consents on the record.

(3) ***Alternate Jurors.*** A court may impanel more than 6 alternate jurors.

(4) ***Correcting or Reducing a Sentence.*** Despite Rule 45(b)(2), if emergency conditions provide good cause, a court may extend the time to take action under Rule 35 as reasonably necessary.

(e) Authorized Use of Videoconferencing and Teleconferencing After a Declaration.

(1) ***Videoconferencing for Proceedings Under Rules 5, 10, 40, and 43(b)(2).*** This rule does not modify a court's authority to use videoconferencing for a proceeding under Rules 5, 10, 40, or 43(b)(2), except that if emergency conditions substantially

impair the defendant's opportunity to consult with counsel, the court must ensure that the defendant will have an adequate opportunity to do so confidentially before and during those proceedings.

(2) ***Videoconferencing for Certain Proceedings at Which the Defendant Has a Right to Be Present.*** Except for felony trials and as otherwise provided under (e)(1) and (3), for a proceeding at which a defendant has a right to be present, a court may use videoconferencing if:

(A) the district's chief judge finds that emergency conditions substantially impair a court's ability to hold in-person

proceedings in the district within a reasonable time;

(B) the court finds that the defendant will have an adequate opportunity to consult confidentially with counsel before and during the proceeding; and

(C) the defendant consents after consulting with counsel.

(3) ***Videoconferencing for Felony Pleas and Sentencings.*** For a felony proceeding under Rule 11 or 32, a court may use videoconferencing only if, in addition to the requirement in (2)(B):

(A) the district's chief judge finds that emergency conditions

substantially impair a court's ability to hold in-person felony pleas and sentencings in the district within a reasonable time;

(B) the defendant, before the proceeding and after consulting with counsel, consents in a writing signed by the defendant that the proceeding be conducted by videoconferencing; and

(C) the court finds that further delay in that particular case would cause serious harm to the interests of justice.

(4) *Teleconferencing by One or More Participants.* A court may conduct a

proceeding, in whole or in part, by teleconferencing if:

(A) the requirements under any applicable rule, including this rule, for conducting the proceeding by videoconferencing have been met;

(B) the court finds that:

(i) videoconferencing is not reasonably available for any person who would participate by teleconference; and

(ii) the defendant will have an adequate opportunity to consult

confidentially with counsel before and during the proceeding if held by teleconference; and

(C) the defendant consents.

Committee Note

Subdivision (a). This rule defines the conditions for a Criminal Rules emergency that would support a declaration authorizing a court to depart from one or more of the other Federal Rules of Criminal Procedure. Rule 62 refers to the other, non-emergency rules—currently Rules 1-61—as "these rules." This committee note uses "these rules" or "the rules" to refer to the non-emergency rules, and uses "this rule" or "this emergency rule" to refer to new Rule 62.

The rules have been promulgated under the Rules Enabling Act and carefully designed to protect constitutional and statutory rights and other interests. Any authority to depart from the rules must be strictly limited. Compliance with the rules cannot be cast aside because of cost or convenience, or without consideration of alternatives that would permit compliance to continue. Subdivision (a) narrowly restricts the conditions that would permit a declaration granting emergency authority to depart from the rules and defines who may make that declaration.

First, subdivision (a) specifies that the power to declare a rules emergency rests solely with the Judicial

Conference of the United States, the governing body of the judicial branch. To find that a rules emergency exists, the Judicial Conference will need information about the ability of affected courts to comply with the rules, as well as the existence of reasonable alternatives to continue court functions in compliance with the rules. The judicial council of a circuit, for example, may be able to provide helpful information it has received from judges within the circuit regarding local conditions and available resources.

Paragraph (a)(1) requires that before declaring a Criminal Rules emergency, the Judicial Conference must determine that circumstances are extraordinary and that they relate to public health or safety or affect physical or electronic access to a court. These requirements are intended to prohibit the use of this emergency rule to respond to other challenges, such as those arising from staffing or budget issues. Second, those extraordinary circumstances must substantially impair the ability of a court to perform its functions in compliance with the rules.

In addition, paragraph (a)(2) requires that even if the Judicial Conference determines the extraordinary circumstances defined in (a)(1), it cannot declare a Criminal Rules emergency unless it also determines that no feasible alternative measures would sufficiently address the impairment and allow the affected court to perform its functions in compliance with the rules within a reasonable time. For example, in the districts devastated by hurricanes Katrina and Maria, the ability of courts to function in compliance with the rules was substantially impaired for extensive periods of time. But there would have been no Criminal Rules emergency under this rule because those districts were able to remedy that impairment and function effectively in compliance with the rules by moving proceedings to other districts under 28 U.S.C. § 141.

Another example might be a situation in which the judges in a district are unable to carry out their duties as a result of an emergency that renders them unavailable, but courthouses remain safe. The unavailability of judges would substantially impair that court's ability to function in compliance with the rules, but temporary assignment of judges from other districts under 28 U.S.C. § 292(b) and (d) would eliminate that impairment.

Subdivision (a) also recognizes that emergency circumstances may affect only one or a small number of courts—familiar examples include hurricanes, floods, explosions, or terroristic threats—or may have widespread impact, such as a pandemic or a regional disruption of electronic communications. This rule provides a uniform procedure that is sufficiently flexible to accommodate different types of emergency conditions with local, regional, or nationwide impact.

Paragraph (b)(1). Paragraph (b)(1) specifies what must be included in a declaration of a Criminal Rules emergency. Subparagraph (A) requires that each declaration of a Criminal Rules emergency designate the court or courts affected by the Criminal Rules emergency as defined in subdivision (a). Some emergencies may affect all courts, some will be local or regional. The declaration must be no broader than the Criminal Rules emergency. That is, every court identified in a declaration must be one in which extraordinary circumstances that relate to public health or safety or that affect physical or electronic access to the court are substantially impairing its ability to perform its functions in compliance with these rules, and in which compliance with the rules cannot be achieved within a reasonable time by alternative measures. A court may not exercise authority under (d) and (e) unless the Judicial Conference includes the court in its declaration, and then only in a manner consistent

with that declaration, including any limits imposed under (b)(1)(B).

Subparagraph (b)(1)(B) provides that the Judicial Conference's declaration of a Criminal Rules emergency must state any restrictions on the authority granted by subdivisions (d) and (e) to depart from the rules. For example, if the emergency arises from a disruption in electronic communications, there may be no reason to authorize videoconferencing for proceedings in which the rules require in-person appearance. But (b)(1)(B) does not allow a declaration to expand departures from the rules beyond those authorized by subdivisions (d) and (e).

Under (b)(1)(C), each declaration must state when it will terminate, which may not exceed 90 days from the date of the declaration. This sunset clause is included to ensure that these extraordinary deviations from the rules last no longer than necessary.

Paragraph (b)(2). If emergency conditions end before the termination date of the declaration for some or all courts included in that declaration, (b)(2) provides that the Judicial Conference may terminate the declaration for the courts no longer affected. This provision also ensures that any authority to depart from the rules lasts no longer than necessary.

Paragraph (b)(3) recognizes that the conditions that justified the declaration of a Criminal Rules emergency may continue beyond the term of the declaration. The conditions may also change, shifting in nature or affecting more districts. An example might be a flood that leads to a contagious disease outbreak. Rather than provide for extensions, renewals, or modifications of an initial declaration, paragraph (b)(3) gives the Judicial Conference

the authority to respond to such situations by issuing additional declarations. Each additional declaration must meet the requirements of subdivision (a), and must include the contents required by (b)(1).

Subdivision (c). In general, the termination of a declaration of emergency ends all authority to depart from the other Federal Rules of Criminal Procedure. It does not terminate, however, the court's authority to complete an ongoing trial with alternate jurors who have been impaneled under (d)(3), because the proceeding authorized by (d)(3) is the completed impanelment. In addition, subdivision (c) carves out a narrow exception for certain proceedings commenced under a declaration of emergency but not completed before the declaration terminates. If it would not be feasible to conclude a proceeding commenced before a declaration terminates with procedures that comply with the rules, or if resuming compliance with the rules would work an injustice, the court may complete that proceeding using procedures authorized by this emergency rule, but only if the defendant consents to the use of emergency procedures after the declaration ends. Subdivision (c) recognizes the need for some accommodation and flexibility during the transition period, but also the importance of returning promptly to the rules to protect the defendant's rights and other interests.

Subdivisions (d) and (e) describe the authority to depart from the rules after a declaration.

Paragraph (d)(1) addresses the courts' obligation to provide alternative access when emergency conditions have substantially impaired in-person attendance by the public at public proceedings. The term "public proceeding" is intended to capture proceedings that the rules require to be conducted "in open court," proceedings to which a victim must be provided access, and proceedings that must be open

to the public under the First and Sixth Amendments. The rule creates a duty to provide the public with "reasonable alternative access," notwithstanding Rule 53's ban on the "broadcasting of judicial proceedings." Under appropriate circumstances, the reasonable alternative could be audio access to a video proceeding.

The duty arises only when the substantial impairment of in-person access by the public is caused by emergency conditions. The rule does not apply when reasons other than emergency conditions restrict access. The duty arises not only when emergency conditions substantially impair the attendance of anyone, but also when conditions would allow participants but not the public to attend, as when capacity must be restricted to prevent contagion.

Alternative access must be contemporaneous when feasible. For example, if public health conditions limit courtroom capacity, contemporaneous transmission to an overflow courthouse space ordinarily could be provided.

When providing "reasonable alternative access," courts must comply with the constitutional guarantees of public access and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771.

Paragraph (d)(2) recognizes that emergency conditions may disrupt compliance with a rule that requires the defendant's signature, written consent, or written waiver. If emergency situations limit the defendant's ability to sign, (d)(2) provides an alternative, allowing defense counsel to sign if the defendant consents. To ensure that there is a record of the defendant's consent to this procedure, the amendment provides two options: (1) defense counsel may sign for the defendant if the defendant consents on the record, or, (2) without the defendant's consent on the record,

defense counsel must file an affidavit attesting to the defendant's consent to the procedure. The defendant's oral agreement on the record alone will not substitute for the defendant's signature. The written document signed by counsel on behalf of the defendant provides important additional evidence of the defendant's consent.

The court may sign for a pro se defendant, if that defendant consents on the record. There is no provision for the court to sign for a counseled defendant, even if the defendant provides consent on the record. The Committee concluded that rules requiring the defendant's signature, written consent, or written waiver protect important rights, and permitting the judge to bypass defense counsel and sign once the defendant agrees could result in a defendant perceiving pressure from the judge to sign. Requiring a writing from defense counsel is an essential protection when the defendant's own signature is not reasonably available because of emergency conditions.

It is generally helpful for the court to conduct a colloquy with the defendant to ensure that defense counsel consulted with the defendant with regard to the substance and import of the pleading or document being signed, and that the consent to allow counsel to sign was knowing and voluntary.

Paragraph (d)(3) allows the court to impanel more than six alternate jurors, creating an emergency exception to the limit imposed by Rule 24(c)(1). This flexibility may be particularly useful for a long trial conducted under emergency conditions—such as a pandemic—that increase the likelihood that jurors will be unable to complete the trial. Because it is not possible to anticipate all of the situations in which this authority might be employed, the amendment leaves to the discretion of the district court whether to

impanel more alternates, and if so, how many. The same uncertainty about emergency conditions that supports flexibility in the rule for the provision of additional alternates also supports avoiding mandates for additional peremptory challenges when more than six alternates are provided. Nonetheless, if more than six alternates are impaneled and emergency conditions allow, the court should consider permitting each party one or more additional peremptory challenges, consistent with the policy in Rule 24(c)(4).

Paragraph (d)(4) provides an emergency exception to Rule 45(b)(2), which prohibits the court from extending the time to take action under Rule 35 "except as stated in that rule." When emergency conditions provide good cause for extending the time to take action under Rule 35, the amendment allows the court to extend the time for taking action "as reasonably necessary." The amendment allows the court to extend the 14-day period for correcting a clear error in the sentence under Rule 35(a) and the one-year period for government motions for sentence reductions based on substantial assistance under Rule 35(b)(1). Nothing in this provision is intended to expand the authority to correct or reduce a sentence under Rule 35. This emergency rule does not address the extension of other time limits because Rule 45(b)(1) already provides the necessary flexibility for courts to consider emergency circumstances. It allows the court to extend the time for taking other actions on its own or on a party's motion for good cause shown.

Subdivision (e) provides authority for a court to use videoconferencing or teleconferencing under specified circumstances after the declaration of a Criminal Rules emergency. The term "videoconferencing" is used throughout, rather than the term "video teleconferencing" (which appears elsewhere in the rules), to more clearly

distinguish conferencing with visual images from "teleconferencing" with audio only. The first three paragraphs in (e) describe a court's authority to use videoconferencing, depending upon the type of proceeding, while the last describes a court's authority to use teleconferencing when videoconferencing is not reasonably available. The defendant's consent to the use of conferencing technology is required for all proceedings addressed by subdivision (e).

Subdivision (e) applies to the use of videoconferencing and teleconferencing for the proceedings defined in paragraphs (1) through (3), for all or part of the proceeding, by one or more participants. But it does not regulate the use of video and teleconferencing technology for all possible proceedings in a criminal case. It does not speak to or prohibit the use of videoconferencing or teleconferencing for proceedings, such as scheduling conferences, at which the defendant has no right to be present. Instead, it addresses three groups of proceedings: (1) proceedings for which the rules already authorize videoconferencing; (2) certain other proceedings at which a defendant has the right to be present, excluding felony trials; and (3) felony pleas and sentencings. The new rule does not address the use of technology to maintain communication with a defendant who has been removed from a proceeding for misconduct.

Paragraph (e)(1) addresses first appearances, arraignments, and certain misdemeanor proceedings under Rules 5, 10, 40, and 43(b)(2), where the rules already provide for videoconferencing if the defendant consents. *See* Rules 5(f), 10(c), 40(d), and 43(b)(2) (written consent). This paragraph was included to eliminate any confusion about the interaction between existing videoconferencing authority and this rule. It clarifies that this rule does not change the

court's existing authority to use videoconferencing for these proceedings, except that it requires the court to address emergency conditions that significantly impair the defendant's opportunity to consult with counsel. In that situation, the court must ensure that the defendant will have an adequate opportunity for confidential consultation before and during videoconference proceedings under Rules 5, 10, 40, and 43(b)(2). Paragraphs (e)(2) through (4) apply this requirement to all emergency video and teleconferencing authority granted by the rule after a declaration.

The requirement is based upon experience during the COVID-19 pandemic, when conditions dramatically limited the ability of counsel to meet or even speak with clients. The Committee believed it was essential to include this prerequisite for conferencing under Rules 5, 10, 40, and 43(b)(2), as well as conferencing authorized only during a declaration by paragraphs (e)(2), (3), and (4), in order to safeguard the defendant's constitutional right to counsel. The rule does not specify any particular means of providing an adequate opportunity for private communication.

Paragraph (e)(2) addresses videoconferencing authority for proceedings "at which a defendant has a right to be present" under the Constitution, statute, or rule, excluding felony trials and proceedings addressed in either (e)(1) or (e)(3). Such proceedings include, for example, revocations of release under Rule 32.1, preliminary hearings under Rule 5.1, and waivers of indictment under Rule 7(b). During a declaration, an affected court may use videoconferencing for these proceedings, but only if the three circumstances are met.

First, subparagraph (e)(2)(A) restricts videoconferencing authority to affected districts in which the chief judge (or alternate under 28 U.S.C. § 136(e)) has found

that emergency conditions substantially impair a court's ability to hold proceedings in person within a reasonable time. Recognizing that important policy concerns animate existing limitations in Rule 43 on virtual proceedings, even with the defendant's consent, this district-wide finding is not an invitation to substitute virtual conferencing for in-person proceedings without regard to conditions in a particular division, courthouse, or case. If a proceeding can be conducted safely in-person within a reasonable time, a court should hold it in person.

Second, subparagraph (e)(2)(B) conditions videoconferencing upon the court's finding that the defendant will have an adequate opportunity to consult confidentially with counsel before and during the proceeding. If emergency conditions prevent the defendant's presence, and videoconferencing is employed as a substitute, counsel will not have the usual physical proximity to the defendant during the proceeding and may not have ordinary access to the defendant before and after the proceeding.

Third, subparagraph (e)(2)(C) requires that the defendant consent to videoconferencing after consulting with counsel. Insisting on consultation with counsel before consent assures that the defendant will be informed of the potential disadvantages and risks of virtual proceedings. It also provides some protection against potential pressure to consent, from the government or the judge.

The Committee declined to provide authority in this rule to conduct felony trials without the physical presence of the defendant, even if the defendant wishes to appear at trial by videoconference during an emergency declaration. And this rule does not address the use of technology to maintain communication with a defendant who has been removed from a proceeding for misconduct. Nor does it address if or

when trial participants other than the defendant may appear by videoconferencing.

Paragraph (e)(3) addresses the use of videoconferencing for a third set of proceedings: felony pleas and sentencings under Rules 11 and 32. The physical presence of the defendant together in the courtroom with the judge and counsel is a critical part of any plea or sentencing proceeding. Other than trial itself, in no other context does the communication between the judge and the defendant consistently carry such profound consequences. The importance of defendant's physical presence at plea and sentence is reflected in Rules 11 and 32. The Committee's intent was to carve out emergency authority to substitute virtual presence for physical presence at a felony plea or sentence only as a last resort, in cases where the defendant would likely be harmed by further delay. Accordingly, the prerequisites for using videoconferencing for a felony plea or sentence include three circumstances in addition to those required for the use of videoconferencing under (e)(2).

Subparagraph (e)(3)(A) requires that the chief judge of the district (or alternate under 28 U.S.C. § 136(e)) make a district-wide finding that emergency conditions substantially impair a court's ability to hold felony pleas and sentencings in person in that district within a reasonable time. This finding serves as assurance that videoconferencing may be necessary and that individual judges cannot on their own authorize virtual pleas and sentencings when in-person proceedings might be manageable with patience or adaptation. Although the finding serves as assurance that videoconferencing might be necessary in the district, as under (e)(2), individual courts within the district may not conduct virtual plea and sentencing proceedings in individual cases unless they find the remaining criteria of (e)(3) and (4) are satisfied.

As protection against undue pressure to waive physical presence, subparagraph (e)(3)(B) states that, before the proceeding and after consultation with counsel, the defendant must consent in writing that the proceeding be conducted by videoconferencing. This requirement of writing is, like other requirements of writing in the rules, subject to the emergency provisions in (d)(2), unless the relevant emergency declaration excludes the authority in (d)(2). To ensure that the defendant consulted with counsel with regard to this decision, and that the defendant's consent was knowing and voluntary, the court may need to conduct a colloquy with the defendant before accepting the written request.

Subparagraph (e)(3)(C) requires that before a court may conduct a plea or sentencing proceeding by videoconference, it must find that the proceeding in that particular case cannot be further delayed without serious harm to the interests of justice. Examples may include some pleas and sentencings that would allow transfer to a facility preferred by the defense, or result in immediate release, home confinement, probation, or a sentence shorter than the time expected before conditions would allow in-person proceedings. A judge might also conclude that under certain emergency conditions, delaying certain guilty pleas under Rule 11(c)(1)(C), even those calling for longer sentences, may result in serious harm to the interests of justice.

Paragraph (e)(4) details conditions for the use of teleconferencing to conduct proceedings for which videoconferencing is authorized. Videoconferencing is always a better option than an audio-only conference because it allows participants to see as well as hear each other. To ensure that participants communicate through audio alone only when videoconferencing is not feasible,

(e)(4) sets out four prerequisites. Because the rule applies to teleconferencing "in whole or in part," it mandates these prerequisites whenever the entire proceeding is held by teleconference from start to finish, or when one or more participants in the proceeding are connected by audio only, for part or all of a proceeding.

The first prerequisite, in (e)(4)(A), is that all of the conditions for the use of videoconferencing for the proceeding must be met before a court may conduct a proceeding, in whole or in part, by audio-only. For example, videoconferencing for a sentencing under Rule 32 requires compliance with (e)(3)(A), (B), and (C). No part of a felony sentencing proceeding may be held by teleconference, nor may any person participate in such a proceeding by audio only, unless those videoconferencing requirements have been met. Likewise, for a misdemeanor proceeding, teleconferencing requires compliance with (e)(1) and Rule 43(b)(2).

Second, (e)(4)(B)(i) requires the court to find that videoconferencing for all or part of the proceeding is not reasonably available before allowing participation by audio only. Because it focuses on what is "reasonably available," this requirement is flexible. It is intended to allow courts to use audio only connections when necessary, but not otherwise. For example, it precludes the use of teleconferencing alone if videoconferencing—though generally limited—is available for all participants in a particular proceeding. But it permits the use of teleconferencing in other circumstances. For example, if only an audio connection with a defendant were feasible because of security concerns at the facility where the defendant is housed, a court could find that videoconferencing for that defendant in the particular proceeding is not reasonably available. Or, if the video

connection fails for one or more participants during a proceeding started by videoconference and audio is the only option for completing that proceeding expeditiously, this rule permits the affected participants to use audio technology to finish the proceeding.

Third, (e)(4)(B)(ii) provides that the court must find that the defendant will have an adequate opportunity to consult confidentially with counsel before and during the teleconferenced proceeding. Opportunities for confidential consultation may be more limited with teleconferencing than they are with videoconferencing as when a defendant or a defense attorney has only one telephone line to use to call into the conference, and there are no "breakout rooms" for private conversations like those videoconferencing platforms provide. This situation may arise not only when a proceeding is held entirely by phone, but also when, in the midst of a videoconference, video communication fails for either the defendant or defense counsel. An attorney or client may have to call into the conference using the devices they had previously been using for confidential communication. Experiences like these prompted this requirement that the court specifically find that an alternative opportunity for confidential consultation is in place before permitting teleconferencing in whole or in part.

Finally, recognizing the differences between videoconferencing and teleconferencing, subparagraph (e)(4)(C) provides that the defendant must consent to teleconferencing for the proceeding, even if the defendant previously requested or consented to videoconferencing. A defendant who is willing to be sentenced with a videoconference connection with the judge may balk, understandably, at being sentenced over the phone. Subparagraph (e)(4)(C) does not require that consent to teleconferencing be given only after consultation with

counsel. By requiring only "consent," it recognizes that the defendant would have already met the consent requirements for videoconferencing for that proceeding, and it allows the court more flexibility to address varied situations. To give one example, if the video but not audio feed drops for the defendant or another participant near the very end of a videoconference, and the judge asks the defendant, "do you want to talk to your lawyer about finishing this now without the video?," an answer "No, I'm ok, we can finish now" would be sufficient consent under (e)(4)(C).

Excerpt from the May 12, 2022 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

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on the Rules of Practice and Procedure

FROM: Hon. Raymond M. Kethledge, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: May 12, 2022

Introduction

The Advisory Committee on Criminal Rules met on April 28, 2022. We presented draft Rule 62 with the other reports on emergency rules. What remains for this report are one action item and several information items.

I. Action item: Juneteenth Amendments

On June 17, 2021, President Biden signed into law the Juneteenth National Independence Day Act, Pub. Law No. 117–17, 135 Stat. 287 (2021), which amends 5 U.S.C. § 6103(a) to add to the list of legal public holidays "Juneteenth National Independence Day, June 19."

The Committee has approved two amendments to incorporate the Juneteenth National

Independence Day into the holidays listed in the Rules of Criminal Procedure. At its fall meeting in 2021, the Committee approved an amendment adding Juneteenth to the definition of "legal holiday" in Rule 45(a)(6) (which governs time computation), and by a later email vote the Committee approved an amendment adding it to Rule 56(c), which allows courts to open the clerk's office except for certain listed federal holidays. The text of the proposed amendments and committee note appear at the end of this report.

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

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Raymond M. Kethledge, Chair
Advisory Committee on Criminal Rules

RE: Corrective Technical Amendment to Rule 16

DATE: May 16, 2022

Although Rule 16's new amendments on expert discovery are on track to take effect this December, the Department of Justice recently brought to our attention a typographical error in the amendments. This memo adds an action item to the Standing Committee's June 7th agenda, to approve a technical and conforming amendment to correct the error.

The Rule 16 amendments revise both the provision governing expert witness disclosures by the government – 16(a)(1)(G) – and the provision governing disclosures by the defense – 16(b)(1)(C). Both new (a)(1)(G) and (b)(1)(C) contain two exceptions to a new requirement that the expert must approve and sign the disclosure. One exception applies if the disclosing party had previously provided the information in a report signed by the witness.

The text for **government disclosures** – 16(a)(1)(G)(v) – has the correct cross reference. It states that a witness need not approve and sign the disclosure if the government "previously provided **under (F)** a report, signed by the witness, that contains all the opinions and the bases and reasons for them . . . ." 16(a)(1)(F) is titled "Reports of Examinations and Tests."

The text for **defense disclosures** – 16(b)(1)(C)(v) – has identical language, but should have referred to a report previously provided **under (B)**, not (F). 16(b)(1)(B) is the subparagraph titled "Reports of Examinations and Tests" for defendant's disclosures.

The technical amendment, approved by email vote of the Committee, would correct this typo as shown below:

> **(v) Signing the Disclosure.** The witness must approve and sign the disclosure, unless the defendant:
>
> * * * * *
>
> - has previously provided under (~~F~~B) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).

As a technical and conforming amendment, this correction would not need to be published. However, it would not take effect until December 1, 2023.

The delay before the correction takes effect is not likely to cause significant problems. The structure of the rule makes it clear that the correct reference should be to (B). Indeed, there is no (F) in the defense disclosure rule; the only (F) is in the prosecution disclosure section. Additionally, we expect that the Department of Justice and the Federal Defenders will inform their attorneys about the error. Finally, if the issue were litigated, judges could apply the doctrine of scrivener's error to apply the rule as intended, despite the typographical error.

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

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Raymond M. Kethledge, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules (Rule 62)

DATE: May 11, 2022

Last June, the Standing Committee approved for publication proposed Criminal Rule 62, the draft emergency rule. In April, the Criminal Rules Committee met to consider the public comments on the proposed rule, which numbered ten or so. After considerable discussion, the Committee chose not to revise the proposed rule, but approved two changes in the note dealing with alternative public access.

The Committee recommends that Rule 62, with the two changes in the note, be approved for transmittal to the Judicial Conference with the recommendation that the Conference transmit the rule to the Supreme Court.

A. The recommended changes in the committee note

The Committee recommends two amendments to the published note accompanying paragraph (d)(1), which requires courts to provide reasonable alternative access for the public. As amended, the note would read as follows:

> **Paragraph (d)(1)** addresses the courts' obligation to provide alternative access when emergency conditions have substantially impaired in-person attendance by the public at public proceedings. The term "public proceeding" ~~was~~ is[1] intended to capture proceedings that the rules require to be conducted "in open court," proceedings to which a victim must be provided access, and proceedings that must be open to the public under the First and Sixth Amendments. The rule creates a duty to provide the public~~, including victims,~~ with "reasonable alternative access," notwithstanding Rule 53's ban on the "broadcasting of judicial proceedings." Under appropriate circumstances, the reasonable alternative could be audio access to a video proceeding.
>
> The duty arises only when the substantial impairment of in-person access by the public is caused by emergency conditions. The rule does not apply when reasons other than emergency conditions restrict access. The duty arises not only when emergency conditions substantially impair the attendance of anyone, but also when conditions would allow participants but not the public to attend, as when capacity must be restricted to prevent contagion.
>
> Alternative access must be contemporaneous when feasible. For example, if public health conditions limit courtroom capacity, contemporaneous transmission to an overflow courthouse space ordinarily could be provided.
>
> When providing "reasonable alternative access," courts must be mindful of the constitutional guarantees of public access and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771.

a. Comments received

Three submissions commented on the reference to "victims" in the published committee note discussing (d)(1). They offered conflicting views.

The **Department of Justice (21-CR-0003-0008)** requested that the following sentence be added to the note: "When providing 'reasonable alternative access' courts must be mindful of victims' rights under the Crime Victims' Rights Act, 18 U.S.C. § 3771." It explained:

> …without an explicit reference to the CVRA, the commentary's grouping of victims with the public for the purposes of providing "reasonable alternative access, contemporaneous if feasible" may result in courts providing reasonable alternative access that falls short of the CVRA's requirements. We believe a victim should be

[1] To keep the present tense consistent throughout the note, the Committee also accepted this stylistic change at the meeting. No change in meaning is intended.

> considered similar to a participant in the proceedings, and not the public. Most importantly, we think the CVRA must be scrupulously followed. When providing "reasonable alternative access," courts must account for a victim who wishes to exercise her right: 1) to be "reasonably heard" at any public court proceeding involving the "release, plea, sentencing," or parole of the accused; 2) to not be excluded from any such court proceeding subject to limited exceptions; and 3) to have reasonable, accurate, and timely notice of any public court proceeding involving the crime, release, or escape of the accused. 18 U.S.C. § 3771(a)(2)-(4). Non-contemporaneous access or access that allows a victim to watch or listen, but not participate in the public proceedings, may not satisfy the CVRA. To avoid confusion the Department recommends explicitly referencing courts' obligations to comply with CVRA in the commentary.

The **National Association of Criminal Defense Lawyers (NACDL) (21-CR-0003-0011)** strongly disagreed with DOJ's request, and it urged no change to the published note. NACDL argued:

> The current draft Note is entirely correct to group alleged victims with other members of the public for this purpose. The CVRA does not dictate the details of "victim" notice or access, and in some respects is superseded by Fed.R.Crim.P. 60. As to procedural implementation, then, under the principles of the Rules Enabling Act the CVRA's notice and attendance requirements are properly subordinated to the provisions of the new Rule (in the event of a qualifying emergency), just as it is to Rule 60(a) in ordinary times. The Department's suggested addition to the Committee Note would not "avoid confusion" but rather would engender it, by encouraging challenges by alleged "victims," either before or after the fact, to proceedings held in accordance with the Rule.

Professor Miller and the Federal Criminal Justice Clinic at the University of Chicago (FCJC) (21-CR-0003-0013) requested that the Committee eliminate the phrase "'including victims' from the phrase 'duty to provide the public, including victims, with 'reasonable alternative access.'" Alternatively, the FCJC suggested revising the note to reflect the Sixth Amendment's priority of access for the friends and family of the defendant, and to ensure reasonable press access.

In addressing this topic and several others discussed below, the FCJC argued that some of the language in the proposed rule and note is misleading or inconsistent with existing constitutional standards:

> The Note's express reference to victims and silence about friends and family of the defendant may be interpreted to suggest that courts should prioritize the access rights of victims over others when space is limited. The Note thus appears to conflict with Supreme Court precedent that requires courts to provide access for friends and family of the accused, *Oliver*, 333 U.S. at 272.

The FCJC stated that "access problems can be felt most acutely by friends and family of the accused," listing lack of technology or the knowledge to use it, "[i]mprecise instructions that impede their ability to access proceedings," and the importance of their contributions at detention hearings and sentencings, under 18 U.S.C. §§ 3142(g)(3)(A); 3553(a)(1)."

b. Committee deliberations

The Committee accepted the subcommittee's recommendation to revise the note to draw attention to the concerns about victim participation under the CVRA—and also the concerns raised by FCJC that any access comply with the First and Sixth Amendments—without suggesting a position on substantive issues of constitutional law, assigning priority to any particular group among the public, or attempting to recite the groups "included" in "the public." After deleting the phrase "including victims," the revision adds the following sentence to the note's discussion of (d)(1):

> When providing "reasonable alternative access," courts must be mindful of the constitutional guarantees of public access, and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771.

The phrase "any applicable statutory provision, including the Crime Victims' Rights Act" is intended to encompass any other existing or future statutory provision that might be applicable.

The Committee agreed with the subcommittee's approach to the issues raised by public comments. But members extensively discussed two points concerning the precise wording of the new sentence: namely, whether to refer specifically to the First and Sixth Amendments, and whether to include a reference to the common law right of access.

As proposed by the subcommittee, the new sentence advised courts to be "mindful of the constitutional guarantees of public access in the First and Sixth Amendments." The proposal responded to the FCJC's concern that courts may overlook these rights during emergencies. At the April meeting, Judge Furman raised the question whether there might be other constitutional bases for a right of public access. No one had raised that issue before, and the reporters had not researched it. But members thought that defendants might turn to the Due Process Clause if the Sixth Amendment were not applicable, and they were reluctant to adopt language that might preclude such an approach.

Discussion focused on the benefits of drawing courts' attention to the extensive case law on the right of public access under the First and Sixth Amendments versus the potential for a negative implication that there were no other relevant constitutional rights. Members noted that the negative implication would be strengthened by the phrasing referring to statutory rights: "any applicable statutory provision, including the Crime Victims' Rights Act." There was some support for a revision to make the references to the constitutional and statutory provisions parallel, such as "the constitutional guarantees of public access, including the First and Sixth Amendments access and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771."

A majority of the Committee was persuaded that the better course was to refer generally to "the constitutional guarantees of public access," without a reference in the new sentence to the First and Sixth Amendments. Members who supported that view pointed out that the note as published already referred to these amendments. Just three paragraphs earlier, the note to (d)(1) provided:

> The term "public proceeding" was intended to capture proceedings that the rules require to be conducted "in open court," proceedings to which a victim must be provided access, and proceedings that must be open to the public under the First and Sixth Amendments.

With this reference already in the note accompanying the very provision in question, members thought the new reference to the constitutional guarantees of public access would be construed to include the First and Sixth Amendments, while avoiding the potential for a negative implication.

The discussion of this issue also addressed a second question, raised by Judge Bates at the meeting: whether the note should refer to a common law right of public access. This issue had not been raised during the drafting process, nor in any of the public comments, and the reporters had not researched it. During the meeting the reporters recalled, in general, that they had found support for a common law right of access while researching the issues raised by efforts to protect cooperators through methods such as sealing court records. In order to avoid any negative implication, members expressed support for the inclusion of a reference to the common law.

By a vote of seven to three, the Committee voted at the meeting to revise the addition to the note as follows:

> When providing "reasonable public access," courts must be mindful of the constitutional and common law guarantees of public access and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771.

After the meeting the reporters requested the assistance of the Rules Law Clerk, Mr. DeWitt, to determine whether there was a sufficient body of precedent on the common law right to physical presence at judicial proceedings to warrant an admonition that courts consider the common law in providing public access. His research found that only the Third Circuit had applied a common law right of access to proceedings, and all of the Third Circuit cases addressing the common law right of access did so while applying First and or Sixth Amendment rights to access as well.[2] None of these cases applied the common law right independently, or suggested that access under the common law right is any broader than access under the First or Sixth Amendment. The Eleventh Circuit, and several district courts from other circuits, mentioned a

[2] These cases from the Third Circuit enforce both the common law and constitutional rights simultaneously: Gov't of the V.I. v. Leonard A., 922 F.2d 1141, 1144-45 (3d Cir. 1991) (upholding district court decision to allow the daughter of a prosecution witness to remain in the courtroom); US Investigations Servs., LLC v. Callihan, No. 2:11-cv-0355, 2011 WL 1157256, at *1 (W.D. Pa. Mar. 29, 2011) (denying motion to close courtroom in civil case re trade secrets); Harris v. City of Philadelphia, No. CIV. A 82-1847, 1995 WL 385102, at *2 (E.D. Pa. June 26, 1995) (declining to close courtroom). And this one finds an exception to both constitutional and common law right of access and closed certain proceedings: United States v. Sabre Corp., 452 F. Supp. 3d 97, 149-50 (D. Del. 2020) (Stark, J), vacated as moot No. 20-1767, 2020 WL 4915824 (3d Cir. July 20, 2020).

common law right of access to judicial "proceedings and records" or "proceedings and documents" in cases addressing access to documents. Courts in other circuits by-and-large have not specifically addressed the issue, but turned to the common law only for discussion as to whether the public has a right to access certain documents.[3]

In light of this research, Judge Kethledge polled the Committee, which voted unanimously by email to delete the reference to "the . . . common law right" of access from the proposed addition to the committee note. The proposed addition provides:

> When providing "reasonable alternative access," courts must be mindful of the constitutional guarantees of public access, and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771.

B. Provisions with public comments, no change recommended

1. Subdivision (a) – the role of the Judicial Conference

a. Comments received

Two comments addressed the language in subdivision (a) authorizing the Judicial Conference to declare a "judicial emergency." The comments state conflicting views. The **Federal Magistrate Judges Association (FMJA) (21-CR-0003-0006)** expressed concern that "the Judicial Conference might not be well suited to addressing regional or District-specific emergencies of the type more likely to present in the future." In contrast, the **Federal Bar Association (21-CR-0003-0009)** "agree[d] that the Judicial Conference exclusively, rather than specific circuits, districts, or judges, should be permitted to declare a rules emergency." It noted that "[c]onferring this authority to the Judicial Conference alone should help prevent a disjointed or balkanized response to unusual circumstances, including emergencies affecting only particular regions or other subsets of federal courts."

b. Committee deliberations

The Committee declined to revise the carefully crafted consensus about the authority of the Judicial Conference reflected in subdivision (a) as published. It was satisfied that the Judicial Conference has the ability to gather information and respond quickly to emergencies, through its executive committee if necessary. Moreover, it is important to have the Judicial Conference act as a national gatekeeper, charged with strictly limiting the authority to depart from the Rules of Criminal Procedure, which have been carefully designed to protect constitutional and statutory rights, as well as other interests.

[3] The Sixth Circuit opinion in Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1177-79 (6th Cir. 1983), for example, discussed the common law right of access to proceedings for a couple of paragraphs, but the issue in the case was sealing documents.

2. Paragraph (d)(1) - deleting or revising references to requiring public access to be "contemporaneous if feasible"

As published, paragraph (d)(1) provided:

> **(1) Public Access to a Proceeding.** If emergency conditions substantially impair the public's in-person attendance at a public proceeding, the court must provide reasonable alternative access, contemporaneous if feasible.

a. Comments received

Two comments expressed concern that the language "contemporaneous if feasible" in the text of (d)(1) and accompanying note did not convey adequately the importance of providing contemporaneous access and might be read as endorsing delayed access. They proposed different revisions to avoid this concern.

The **FMJA (21-CR-0003-0006)** requested that the Committee "eliminate the reference of contemporaneous if feasible" or revise the text to "indicate public access may only be denied if the interests of justice require a proceeding to go forward without public access." The FMJA expressed concern that this phrase "might actually lead to more frequent denial of public access."

The **FCJC (21-CR-0003-0013)** commented that the Committee should revise the proposed rule to "expressly provide that any limitations on public access during Rules Emergencies must satisfy *Waller*." Specifically, "the Rule should be amended to expressly state that courts must provide both contemporaneous and audio-visual public access except where closure complies with the constitutional standard." The FCJC objected to the statement in the note that "Under appropriate circumstances, the reasonable alternative could be audio access to a video proceeding." Also, the FCJC urged that "the Rule and Note should clarify that feasibility and appropriateness are likewise governed by the constitutional standard."

b. Committee deliberations

After extensive discussion (Draft Minutes, pp. 13-18), the Committee decided to retain the phrase "contemporaneous if feasible," and not to add references to particular Supreme Court decisions defining the constitutional standards for public access. There was general agreement that it would not be appropriate for the rule or note to attempt to spell out the substantive constitutional requirements. But members found the decision whether to retain, reword, or eliminate the phrase "contemporaneous if feasible" more challenging.

During the drafting process, this phrase had been added to recognize the importance of contemporaneous access but also the possibility that such access might not be possible under emergency conditions that could be foreseen. By itself, the phrase "reasonable alternative access" is very general, and under emergency circumstances there was a concern that courts might not be attentive to the need for contemporaneous access. Adding this phrase to the text (as well as the note) was intended to serve as a reminder of this important norm, which might otherwise be overlooked in emergency situations. At the April meeting, there was a consensus that contemporaneous access should be the norm.

On the other hand, members recognized the need for flexibility given the impossibility of foreseeing the kinds of rules emergencies that might occur in the future. For example, in a situation like 9/11, telephone lines and the Internet could be down, and physical access interrupted as well. In that scenario, it might be impossible to provide public access contemporaneously.

But members also expressed concern that the limiting phrase, "contemporaneous *if feasible*" might, as the magistrate judges suggested, actually cause courts to provide less rather than more contemporary access. Members grappled with the tradeoff between the value of calling attention to the importance of contemporary access versus the possibility that the phrase might have such an unintended effect. Some possible compromises were discussed. The possibility of revising that phrase to the stronger wording of "contemporaneous if possible" was suggested, but several participants thought it would state too stringent a standard, potentially requiring herculean efforts. The possibility of deleting "contemporaneous if feasible" from the text but retaining it in the note was also considered. It was rejected because notes should not add requirements to the text, and they are also difficult for courts and litigants to access.

A member urged that when contemporaneous access cannot be provided proceedings should not occur, and she made a motion to revise the rule to require the court to provide "contemporaneous reasonable alternative access." She argued that contemporaneous access to a public hearing is critical to allow victims and family members to participate, and the press to hear as the proceeding is occurring. If some form of contemporary access cannot be provided, she thought proceedings should not go forward. But other participants disagreed, citing the need for flexibility and noting that it would be inappropriate to delay some proceedings. For example, if someone was due to be released on bond, the proceedings should not be delayed if there was no phone line or the Internet that people could use to allow public access.

When there was no second to the motion to revise the rule, the Committee accepted the language of the rule as published.

3. Paragraph (d)(1) - adding references to the constitutional tests and various requirements regarding public access

Several other changes were proposed to paragraph (d)(1), quoted above, or to the note accompanying it.

a. Comment received

The **FCJC (21-CR-0003-0013)** proposed a series of additions to the text of (d)(1) and/or the note: requiring court participants to be able to see the public, barring courts from conditioning public access on advance permission of the court, and requiring prominently placed, district-wide announcement of any public access limitations.

The FCJC urged the Committee to revise the rule and note to "expressly require that court participants be able to see the public unless *Waller* can be satisfied." Stating that during the pandemic at least 32 districts rendered spectators "effectively invisible" by reducing them to a phone number on a computer screen, the FCJC argued that the public should be visible to participants to the degree possible. It argued that "the presence of interested spectators may keep [the defendant's] triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller*, 467 U.S. at 46 (quoting *Gannett Co.*, 443 U.S. at 380). Without being seen, the

public may lose trust in the criminal justice system, the FCJC argued. Admitting that "*Waller* may well allow such restrictions based on technological capacity and courtroom decorum," the FCJC argued that "such closures should be analyzed and justified, not taken as the default."

The FCJC also asked the Committee to bar courts from conditioning public access on advance permission of the court, except as permitted by *Waller*. The submission states: "Eliminating advance registration requirements would bring public access during Rules Emergencies closer to the norm: The public could 'walk into' a courtroom at any time, with or without permission, unless the courtroom has been lawfully closed."

And the FCJC proposed adding to the rule the requirement of a prominently placed, district-wide announcement of any public access limitations that (a) details the scope of the limitation, (b) explains in plain language how the public can access court, and (c) contains necessary constitutional findings.

b. Committee deliberations

The Committee declined to add the proposed details to the rule or the note. If guidance this detailed is necessary, it should come from other sources, such as the Benchbook or the Committee on Court Administration and Case Management.

4. Paragraph (d)(1) - barring courthouse-only access to remote proceedings

a. Comment received

The **FCJC (21-CR-0003-0013)** also objected to language in the published note that states: "For example, if public health conditions limit courtroom capacity, contemporaneous transmission to an overflow courthouse space ordinarily could be provided." The FCJC argued that "[t]he Rule should prohibit courthouse-only [public] access to remote proceedings," and "should recommend that districts allow remote access to any proceedings remotely or partially remotely. That remote access should not be within the courthouse itself." Noting that several districts allowed only in-person public access, even to remote or partially remote hearings, the FCJC commented it is "debatable whether doing so during a deadly and contagious pandemic constitutes public access within the meaning of the First and Sixth Amendments." But in any event, the FCJC contended, such a restriction is "unwise." It explained: "when public health or safety is on the line—no one should have to choose between exercising their First or Sixth Amendment rights and risking their lives."

b. Committee deliberations

The Committee declined to revise the rule to prohibit court-house only alternative access to remote proceedings or to delete the language referring to overflow courthouse space from the note. Rule 53 generally bans broadcasting, and the norm is in-person attendance. The FCJC suggestion would limit how courts could navigate around the prohibition against broadcasting during emergencies, and would add an unprecedented prohibition regarding alternative in-person access. There was no support for making the proposed changes in the rule and note.

5. Paragraph (d)(2): written consents, waivers, and signatures of the defendant

This provision provides alternative signature requirements when emergency conditions limit a defendant's ability to sign. This was a particular problem for detained defendants who were unable to have in-person contact with counsel or receive and send documents electronically during the pandemic.

As published, (d)(2) states: "If any rule, including this rule, requires a defendant's signature, written consent, or written waiver—and emergency conditions limit a defendant's ability to sign—defense counsel may sign for the defendant if the defendant consents on the record." Paragraph (d)(2) also allows counsel to sign on behalf of a defendant who is not before the court at the time of consent; in that scenario, defense counsel must file an affidavit. The rule allows the judge to sign for the defendant only if the defendant is pro se and consents on the record.

As published, the note states:

> **Paragraph (d)(2)** recognizes that emergency conditions may disrupt compliance with a rule that requires the defendant's signature, written consent, or written waiver. If emergency situations limit the defendant's ability to sign, (d)(2) provides an alternative, allowing defense counsel to sign if the defendant consents. To ensure that there is a record of the defendant's consent to this procedure, the amendment provides two options: (1) defense counsel may sign for the defendant if the defendant consents on the record, or, (2) without the defendant's consent on the record, defense counsel must file an affidavit attesting to the defendant's consent to the procedure. The defendant's oral agreement on the record alone will not substitute for the defendant's signature. The written document signed by counsel on behalf of the defendant provides important additional evidence of the defendant's consent.
>
> The court may sign for a pro se defendant, if that defendant consents on the record. There is no provision for the court to sign for a counseled defendant, even if the defendant provides consent on the record. The Committee concluded that rules requiring the defendant's signature, written consent or written waiver protect important rights, and permitting the judge to bypass defense counsel and sign once the defendant agrees could result in a defendant perceiving pressure from the judge to sign. Requiring a writing from defense counsel is an essential protection when the defendant's own signature is not reasonably available because of emergency conditions.
>
> It is generally helpful for the court to conduct a colloquy with the defendant to ensure that defense counsel consulted with the defendant with regard to the substance and import of the pleading or document being signed, and that the consent to allow counsel to sign was knowing and voluntary.

a. Comments received

Judge Denise Cote (21-CR-0003-0005) recommended that (d)(2) be revised to provide that "defense counsel or the court may sign for the defendant." She explained "it may be difficult

and create unnecessary delay for the attorney to affix the defendant's name to a signature line and then provide that document to the court." She argued Rule 62 should focus exclusively on creating an unambiguous record of the defendant's consent, regardless of who affixes the defendant's signature. Describing her court's experience during emergencies including the pandemic, Judge Cote noted that it regularly conducted proceedings where everyone participated remotely from different locations, and it was both useful and important for the court to be able to sign documents on the defendant's behalf with proper safeguards:

> Defense counsel were provided an opportunity to consult confidentially with the defendant and the judge confirmed on the record that the consultation had occurred, that the issue requiring the defendant's signature had been discussed, and that the defendant had knowingly and voluntarily given consent. Defense counsel often ask the judge to add the defendant's signature to the form or express relief when we volunteer to do so. Again, what is essential is that the consultation has occurred, that consent has been knowing and voluntary, and that there is an adequate contemporaneous record of this consultation and assent.

The **FMJA (21-CR-0003-0006)** agreed that the court should be able to sign for a defendant if the court can obtain "oral consent on the record." It urged that:

> Flexibility during emergencies is the key to ensuring a defendant can be seen promptly by the Court, especially when first arrested. Many members of the FMJA had to obtain oral consent on the record during the pandemic and believe the flexibility to do this was critical to ensuring that initial presentments, in particular, went forward without delay.

b. Committee deliberations

Allowing counsel to sign for the defendant was first suggested at the 2020 miniconference by defense attorneys, who said it was working well. The Committee discussed the issue again at its November 2020 meeting. There, in response to a suggestion that the judge should be permitted to sign for a defendant who consented on the record, Judge Dever (who then chaired the Emergency Rules subcommittee) noted that the written signature by counsel on the defendant's behalf is an "extra piece of evidence to the extent someone later says, 'I didn't really consent, or the judge misunderstood me'. . . ." Minutes, at 19. Judge Dever raised an additional concern "that the judge might get in between that relationship, and that having the lawyer sign was better than allowing the judge to say, 'you consent—don't you?—and we're going to do this today.'" *Id.* at 28. The Committee declined to revise the rule to allow the court to sign for a represented defendant.

At its April 2022 meeting, the Committee gave this question plenary consideration. The Committee's discussion revealed little support for claims that defense counsel wanted judges to be able to sign for their clients. Nor was there much evidence that defense counsel have been unable themselves to sign on their clients' behalf. To the contrary, every defense member, as well as many judicial members, said that defense counsel have been able to sign and submit those documents without problems. One member summed it up this way: "it is a matter of expediency that maybe isn't worth the possible infringement on rights if we have the judge get involved. The defense attorney should be doing the advising." Draft Minutes, at p. 24.

6. Paragraph (d)(4): Rule 35 deadlines

Rule 62(d)(4) allows a court to extend the time to take action under Rule 35 as reasonably necessary when emergency conditions provide good cause to do so. The published committee note states the rationale for this provision:

> **Paragraph (d)(4)** provides an emergency exception to Rule 45(b)(2), which prohibits the court from extending the time to take action under Rule 35 "except as stated in that rule." When emergency conditions provide good cause for extending the time to take action under Rule 35, the amendment allows the court to extend the time for taking action "as reasonably necessary." The amendment allows the court to extend the 14-day period for correcting a clear error in the sentence under Rule 35(a) and the one-year period for government motions for sentence reductions based on substantial assistance under Rule 35(b)(1). Nothing in this provision is intended to expand the authority to correct or reduce a sentence under Rule 35. This emergency rule does not address the extension of other time limits because Rule 45(b)(1) already provides the necessary flexibility for courts to consider emergency circumstances. It allows the court to extend the time for taking other actions on its own or on a party's motion for good cause shown.

a. Comment received

The **Department of Justice (21-CR-0003-0008)** recommended that the Committee add to the note accompanying this paragraph the following language to make it clear that the extension is "limited to sentences imposed immediately prior to or during the criminal rules emergency." It explained:

> The extension of time to take action under Rule 35 only applies to sentences imposed within 14 days immediately prior to the declaration of a criminal rules emergency or to sentences imposed during the criminal rules emergency. Nothing in this rule is intended to provide relief for a defendant who had the benefit of a full 14-day period under Rule 35, but failed to take action.

b. Committee deliberations

The Department did not raise this proposed addition during the drafting process. It did previously suggest limiting language for the note. At the Department's suggestion the Committee approved the sentence that reads: "Nothing in this provision is intended to expand the authority to correct or reduce a sentence under Rule 35."

The subcommittee recommended that the Committee reject the new addition suggested by the Department. The subcommittee concluded that the rule was clear and no additional language in the note was needed to address any frivolous motions seeking relief, including motions by those who had the benefit of a full 14-day period under Rule 35 before the emergency declaration but failed to take action.

At the April Committee meeting, Mr. Wroblewski said the Department was satisfied with

these deliberations by the subcommittee, and that he did not intend to renew the request for new note language. Draft Minutes, at p. 42.

7. Paragraphs (e)(1), (2), and (3): consultation opportunities with counsel

Subdivision (e) provides authority to use virtual conferencing technology when emergency conditions limit the physical presence of participants at criminal proceedings. The Advisory Committee concluded that, given the critical interests served by holding proceedings in court, any authority to substitute virtual for physical presence must extend no further than necessary.

Paragraph (e)(1) addresses proceedings that courts may already conduct by videoconference with the defendant's consent under existing Rules 5, 10, 40, and 43(b)(2) (initial appearances, arraignments, and certain misdemeanor proceedings). The committee note explains that paragraph (e)(1) –

> does not change the court's existing authority to use videoconferencing for these proceedings, except that it requires the court to address emergency conditions that significantly impair the defendant's opportunity to consult with counsel. In that situation, the court must ensure that the defendant will have an adequate opportunity for confidential consultation before and during videoconference proceedings under Rules 5, 10, 40, and 43(b)(2).

Paragraphs (e)(2) and (3), addressing the use of videoconferencing in other proceedings, also require that the court must ensure that the defendant will have an adequate opportunity for confidential consultation before and during videoconference proceedings.

a. Comments received

Three of the comments received by the Committee addressed the language requiring an adequate opportunity to consult confidentially with counsel.

The **FMJA (21-CR-0003-0006)** recommended deleting from paragraph (e)(1) the requirement "that if emergency conditions substantially impair the defendant's opportunity to consult with counsel, the court must ensure that the defendant will have an adequate opportunity to do so confidentially before and during those proceedings." That paragraph addresses videoconferencing authorized by current Rules 5, 10, 40, and 43(b)(2). The FMJA expressed concern that this requirement "appears to impose a duty on the Court only in emergency situations," and implies that this obligation does not exist in the non-emergency times.

Judge Cote (21-CR-0003-0005) recommended revising the proposed consultation requirements in (e)(1) and (2) so that they require that the defendant have an "adequate opportunity" to consult with counsel "confidentially either before ~~and~~ or during" certain videoconference proceedings. She explained:

> Our experience . . . has been that consultation between the defendant and defense counsel might be very difficult to arrange, particularly if a defendant is

> incarcerated. If the record created by the judge during the proceeding establishes that an adequate opportunity for consultation has been provided for the particular proceeding (that is, for whatever the defendant must understand from that proceeding and do at it), that should be sufficient.

A third comment from **NACDL (21-CR-0003-0011)** supported retaining the requirement as published but recommended adding to the note more explanation of what an "adequate opportunity" would entail. NACDL expressed strong support for the requirement of an adequate opportunity to consult with counsel before (as well as during) proceedings under proposed Rule 62(e). During the pandemic, NACDL's members were "often unable to consult with clients—a critical aspect of rendering effective assistance of counsel—as frequently, for as long, or with sufficient privacy, as is required for us to establish a proper attorney-client relationship and fulfill our professional duties and constitutional mission." NACDL urged an addition to the committee note stating that "an 'adequate opportunity' will ordinarily require an unhurried and confidential meeting between the accused and counsel that occurs well before—and whenever feasible, not on the same day as—the proceeding itself." Noting that the current note is silent on what "before" means, NACDL urged that it should not be sufficient to have only a few minutes of contact just before the proceeding, while the other participants are waiting.

b. Committee deliberations

At the April 2022 meeting, members did not share the FMJA's concern that the requirement in (e)(1) that the court ensure an adequate opportunity for confidential consultation for proceedings under Rules 5, 10, 40, and 43(b) would somehow imply that the same obligation is absent in non-emergency times. The requirement, the subcommittee had concluded, is clearly conditioned on the impairment of consultation opportunities by emergency conditions—and will not suggest that courts can dispense with consultation opportunities in non-emergency times.

Members were similarly unpersuaded by Judge Cote's suggestion to require only an adequate opportunity before *or* during the proceeding. Arguably the top priority for the defense bar with respect to the emergency rule has been to ensure an adequate opportunity to consult with clients. Members likewise emphasized the importance of these consultations, and saw no practical reason to dilute this requirement.

As for NACDL's request for added language defining when consultation would be adequate, the subcommittee recommendation to the Committee was that no change to the rule or note as published be made, and no Committee member opted to discuss this issue further.

8. Paragraph (e)(3): defendant's written request for videoconferencing for pleas and sentencings

This provision prompted lengthy discussion at the Committee's April meeting. Paragraph (e)(3), like the CARES Act, imposes more restrictions on the use of videoconferencing at pleas and sentencings than it imposes on its use in other proceedings. In addition to the consultation requirement, videoconferencing for pleas or sentencings are permissible only if (1) the chief judge of the district makes a district-wide finding that emergency conditions substantially impair a court's ability to hold felony pleas and sentencings in person in that district, (2) "the defendant, after consulting with counsel, requests in a writing signed by the defendant that the proceeding be conducted by videoconferencing," and (3) the court finds "that further delay in that particular case would cause serious harm to the interests of justice."

As published, the committee note accompanying this provision states:

> **Paragraph (e)(3)** addresses the use of videoconferencing for a third set of proceedings: felony pleas and sentencings under Rules 11 and 32. The physical presence of the defendant together in the courtroom with the judge and counsel is a critical part of any plea or sentencing proceeding. Other than trial itself, in no other context does the communication between the judge and the defendant consistently carry such profound consequences. The importance of defendant's physical presence at plea and sentence is reflected in Rules 11 and 32. The Committee's intent was to carve out emergency authority to substitute virtual presence for physical presence at a felony plea or sentence only as a last resort, in cases where the defendant would likely be harmed by further delay. Accordingly, the prerequisites for using videoconferencing for a felony plea or sentence include three circumstances in addition to those required for the use of videoconferencing under (e)(2).
>
> Subparagraph (e)(3)(A) requires that the chief judge of the district (or alternate under 28 U.S.C. § 136(e)) make a district-wide finding that emergency conditions substantially impair a court's ability to hold felony pleas and sentencings in person in that district within a reasonable time. This finding serves as assurance that videoconferencing may be necessary and that individual judges cannot on their own authorize virtual pleas and sentencings when in-person proceedings might be manageable with patience or adaptation. Although the finding serves as assurance that videoconferencing might be necessary in the district, as under (e)(2), individual courts within the district may not conduct virtual plea and sentencing proceedings in individual cases unless they find the remaining criteria of (e)(3) and (4) are satisfied.
>
> Subparagraph (e)(3)(B) states that the defendant must request in writing that the proceeding be conducted by videoconferencing, after consultation with counsel. The substitution of "request" for "consent" was deliberate, as an additional protection against undue pressure to waive physical presence. This requirement of writing is, like other requirements of writing in the rules, subject to the emergency provisions in (d)(2), unless the relevant emergency declaration excludes the

> authority in (d)(2). To ensure that the defendant consulted with counsel with regard to this decision, and that the defendant's consent was knowing and voluntary, the court may need to conduct a colloquy with the defendant before accepting the written request.
>
> Subparagraph (e)(3)(C) requires that before a court may conduct a plea or sentencing proceeding by videoconference, it must find that the proceeding in that particular case cannot be further delayed without serious harm to the interests of justice. Examples may include some pleas and sentencings that would allow transfer to a facility preferred by the defense, or result in immediate release, home confinement, probation, or a sentence shorter than the time expected before conditions would allow in-person proceedings. A judge might also conclude that under certain emergency conditions, delaying certain guilty pleas under Rule 11(c)(1)(C), even those calling for longer sentences, may result in serious harm to the interests of justice.

a. Comments received

The Committee received comments from **Judge Denise Cote (21-CR-0003-0005)** and **Judge Mark R. Hornak (21-CR-0003-0012)** on this portion of the rule.

Judge Cote recommended omitting the requirement that felony pleas and sentencing can occur by videoconferencing only if the defendant, after consulting with counsel, requests in writing that the proceeding be conducted by videoconferencing. She urged that the rule be revised to allow videoconferencing if "the court finds during the proceeding that the defendant, following consultation with counsel, has requested that the proceeding be conducted by videoconferencing."

Judge Cote contended there is no need for a written request received *before* the proceeding, and if a written request is required, the rule should allow signature by the defendant, defense counsel, *or the court* on behalf of and with authorization from the defendant on the record. She urged that the focus should be on whether there is consent, based on consultation with defense counsel, and that the record adequately reflect informed and voluntary consent. She stressed practical difficulties:

> During an emergency it may be particularly difficult for a defendant to sign and transmit any writing to his/her counsel or the court. A defendant, particularly an incarcerated defendant, may lack access to the technology needed to sign and electronically transmit a request to his/her counsel or the court, and during an emergency such as a pandemic, defense counsel and the court may not be able to receive a signed writing by mail. Even if the Rule envisions that defense counsel may sign the written request on behalf of the defendant, defense counsel may in many emergencies find it difficult to create the writing and to transmit it.

Judge Hornak concurred in this portion of Judge Cote's comment. Based on his court's experience, he concluded:

> the requirement of an advance writing signed by the defendant (1) would likely be inconsistent with the circumstances generating the emergency that would warrant such proceedings in the first place, (2) would generate a procedure that would be functionally impractical in most every case during an emergency, (3) would create a precondition for which there does not appear to be empirical or anecdotal evidence of necessity, and (4) addresses a concern which may be readily addressed in alternative ways.

Judge Hornak stated that in his court the defendant's consent has been placed on the record and then confirmed in a colloquy with the defendant and counsel at each video-conference proceeding. He concluded that "imposing the 'written request signed by the defendant' requirement is almost certainly inconsistent with the existence of the emergency that would require it in the first place." Difficulties of access "will be particularly acute for those in detention, but even for defendants on bond/conditions of release, physical or other access in order to exchange and process written and signed request documents will likely be most challenging and difficult for their own reasons."

Judge Hornak also stated that in his experience the courts have been conducting "a detailed on-the-record colloquy to confirm the counseled consent and desire of the defendant to proceed via videoconferencing, and in those in which I have presided, there has been no doubt about that counseled consent and desire before the hearing proceeded." In his role as chief judge, he had received no formal or informal concerns about the counseled voluntary nature of the defendants' consent. Moreover, he argued, imposing this requirement is inconsistent with the type and level of judgments that district judges make in every plea proceeding. Finally, he concluded that allowing counsel to sign the required writing would not solve the problem because the existence of the emergency would almost always impede counsel's access.

Accordingly, Judge Hornak recommended either retaining the current consent procedures under the CARES Act, or requiring confirmation of counseled consent and a desire to proceed by videoconferencing via a judicial colloquy with the defendant at the beginning of the proceeding in question.

b. Committee deliberations.

To the extent these comments reflected concern about any inability of defendants themselves to sign, that concern is already addressed in (d)(2). The Committee's discussion as to (e)(3) itself focused on whether the rule meant that the written request must be submitted *in advance* of the videoconference in which the plea proceeding takes place, or whether instead the defendant can somehow make that written request during a videoconference proceeding.

Throughout the discussion of (e)(3), Judge Kethledge and other members stressed the Committee's animating concern for the requirement that any request for remote pleas or sentencings originate from the *defendant*, in writing. That concern is that some judges do not share the Committee's view that conducting a plea or sentencing remotely is truly a last resort. Instead, some judges have emphasized convenience or efficiency more than whether the defendant himself would prefer an in-person proceeding. As Judge Kethledge explained (Draft Minutes, at p. 36):

> Institutionally we come with a different perspective. He remembered from his early days on the Committee where we would get these requests, it seemed once a year. He recalled one from a judge in another district who had a lake house in Maine, and he wanted to sentence people when he was in Maine. The Committee has received these requests every year for remote pleas and sentencing. Institutionally it has a sense that there are many judges who want to do this more often than they should.
>
> And . . . the defense bar never came to us with this. The defense bar never came saying, "We're having a problem. My guy wants to make it a plea and he can't." We have never heard a peep along those lines from the defense bar. The Department of Justice hasn't come to us. It has always been judges who wanted this, and we're a little paranoid about that. This is the most important thing that happens in a courtroom. It is much more important than what happens in our appellate courtrooms. That, he said, was the concern.

Similar comments at the meeting included statements describing judges who had expressed "frustration and anger about not being able to force a defendant to go forward virtually" and attorneys "being pressured by the courts to get their clients . . . pled, and out of whatever jail system they were in . . . having that barrier between the client and the court is a very important protection." Judge Kethledge reiterated that "there are many judges who want to do a lot of remote pleas and sentencings . . . . That's the concern."

Request v. Consent

The requirement that the *request* for a video proceeding come from the defendant—after consultation with counsel—is aimed to prevent a defendant from feeling pressured to *consent* to a remote plea or sentencing if that were suggested by the judge. The Committee's concern was "that the judge could be really nice about it and not say anything objectionable when you read the record, but a criminal defendant might feel pressured to agree to do these proceedings remotely" when the person who will sentence him is asking. Draft Minutes, at p. 26.

Judge Bates asked whether his district's practice of including a consent to video in the plea agreement would comply with the requirement of "request" in proposed rule. He asked if the idea of holding a plea or sentence by video could come initially from the prosecution instead of the defendant. Judge Kethledge's response was yes, so long as in the document submitted to the court, the defendant says, "I request" or "I want my proceeding to be remote," rather than just "I agree" or "I consent." It can't be the judge saying to the defendant, "Do you have a problem with this?"

A judicial member echoed this understanding: "...[W]e're all experiencing during the pandemic some slippage into Zoom court appearances and Zoom arguments. This language signals this last line, that when it comes to plea discussions and sentencings, that should be done in person unless the defendant affirmatively requests it." Draft Minutes, at p. 27. This member described her interpretation of the rule:

> . . . . [S]he did not read the rule as requiring that the defendant has to be the initiator of the idea. If the defendant is not going to serve a whole lot more time and the logistical difficulties are such that everybody's motivated to get the plea agreement on the record as

> soon as possible, the prosecutor could go to defense counsel and say, "Hey, is he interested in doing it by video? Maybe we need to talk about that? Can you go talk to your client about that?" It doesn't matter who initiated the discussion so long as the request is initiated by the defendant as far as the court is concerned. There has to be a formal request rather than having it come up impromptu during the middle of discussion. In that sense, this requirement, in context, is very different than just consent. This is something that after careful consideration and discussion with counsel, the defendant asks that the court go forward with the video conferencing.

Id. at 28.

Timing of the request

The comments of both Judge Cote and Judge Hornak assumed that the written request must be submitted prior to the plea or sentencing proceeding. They opposed that requirement. Judge Furman shared that opposition to a requirement that the written request be filed in advance. He did not read the language of the rule to require that the request be filed in advance. He thus urged the Committee to add language to the note stating two things: first, that the preferred approach would be to schedule a video plea or sentence only if the defense had already filed a request to that effect with the court; but second, the rule as written would permit a court to convert an ongoing videoconference—originally convened for some other purpose—to a remote plea or sentencing if the defense wrote out a request to that effect and held it up to the camera for the judge to see. Judge Furman said that this process was frequently used in his district.

Judge Bates and some Committee members read the rule to allow what Judge Furman described, but most did not. They thought that the nature of a written request to a court is that the court must have the request in hand for the request to be effective. Judge Kethledge and some members also thought that any process that allows judges to accept a defendant's mid-hearing request for a remote plea or sentence would open the door to actual or perceived pressure by the judge upon the defendant to make that request—which is precisely what this requirement seeks to avoid.

Ultimately, no member of the Committee moved to add the note language that Judge Furman requested. A member did move to amend the rule expressly to require that the defendant's request for videoconferencing be "filed," but the motion was withdrawn because of uncertainty about whether that revision would require republication.

9. Adding a new subdivision on grand juries

The **Department of Justice (21-CR-0003-0008)** also recommended adding a new paragraph (d)(5) to allow courts to extend the term of sitting grand juries during judicial emergencies. In its submission **NACDL (21-CR-0003-0011)** opposed this proposal.

Because this new provision could not be added without republication of the whole rule, derailing the accelerated schedule set by the Standing Committee for all of the emergency rules, the Committee treated this as a new suggestion. It is discussed as an information item in the Committee's general report.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 106. Remainder of or Related ~~Writings or Recorded~~ Statements

If a party introduces all or part of a ~~writing or recorded~~ statement, an adverse party may require the introduction, at that time, of any other part—or any other ~~writing or recorded~~ statement—that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.

Committee Note

Rule 106 has been amended in two respects:

(1) First, the amendment provides that if the existing fairness standard requires completion, then that completing statement is admissible over a hearsay objection. Courts have been in conflict over whether completing evidence properly required for completion under Rule 106 can be admitted over a hearsay objection. The Committee has determined that the rule of completeness, grounded in fairness, cannot fulfill its function if the party that creates a misimpression about the meaning of a proffered statement can then object on hearsay grounds and exclude a statement that would correct the misimpression. *See United States v.*

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

Sutton, 801 F.2d 1346, 1368 (D.C. Cir. 1986) (noting that "[a] contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court"). For example, assume the defendant in a murder case admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership creates a misimpression because it suggests that the defendant implied that he owned the weapon at the time of the crime—when that is not what he said. In this example the prosecution, which has created the situation that makes completion necessary, should not be permitted to invoke the hearsay rule and thereby allow the misleading statement to remain unrebutted. A party that presents a distortion can fairly be said to have forfeited its right to object on hearsay grounds to a statement that would be necessary to correct the misimpression. For similar results see Rules 502(a), 410(b)(1), and 804(b)(6).

The courts that have permitted completion over hearsay objections have not usually specified whether the completing remainder may be used for its truth or only for its non-hearsay value in showing context. Under the amended rule, the use to which a completing statement can be put will depend on the circumstances. In some cases, completion will be sufficient for the proponent of the completing statement if it is admitted to provide context for the initially proffered statement. In such situations, the completing statement is properly admitted over a hearsay objection because it is offered for a non-hearsay purpose. An example would be a completing statement that corrects a misimpression about what a party heard before undertaking a disputed action, where the party's state of mind is relevant. The completing statement in this example is admitted only to show what the party actually heard, regardless of the underlying truth of the completing statement. But in some

cases, a completing statement places an initially proffered statement in context only if the completing statement is true. An example is the defendant in a murder case who admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. The statement about selling the weapon corrects a misimpression only if it is offered for its truth. In such cases, Rule 106 operates to allow the completing statement to be offered as proof of a fact.

(2) Second, Rule 106 has been amended to cover all statements, including oral statements that have not been recorded. Most courts have already found unrecorded completing statements to be admissible under either Rule 611(a) or the common-law rule of completeness. This procedure, while reaching the correct result, is cumbersome and creates a trap for the unwary. Most questions of completion arise when a statement is offered in the heat of trial—where neither the parties nor the court should be expected to consider the nuances of Rule 611(a) or the common law in resolving completeness questions. The amendment, as a matter of convenience, covers these questions under one rule. The rule is expanded to now cover all statements, in any form -- including statements made through conduct or sign language.

The original committee note cites "practical reasons" for limiting the coverage of the rule to writings and recordings. To the extent that the concern was about disputes over the content or existence of an unrecorded statement, that concern does not justify excluding all unrecorded statements completely from the coverage of the rule. *See United States v. Bailey*, 2017 WL 5126163, at *7 (D. Md. Nov. 16, 2017) ("A blanket rule of prohibition is unwarranted, and invites abuse. Moreover, if the content of some oral statements are disputed and difficult to prove,

others are not—because they have been summarized . . . , or because they were witnessed by enough people to assure that what was actually said can be established with sufficient certainty."). A party seeking completion with an unrecorded statement would of course need to provide admissible evidence that the statement was made. Otherwise, there would be no showing that the original statement is misleading, and the request for completion should be denied. In some cases, the court may find that the difficulty in proving the completing statement substantially outweighs its probative value—in which case exclusion is possible under Rule 403.

The rule retains the language that completion is made at the time the original portion is introduced. That said, many courts have held that the trial court has discretion to allow completion at a later point. *See, e.g.*, *Phoenix Assocs. III v. Stone*, 60 F.3d 95, 103 (2d Cir. 1995) ("While the wording of Rule 106 appears to require the adverse party to proffer the associated document or portion contemporaneously with the introduction of the primary document, we have not applied this requirement rigidly."). Nothing in the amendment is intended to limit the court's discretion to allow completion at a later point.

The intent of the amendment is to displace the common-law rule of completeness. In *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171–72 (1988), the Court in dictum referred to Rule 106 as a "partial codification" of the common-law rule of completeness. There is no other rule of evidence that is interpreted as coexisting with common-law rules of evidence, and the practical problem of a rule of evidence operating with a common-law supplement is apparent—especially when the rule is one, like the rule of completeness, that arises most often during the trial.

The amendment does not give a green light of admissibility to all excised portions of statements. It does not change the basic rule, which applies only to the narrow circumstances in which a party has created a misimpression about the statement, and the adverse party proffers a statement that in fact corrects the misimpression. The mere fact that a statement is probative and contradicts a statement offered by the opponent is not enough to justify completion under Rule 106. So, for example, the mere fact that a defendant denies guilt before later admitting it does not, without more, mandate the admission of his previous denial. *See United States v. Williams*, 930 F.3d 44 (2d Cir. 2019).

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 615. Excluding Witnesses from the Courtroom; Preventing an Excluded Witness's Access to Trial Testimony

(a) Excluding Witnesses. At a party's request, the court must order witnesses excluded from the courtroom so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(a)(1) a party who is a natural person;

(b)(2) an one officer or employee of a party that is not a natural person, after being if that officer or employee has been designated as the party's representative by its attorney;

(c)(3) a any person whose presence a party shows to be essential to presenting the party's claim or defense; or

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

~~(d)~~**(4)** a person authorized by statute to be present.

(b) Additional Orders to Prevent Disclosing and Accessing Testimony. An order under (a) operates only to exclude witnesses from the courtroom. But the court may also, by order:

(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and

(2) prohibit excluded witnesses from accessing trial testimony.

Committee Note

Rule 615 has been amended for two purposes:

(1) Most importantly, the amendment clarifies that the court, in entering an order under this rule, may also prohibit excluded witnesses from learning about, obtaining, or being provided with trial testimony. Many courts have found that a "Rule 615 order" extends beyond the courtroom, to prohibit excluded witnesses from obtaining access to or being provided with trial testimony. But the terms of the rule did not so provide; and other courts have held that a Rule 615 order was limited to exclusion of witnesses from the trial. On the one hand, the courts extending Rule 615 beyond courtroom exclusion properly recognized that the core purpose of the rule is to prevent

witnesses from tailoring their testimony to the evidence presented at trial—and that purpose can only be effectuated by regulating out-of-court exposure to trial testimony. *See United States v. Robertson*, 895 F.3d 1206, 1215 (9th Cir. 2018) ("The danger that earlier testimony could improperly shape later testimony is equally present whether the witness hears that testimony in court or reads it from a transcript."). On the other hand, a rule extending an often vague "Rule 615 order" outside the courtroom raised questions of fair notice, given that the text of the rule itself was limited to exclusion of witnesses from the courtroom.

An order under subdivision (a) operates only to exclude witnesses from the courtroom. This includes exclusion of witnesses from a virtual trial. Subdivision (b) emphasizes that the court may by order extend the sequestration beyond the courtroom, to prohibit those subject to the order from disclosing trial testimony to excluded witnesses, as well as to directly prohibit excluded witnesses from trying to access trial testimony. Such an extension is often necessary to further the rule's policy of preventing tailoring of testimony.

The rule gives the court discretion to determine what requirements, if any, are appropriate in a particular case to protect against the risk that witnesses excluded from the courtroom will obtain trial testimony.

Nothing in the language of the rule bars a court from prohibiting counsel from disclosing trial testimony to a sequestered witness. To the extent that an order governing counsel's disclosure of trial testimony to prepare a witness raises questions of professional responsibility and effective assistance of counsel, as well as the right to confrontation in criminal cases, the court should address those questions on a case-by-case basis.

(2) Second, the rule has been amended to clarify that the exception from exclusion for entity representatives is limited to one designated representative per entity. This limitation, which has been followed by most courts, generally provides parity for individual and entity parties. The rule does not prohibit the court from exercising discretion to allow an entity-party to swap one representative for another as the trial progresses, so long as only one witness-representative is exempt at any one time. If an entity seeks to have more than one witness-representative protected from exclusion, it needs to show under subdivision (a)(3) that the witness is essential to presenting the party's claim or defense. Nothing in this amendment prohibits a court from exempting from exclusion multiple witnesses if they are found essential under (a)(3).

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the ~~expert has reliably applied~~ expert's opinion reflects a reliable application of the

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

principles and methods to the facts of the case.

Committee Note

Rule 702 has been amended in two respects:

(1) First, the rule has been amended to clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule. *See* Rule 104(a). This is the preponderance of the evidence standard that applies to most of the admissibility requirements set forth in the evidence rules. *See Bourjaily v. United States*, 483 U.S. 171, 175 (1987) ("The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration."); *Huddleston v. United States*, 485 U.S. 681, 687 n.5 (1988) ("preliminary factual findings under Rule 104(a) are subject to the preponderance-of-the-evidence standard"). But many courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a).

There is no intent to raise any negative inference regarding the applicability of the Rule 104(a) standard of proof for other rules. The Committee concluded that emphasizing the preponderance standard in Rule 702 specifically was made necessary by the courts that have failed to apply correctly the reliability requirements of that

rule. Nor does the amendment require that the court make a finding of reliability in the absence of objection.

The amendment clarifies that the preponderance standard applies to the three reliability-based requirements added in 2000—requirements that many courts have incorrectly determined to be governed by the more permissive Rule 104(b) standard. But it remains the case that other admissibility requirements in the rule (such as that the expert must be qualified and the expert's testimony must help the trier of fact) are governed by the Rule 104(a) standard as well.

Some challenges to expert testimony will raise matters of weight rather than admissibility even under the Rule 104(a) standard. For example, if the court finds it more likely than not that an expert has a sufficient basis to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility. But this does not mean, as certain courts have held, that arguments about the sufficiency of an expert's basis always go to weight and not admissibility. Rather it means that once the court has found it more likely than not that the admissibility requirement has been met, any attack by the opponent will go only to the weight of the evidence.

It will often occur that experts come to different conclusions based on contested sets of facts. Where that is so, the Rule 104(a) standard does not necessarily require exclusion of either side's experts. Rather, by deciding the disputed facts, the jury can decide which side's experts to credit. "[P]roponents 'do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable. . . . The evidentiary requirement of

reliability is lower than the merits standard of correctness.'" Advisory Committee Note to the 2000 amendment to Rule 702, quoting *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 744 (3d Cir. 1994).

Rule 702 requires that the expert's knowledge "help" the trier of fact to understand the evidence or to determine a fact in issue. Unfortunately, some courts have required the expert's testimony to "appreciably help" the trier of fact. Applying a higher standard than helpfulness to otherwise reliable expert testimony is unnecessarily strict.

(2) Rule 702(d) has also been amended to emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology. Judicial gatekeeping is essential because just as jurors may be unable, due to lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert's basis and methodology may reliably support.

The amendment is especially pertinent to the testimony of forensic experts in both criminal and civil cases. Forensic experts should avoid assertions of absolute or one hundred percent certainty—or to a reasonable degree of scientific certainty—if the methodology is subjective and thus potentially subject to error. In deciding whether to admit forensic expert testimony, the judge should (where possible) receive an estimate of the known or potential rate of error of the methodology employed, based (where appropriate) on studies that reflect how often the method produces accurate results. Expert opinion testimony regarding the weight of feature comparison evidence (i.e., evidence that a set of

features corresponds between two examined items) must be limited to those inferences that can reasonably be drawn from a reliable application of the principles and methods. This amendment does not, however, bar testimony that comports with substantive law requiring opinions to a particular degree of certainty.

Nothing in the amendment imposes any new, specific procedures. Rather, the amendment is simply intended to clarify that Rule 104(a)'s requirement applies to expert opinions under Rule 702. Similarly, nothing in the amendment requires the court to nitpick an expert's opinion in order to reach a perfect expression of what the basis and methodology can support. The Rule 104(a) standard does not require perfection. On the other hand, it does not permit the expert to make claims that are unsupported by the expert's basis and methodology.

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

MEMORANDUM

TO: Honorable John D. Bates, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Patrick J. Schiltz, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: May 15, 2022

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met in Washington, D.C., on May 6, 2021. At the meeting the Committee discussed and gave final approval to three proposed amendments that had been released for public comment. The Committee also considered and approved six proposed amendments with the recommendation that they be released for public comment.

The Committee made the following determinations at the meeting:

● It unanimously approved proposed amendments to Rules 106, 615, and 702, and recommends to the Standing Committee that they be transmitted to the Judicial Conference.

* * * * *

A full description of all of these matters can be found in the draft minutes of the Committee meeting, attached to this Report. The proposed amendments can also be found as attachments to this Report.

II. Action Items

A. Proposed Amendment to Rule 106, for Final Approval

At the suggestion of Judge Paul Grimm, the Committee has for the last five years considered and discussed whether Rule 106 --- the rule of completeness --- should be amended. Rule 106 provides that if a party introduces all or part of a written or recorded statement in such a way as to be misleading, the opponent may introduce a completing statement that would correct the misimpression. The Committee has considered whether Rule 106 should be amended in two respects: 1) to provide that a completing statement is admissible over a hearsay objection; and 2) to expand the rule to cover unrecorded oral statements, as well as written and recorded statements.

The courts are not uniform in their treatment of these issues. On the hearsay question, some courts have held that when a party introduces a portion of a statement that is misleading, that party can still object, on hearsay grounds, to completing evidence that corrects the misimpression. Other courts have held essentially that if a party introduces a portion of a statement in a manner that misleads the factfinder, that party forfeits the right to object to introduction of other portions of that statement when that is necessary to remedy the misimpression. As to unrecorded oral statements, most courts have found that when necessary to complete, such statements are admissible either under Rule 611(a) or under the common law rule of completeness.

After much discussion and consideration, the Committee in Spring, 2021 unanimously approved an amendment for release for public comment. The proposal released for public comment allows the completing statement to be admitted over a hearsay objection and covers unrecorded oral statements.

The overriding goal of the amendment is to treat all questions of completeness in a single rule. That is particularly important because completeness questions often arise at trial, and so it is important for the parties and the court to be able to refer to a single rule to govern admissibility. What has been particularly confusing to courts and practitioners is that Rule 106 has been considered a "partial codification" of the common law --- meaning that the parties must be aware that common law may still be invoked. As stated in the Committee Note, the amendment is intended to displace the common law, just as the common law has been displaced by all of the other Federal Rules of Evidence.

As to admissibility of out-of-court statements, the amendment takes the position that the proponent, by introducing part of a statement in a misleading manner, forfeits the right to foreclose admission of a remainder that is necessary to remedy the misimpression. Simple notions of fairness, already embodied in Rule 106, dictate that a misleading presentation cannot stand unrebutted. The amendment leaves it up to the court to determine whether the completing remainder will be admissible to prove a fact (a hearsay use) or simply to provide context (a non-hearsay use). Either usage is encompassed within the rule terminology --- that the completing remainder is admissible "over a hearsay objection."

As to unrecorded oral statements, most courts already admit such statements when necessary to complete --- they just do so under a different evidence rule or under the common law. The Committee was convinced that covering unrecorded oral statements under Rule 106 would be a user-friendly change, especially because the existing hodgepodge of coverage of unrecorded statements presents a trap for the unwary. As stated above, the fact that completeness questions almost always arise at trial means that parties cannot be expected to quickly get an answer from the common law, or from a rule such as Rule 611(a) that does not specifically deal with completeness.

It is important to note that nothing in the amendment changes the basic rule, which applies only to the narrow circumstances in which a party has created a misimpression about the statement, and the adverse party proffers a completing statement that in fact corrects the misimpression. So, the mere fact that a statement is probative and contradicts a statement offered by the opponent is not enough to justify completion under Rule 106.

The Committee received only a few public comments on the proposed changes to Rule 106. All comments were in favor of the proposed amendment, with a couple of comments providing some suggestions for minor changes. After considering the public comment, the Committee unanimously approved a slight change to the proposal: deletion of the phrase "written or oral," which makes clear that Rule 106 applies to all statements, including those that are not written or oral. The Committee determined that statements made through conduct, or through sign language, should be covered by the rule of completeness, as there was no reason to distinguish such statements from those that are written or oral. The proposed Committee Note was slightly revised to accord with the change in text.

At its Spring 2022 meeting, the Committee unanimously gave final approval to the proposed amendment to Rule 106. The Committee recommends that the proposed amendment, and the accompanying Committee Note, be approved by the Standing Committee and referred to the Judicial Conference.

The proposed amendment to Rule 106, together with the proposed Committee Note, the GAP report, and the summary of public comment, is attached to this Report.

B. Proposed Amendment to Rule 615, for Final Approval

Rule 615 provides for court orders excluding witnesses so that they "cannot hear other witnesses' testimony." The Committee determined that there are problems raised in the case law

and in practice regarding the scope of a Rule 615 order: does it apply only to exclude witnesses from the courtroom (as stated in the text of the rule) or does it extend outside the confines of the courtroom to prevent prospective witnesses from obtaining or being provided trial testimony? Most courts have held that a Rule 615 order extends to prevent access to trial testimony outside of the courtroom, because exclusion from the courtroom is not sufficient to protect against the risk of witnesses tailoring their testimony after obtaining access to trial testimony. But other courts have read the rule as it is written.

After extensive consideration and research over four years, the Committee agreed on an amendment that would clarify the extent of an order under Rule 615. Committee members have noted that where parties can be held in contempt for violating a court order, due process requires that the order be clear if it seeks to do more than exclude witnesses from the courtroom. The Committee's investigation of this problem is consistent with its ongoing efforts to ensure that the Evidence Rules are keeping up with technological advancement, given the increased possibility of witness access to information about testimony through news, social media, YouTube, or daily transcripts.

At its Spring, 2021 meeting the Committee unanimously voted in favor of an amendment to Rule 615. That amendment, released for public comment in August, 2021, limits an exclusion order to just that --- exclusion of witnesses from the courtroom. But a new subdivision provides that the court has discretion to issue further orders to "(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony." In other words, if a court wants to do more than exclude witnesses from the courtroom, the court must say so.

The Committee also considered whether an amendment to Rule 615 should address orders that prohibit counsel from referring to trial testimony while preparing prospective witnesses. The Committee resolved that any amendment to Rule 615 should not mention trial counsel in text, because the question of whether counsel can use trial testimony to prepare witnesses raises issues of professional responsibility and the right to counsel that are beyond the purview of the Evidence Rules. Judges must address these issues on a case-by-case basis.

Finally, the Committee approved an additional amendment to the existing provision that allows an entity-party to designate "an officer or employee" to be exempt from exclusion. There is some dispute in the courts about whether the entity-party is limited to one such exemption or is entitled to more than one. The amendment clarifies that the exemption is limited to one officer or employee. The rationale is that the exemption is intended to put entities on a par with individual parties, who cannot be excluded under Rule 615. Allowing the entity more than one exemption is inconsistent with that rationale.

As noted, these proposed changes to Rule 615 were released for public comment in August, 2021. Only a few public comments were received. All were supportive of the amendment, with two comments suggesting minor changes. In response to the public comment, the Committee made two minor changes the Committee Note to the proposed amendment.

At its Spring 2022 meeting, the Committee unanimously gave final approval to the proposed amendment to Rule 615. The Committee recommends that the proposed amendment, and the accompanying Committee Note, be approved by the Standing Committee and referred to the Judicial Conference.

The proposed amendment to Rule 615, together with the Committee Note, the GAP report, and the summary of public comment, is attached to this Report.

C. Proposed Amendment to Rule 702, for Final Approval

The Committee has been researching and discussing the possibility of an amendment to Rule 702 for five years. The project began with a Symposium on forensic experts and *Daubert,* held at Boston College School of Law in October, 2017. That Symposium addressed, among other things, the challenges to forensic evidence raised in a report by the President's Council of Advisors on Science and Technology. A Subcommittee on Rule 702 was appointed to consider possible treatment of forensic experts, as well as the weight/admissibility question discussed below. The Subcommittee, after extensive discussion, recommended against certain courses of action. The Subcommittee found that: 1) It would be difficult to draft a freestanding rule on forensic expert testimony, because any such amendment would have an inevitable and problematic overlap with Rule 702; and 2) It would not be advisable to set forth detailed requirements for forensic evidence either in text or Committee Note because such a project would require extensive input from the scientific community, and there is substantial debate about what requirements are appropriate.

The full Committee agreed with these suggestions. But the Subcommittee did express interest in considering an amendment to Rule 702 that would focus on one important aspect of forensic expert testimony --- the problem of overstating results (for example, an expert claiming that her opinion has a "zero error rate", where that conclusion is not supportable by the expert's methodology). The Committee heard extensively from DOJ on the important efforts it is now employing to regulate the testimony of its forensic experts, and to limit possible overstatement.

The Committee considered a proposal to add a new subdivision (e) to Rule 702 that would essentially prohibit any expert from drawing a conclusion overstating what could actually be concluded from a reliable application of a reliable methodology. But a majority of the members decided that the amendment would be problematic, because Rule 702(d) already requires that the expert must reliably apply a reliable methodology. If an expert overstates what can be reliably concluded (such as a forensic expert saying the rate of error is zero) then the expert's opinion should be excluded under Rule 702(d). The Committee was also concerned about the possible unintended consequences of adding an overstatement provision that would be applied to all experts, not just forensic experts.

The Committee, however, unanimously favored a slight change to existing Rule 702(d) that would emphasize that the court must focus on the expert's opinion, and must find that the opinion actually proceeds from a reliable application of the methodology. The Committee unanimously approved a proposal—released for public comment in August, 2021--- that would amend Rule 702(d) to require the court to find that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." As the Committee Note

elaborates: "A testifying expert's opinion must stay within the bounds of what can be concluded by a reliable application of the expert's basis and methodology." The language of the amendment more clearly empowers the court to pass judgment on the conclusion that the expert has drawn from the methodology. Thus the amendment is consistent with *General Electric Co., v. Joiner,* 522 U.S. 136 (1997), in which the Court declared that a trial court must consider not only the expert's methodology but also the expert's conclusion; that is because the methodology must not only be reliable, it must be reliably applied.

Finally, the Committee resolved to respond to the fact that many courts have declared that the reliability requirements set forth in Rule 702(b) and (d) --- that the expert has relied on sufficient facts or data and has reliably applied a reliable methodology --- are questions of weight and not admissibility, and more broadly that expert testimony is presumed to be admissible. These statements misstate Rule 702, because its admissibility requirements must be established to a court by a preponderance of the evidence. The Committee concluded that in a fair number of cases, the courts have found expert testimony admissible even though the proponent has not satisfied the Rule 702(b) and (d) requirements by a preponderance of the evidence --- essentially treating these questions as ones of weight rather than admissibility, which is contrary to the Supreme Court's holdings that under Rule 104(a), admissibility requirements are to be determined by court under the preponderance standard.

Initially, the Committee was reluctant to propose a change to the text of Rule 702 to address these mistakes as to the proper standard of admissibility, in part because the preponderance of the evidence standard applies to almost all evidentiary determinations, and specifying that standard in one rule might raise negative inferences as to other rules. But ultimately the Committee unanimously agreed that explicitly weaving the Rule 104(a) standard into the text of Rule 702 would be a substantial improvement that would address an important conflict among the courts. While it is true that the Rule 104(a) preponderance of the evidence standard applies to Rule 702 as well as other rules, it is with respect to the reliability requirements of expert testimony that many courts are misapplying that standard. Moreover, it takes some effort to determine the applicable standard of proof --- Rule 104(a) does not mention the applicable standard of proof, requiring a resort to case law. And while *Daubert* mentions the standard, *Daubert* does so only in a footnote in the midst of much discussion about the liberal standards of the Federal Rules of Evidence. Consequently, the Committee unanimously approved an amendment for public comment that would explicitly add the preponderance of the evidence standard to Rule 702(b)-(d). The language of the proposal released for public comment required that "the proponent has demonstrated by a preponderance of the evidence" that the reliability requirements of Rule 702 have been met. The Committee Note to the proposal made clear that there is no intent to raise any negative inference regarding the applicability of the Rule 104(a) standard of proof to other rules --- emphasizing that incorporating the preponderance standard into the text of Rule 702 was made necessary by the decisions that have failed to apply it to the reliability requirements of Rule 702.

More than 500 comments were received on the proposed amendments to Rule 702. In addition, a number of comments were received at a public hearing held on the rule. Many of the comments were opposed to the amendment, and almost all of the fire was directed toward the term "preponderance of the evidence." Some thought that "preponderance of the evidence" would limit the court to considering only *admissible* evidence at the *Daubert* hearing. Others thought that the

term represented a shift from the jury to the judge as factfinder. By contrast, commentators who supported the amendment argued that the amendment should go further and clarify that it is the court, not the jury, that decides admissibility.

The Committee carefully considered the public comments. The Committee does not agree that the preponderance of the evidence standard would limit the court to considering only admissible evidence; the plain language of Rule 104(a) allows the court deciding admissibility to consider inadmissible evidence. Nor did the Committee believe that the use of the term preponderance of the evidence would shift the factfinding role from the jury to the judge, for the simple reason that, when it comes to making preliminary determinations about admissibility, the judge *is* and *always has been* a factfinder.

But while disagreeing with these comments, the Committee recognized that it would be possible to replace the term "preponderance of the evidence" with a term that would achieve the same purpose while not raising the concerns (valid or not) mentioned by many commentators. The Committee unanimously agreed to change the proposal as issued for public comment to provide that the proponent must establish that it is "*more likely than not*" that the reliability requirements are met. This standard is substantively identical to "preponderance of the evidence" but it avoids any reference to "evidence" and thus addresses the concern that the term "evidence" means only admissible evidence.

The Committee was also convinced by the suggestion in the public comment that the rule should clarify that it is the court and not the jury that must decide whether it is more likely than not that the reliability requirements of the rule have been met. Therefore, the Committee unanimously agreed with a change requiring that the proponent establish "*to the court*" that it is more likely than not that the reliability requirements have been met. The proposed Committee Note was amended to clarify that nothing in amended Rule 702 requires a court to make any findings about reliability in the absence of a proper objection.

With those changes, and a few stylistic and corresponding changes to the Committee Note, the Committee unanimously voted in favor of adopting the amendments to Rule 702, for final approval.

At the Spring 2022 meeting, the Committee unanimously gave final approval to the proposed amendment to Rule 702. The Committee recommends that the proposed amendment, and the accompanying Committee Note, be approve
d by the Standing Committee and referred to the Judicial Conference.

The proposed amendment to Rule 702, together with the proposed Committee Note, GAP report, summary of public comment, and summary of the public hearing, is attached to this Report.

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Proposed 2022 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002

PREPARED FOR THE
U.S. SENATE AND HOUSE OF REPRESENTATIVES

JUDICIAL CONFERENCE OF THE UNITED STATES

June 2022

PROPOSED 2022 REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADEQUACY OF PRIVACY RULES PRESCRIBED UNDER THE E-GOVERNMENT ACT OF 2002

June 2022

The E-Government Act of 2002 directed that rules be promulgated, under the Rules Enabling Act, "to protect privacy and security concerns relating to electronic filing of documents and the public availability … of documents filed electronically." Pub. L. No. 107-347, § 205(c)(3)(A)(i). Pursuant to this mandate, the "privacy rules" – Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1 – took effect on December 1, 2007.

Subject to specified exemptions, the privacy rules require that filers redact from documents filed with the court (1) all but the last four digits of an individual's social-security number ("SSN") or taxpayer-identification number; (2) the month and day of an individual's birth; (3) all but the initial letters of a known minor's name; (4) all but the last four digits of a financial-account number; and (5) in criminal cases, all but the city and state of an individual's home address. In recognition of the pervasive presence of sensitive personal information in filings in actions for benefits under the Social Security Act, and in proceedings relating to an order of removal, to relief from removal, or to immigration benefits or detention, the privacy rules exempt filings in those matters from the redaction requirement but also limit remote electronic access to those filings.

Section 205(c)(3)(C) of the E-Government Act directs that, every two years, "the Judicial Conference shall submit to Congress a report on the adequacy of [the privacy rules] to protect privacy and security." Pursuant to that directive, the Judicial Conference submitted reports to Congress in 2009 and 2011. This third report covers the period from 2011 to date.[1]

The report proceeds in four parts. Part I discusses amendments, relevant to the privacy rules, that have been adopted since 2011. Part II notes pertinent topics currently pending on the rules committees' dockets. Part III recounts deliberations in which the rules committees considered whether additional rule amendments were necessary, but decided that question in the negative. Part III.A focuses on access to cooperation-related documents in criminal cases. Part III.B discusses the existing privacy rules' redaction requirements. Part III.C notes other privacy-related proposals considered but not adopted by the rules committees. Part IV concludes.

I. Privacy-Related Rule and Form Amendments Adopted Since 2011

Since 2011, the Rules Committees have considered a number of rule and form amendments that are relevant to privacy issues. This subpart discusses the instances in which those deliberations resulted in amendments: to then-Bankruptcy Forms 9 and 21 in 2012; to Appellate Form 4 in 2013 and 2018; to Bankruptcy Rule 9037 in 2019; and to Appellate Rule 25(a)(5) (this amendment is on track to take effect in 2022 absent contrary action by Congress). The amendments to the Bankruptcy Forms – discussed in Part I.A – implemented, rather than altered, the privacy policies set by the Bankruptcy Rules. The amendments to Appellate Form 4 – discussed in Part I.B – did not alter the privacy policies set by Appellate Rule 25(a)(5), but narrowed the scope of sensitive personal information that Form 4 requires an applicant to provide in the first place. The

[1] Future reports will be made in 2024 and every two years thereafter.

amendments to Bankruptcy Rule 9037 and Appellate Rule 25(a)(5) – discussed in Parts I.C and I.D, respectively – represent modest changes to those privacy rules. Part I.E discusses how privacy concerns shaped the content of Rule 2 in the new set of Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g) (which are on track to take effect in 2022 absent contrary action by Congress).

A. 2012 Amendments to then-Bankruptcy Forms 9 and 21

In 2012 the Bankruptcy Rules Committee considered a suggestion by the Judicial Conference's Committee on Court Administration and Case Management ("CACM") for additional Rule and Form amendments to protect the privacy of debtors' social security numbers. Specifically, CACM proposed that Bankruptcy Rule 2002(a)(1) be amended to remove the requirement that the debtor's full SSN be included in the notice to creditors.

The Bankruptcy Rules Committee considered this suggestion but concluded – based on studies performed by the Administrative Office of the U.S. Courts ("AO") – that creditors needed access to debtors' SSNs and thus that it was not advisable to amend Rule 2002 as suggested by CACM. However, the Committee decided that warnings should be added to two forms: Form 9, which at the time was the form for the notice of meeting of creditors, and Form 21, which at the time was the form for the debtor's "Statement of Social-Security Number(s)." The amendment to Form 9 warned creditors not to file Form 9 with their proofs of claim. The amendment to Form 21 warned the debtor not to file Form 21 in the public case file, and stated that the form had to be submitted separately and not included in the court's public electronic records. Those amendments were adopted without publication (because they simply reflected existing policy) and took effect December 1, 2012.

Effective December 1, 2015, Forms 21 and 9 were superseded by Forms 121 ("Statement About Your Social Security Numbers") and 309 (notice to creditors), which contain similar warnings.

B. 2013 and 2018 Amendments to Appellate Form 4

Appellate Rule 24 requires a party seeking to proceed in forma pauperis ("IFP") in the court of appeals to provide an affidavit that, inter alia, "shows in the detail prescribed by Form 4 ... the party's inability to pay or to give security for fees and costs." (Likewise, a party seeking to proceed IFP in the Supreme Court must use Form 4. See Supreme Court Rule 39.1.) Appellate Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis) had previously been amended in 2010 so that it requested only the last four digits of the applicant's SSN.

In 2013, Form 4 was amended to respond to criticisms that two of its questions sought information (about payments for attorney and non-attorney services) that were unnecessary to the IFP determination. The amendment replaced the two questions at issue with a new, more streamlined question that asked about money spent for expenses or attorney fees in connection with the lawsuit. In 2018 the Form was further amended so that it no longer requests any portion of the applicant's SSN.

C. 2019 Adoption of New Bankruptcy Rule 9037(h)

At the request of CACM, the Bankruptcy Rules Committee studied how to handle documents that were previously filed with a bankruptcy court without first redacting personal information as required by Bankruptcy Rule 9037. The Bankruptcy Rules Committee developed what would ultimately become new Bankruptcy Rule 9037(h), which sets a procedure for seeking redaction of documents after they have been filed. Knowing that there is a value to uniformity across the sets of privacy rules, the other advisory committees considered whether to propose similar amendments to the other privacy rules. They concluded, however, that while there was a need for the proposed new rule in bankruptcy cases, there was no similar need for such a provision in other types of cases. Accordingly, the other advisory committees decided not to propose similar amendments to the other privacy rules. New Bankruptcy Rule 9037(h) became effective in 2019.

D. 2022 Amendment to Appellate Rule 25(a)(5)

In 2018 the General Counsel of the U.S. Railroad Retirement Board proposed that actions for benefits under the Railroad Retirement Act be treated the same, under the privacy rules, as actions for benefits under the Social Security Act. Because benefits actions under the Railroad Retirement Act are filed directly in the federal courts of appeals, the Appellate Rules Committee took up this suggestion. Noting the close parallels between the Social Security and Railroad Retirement systems, the Appellate Rules Committee decided to propose amending Appellate Rule 25(a)(5) to provide that the Civil Rule 5.2(c) provisions limiting remote electronic access to Social Security benefits actions also apply to Railroad Retirement Act benefits review proceedings. That amendment has been reported to Congress and, absent contrary action by Congress, will take effect on December 1, 2022.

E. 2022 Adoption of Rule 2 of the Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g)

Also on track to take effect on December 1, 2022, if Congress takes no contrary action, is the new set of Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g). The Supplemental Rules set a simplified procedure for actions seeking review of benefits decisions by the Commissioner of Social Security. Rule 2(b)(1)(B) requires the complaint in such an action to state "the name and the county of residence of the person for whom benefits are claimed," while Rule 2(b)(1)(C) requires the same information about "the person on whose wage record benefits are claimed." As published for public comment, these rules had also required the complaint to state the last four digits of the SSN of the relevant person(s). Due to privacy concerns expressed during the public comment period, the latter requirement was deleted, and instead a requirement was added to Rule 2(b)(1)(A) that the complaint include "any identifying designation provided by the Commissioner with the final decision." The identifying-designation requirement will accommodate the Social Security Administration ("SSA")'s upcoming implementation of the practice of using unique alphanumeric identifiers for each notice it sends, and will enable the SSA to identify the administrative proceeding to which the complaint refers without the necessity of including a portion of the SSN in the complaint.

II. Potential Privacy-Related Rules Amendments Currently Under Consideration

Currently pending on the rules committees' dockets are three topics for possible amendments that relate to the balance between privacy and public access to information filed with the court. Two of those topics concern financial information filed by litigants, though one topic – addressed in Part II.A – concerns the treatment of such information after it is filed and the other topic – addressed in Part II.B – concerns the scope of the information required to be provided in the first place. Part II.A discusses the Criminal Rules Committee's study of Criminal Rule 49.1 and financial affidavits filed by criminal defendants seeking representation pursuant to the Criminal Justice Act ("CJA"). Part II.B discusses ongoing deliberations concerning applications to proceed IFP in civil cases. Part II.C notes proposals to adopt a rule addressing the sealing and/or redaction of court filings.

A. Potential Amendment to Criminal Rule 49.1

The Criminal Rules Committee has begun to evaluate whether any change to Criminal Rule 49.1 is needed to address a reference – in the 2007 Committee Note to that Rule – to CACM's March 2004 "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files." The Committee is evaluating whether the guidance, as outlined in the Note, is consistent with caselaw concerning rights of public access to information contained in criminal defendants' CJA applications. The Committee's work on this matter is very preliminary at present. If the Criminal Rules Committee were to conclude that an amendment to Criminal Rule 49.1 is warranted, the other advisory committees would then consider whether parallel amendments to the other privacy rules would be appropriate.

B. Potential Amendments Concerning Applications to Proceed In Forma Pauperis ("IFP")

The Appellate Rules Committee is considering suggestions to revise Appellate Form 4 (concerning applications to proceed IFP). The basic suggestion is that Form 4 could be substantially simplified while still providing the courts of appeals with enough detail to decide whether to grant IFP status. The Appellate Rules Committee is developing possible amendments to Form 4 but is not yet ready to seek permission to publish them for public comment. The Civil Rules Committee is closely following the Appellate Rules Committee's work on this topic. The Civil Rules do not themselves currently include a Rule or Form that addresses IFP applications, and the Civil Rules Committee is also exploring whether other entities, such as CACM, might usefully address the topic instead.

C. Proposals to Adopt a Rule on Sealing of Court Filings

The Civil Rules Committee has before it proposals to adopt a rule setting standards and procedures governing the sealing and/or redaction of court filings. The Committee has referred these proposals to its Discovery Subcommittee for initial evaluation. In the course of its initial consideration, the subcommittee learned that the AO's Court Services Office is undertaking a project to identify the operational issues related to the management of sealed court records. The goals of the project will be to identify guidance, policy, best practices, and other tools to help courts ensure the timely unsealing of court documents as specified by the relevant court order or other applicable law. Input on this new project was sought from the Appellate, District, and

Bankruptcy Clerks Advisory Groups and the AO's newly formed Court Administration and Operations Advisory Council. In light of this effort, the subcommittee determined that further consideration of suggestions for a new rule should be deferred to await the result of the AO's work.

III. Potential Privacy-Related Rules Amendments Considered But Not Adopted

The rules committees have considered a number of other potential rule amendments that relate to the balance between privacy and public access. This part summarizes instances in which the rules committees considered potential amendments but, after study, concluded that no rule amendment was warranted. Part III.A discusses work on issues relating to cooperation- and plea-related documents in criminal cases. Part III.B notes the committees' periodic study of compliance with the existing privacy rules and the adequacy of those rules. Part III.C briefly notes other topics considered for rulemaking but ultimately not pursued.

A. Cooperation-Related Documents

For a number of years, the Standing Committee, the Criminal Rules Committee, and other bodies within the federal judiciary worked with other interested parties to consider the problem of the risk of harm to cooperating defendants from disclosure of certain materials and whether procedural protections might alleviate this problem. The Judicial Conference's 2011 privacy rules report highlighted the issue of electronic public access to plea and cooperation agreements as a topic warranting careful study by district courts. A 2016 study by the Federal Judicial Center ("FJC")[2] found that survey respondents reported a significant number of instances of harm or threats of harm to government cooperators, as well as that court documents (such as plea agreements) and inferences from docket features (such as gaps in the docket or sealed documents) were reported as sources of information about cooperation.

Over the ensuing years, the Criminal Rules Committee and the Standing Committee were closely involved in discussions aimed at balancing the interest in protecting cooperators against retaliation, on one hand, and rights of access to court records, on the other. Relevant access rights that were considered included those of the public and the press as well as those of criminal defense counsel who need information on defendants' cooperation in other cases in order to assess the fairness of a proffered plea deal.

Based in part on the FJC study, CACM recommended in 2016 that the rules committees consider amendments to the Criminal Rules that would address concerns about the availability of cooperation-related information. The Standing Committee referred CACM's suggestion to the Criminal Rules Committee, which appointed a Cooperator Subcommittee and tasked it with studying the FJC's findings and the recommendations by CACM. Meanwhile, the Director of the AO formed a Task Force on Protecting Cooperators to consider changes that could be made apart from amending the Criminal Rules. Those participating in the Task Force's work included members of CACM, the Criminal Rules Committee, and the Standing Committee, representatives from the Bureau of Prisons ("BOP") and the Department of Justice, and a federal defender.

[2] See Margaret S. Williams et al., Survey of Harm to Cooperators: Final Report Prepared for the Court Administration and Case Management Committee, the Committee on Defender Services, and the Criminal Law Committee of the Judicial Conference of the United States (FJC 2016).

The Criminal Rules Committee's Cooperator Subcommittee took up the Standing Committee's charge of drafting potential amendments to the Criminal Rules that would implement CACM's suggestions, and formulated such a set of possible amendments to Criminal Rules 11, 32, 35, 47, and 49. The Cooperator Subcommittee also drafted a possible new Criminal Rule 49.2 that would have limited remote electronic access to criminal case files. After thorough discussion, however, the Cooperator Subcommittee, and in turn the Criminal Rules Committee and the Standing Committee, decided not to propose these rule amendments for adoption. All participants shared the serious concern over the need to address the threat of harm to cooperators. However, the rules committees determined that rule amendments were not the best way to do so. Some participants expressed concern that the potential rule amendments would decrease the transparency of judicial proceedings; and some participants suggested that the changes wrought by such amendments would be broader than necessary. Participants also noted that recommendations by the Task Force held the promise of addressing the problem of cooperation-related information through other means, such as through actions by the BOP and through changes to the case management/electronic case filing ("CM/ECF") system.

In 2018 the Task Force rendered an interim report recommending changes that BOP could make to diminish retaliation against cooperators housed in BOP facilities, and a final report that recommended changes in filing and docketing practices in CM/ECF, changes to the amended judgment form, and training for justice-system participants in how to handle cooperator information. The Task Force noted that these changes did not require any changes to the Criminal Rules, and it did not recommend any rule amendments. After the Task Force provided its recommendations to the Director of the AO, the AO Director asked CACM and the Criminal Law Committee, as appropriate, as well as the BOP, to review the Task Force's recommendations for potential implementation. The AO Director also circulated the report to the judges and district and circuit clerks of all federal district courts and courts of appeals.

B. Evaluation of Existing Redaction Requirements

The privacy rules' redaction requirements have been reviewed by the rules committees on a number of occasions since the 2011 privacy rules report. A 2015 study by the FJC provided one occasion for review of the rules' operation. Subsequent proposals for amendments to the Civil and Appellate privacy rules were considered in 2015-2016 and 2018. These deliberations, however, did not result in proposals for amendments to the privacy rules.

As noted in the 2011 privacy rules report, the FJC in 2010 conducted a survey of federal court filings to ascertain how often unredacted SSNs appeared in those filings.[3] In 2015, the FJC reported the results of its follow-up study on the same topic.[4] The follow-up study searched 3,900,841 documents filed during a one-month period in late 2013 and found that 5,437 (or less than 0.14 percent of the documents) included one or more unredacted SSNs. This is a greater percentage than was found in the 2010 study; but the 2015 study explained that the difference was due to an improvement in search methodology. In the 2015 study (unlike in the 2010 study), the researchers reprocessed the documents using optical character recognition ("OCR"), which

[3] See Memorandum from George Cort & Joe Cecil, Research Division, FJC, to the Privacy Subcommittee of the Judicial Conference Committee on Rules of Practice and Procedure, Social Security Numbers in Federal Court Documents (April 5, 2010).

[4] See Joe S. Cecil et al., Unredacted Social Security Numbers in Federal Court PACER Documents (FJC 2015).

enabled them to spot SSNs in documents that were originally filed in non-text-searchable format. The researchers noted that, because OCR had not been used for the 2010 study, that study had failed to reflect the full incidence of unredacted SSNs. They observed that a comparison of the two studies' findings, taking into account the difference in methodologies, "suggests that the federal courts have made progress in recent years in reducing the incidence of unredacted Social Security numbers in federal court documents, especially in bankruptcy court documents."[5] The Standing Committee discussed the FJC's findings at its January 2016 meeting; it concluded that no amendments to the privacy rules were warranted, but that the rules committees would stand ready to consult with CACM in the latter's ongoing efforts to implement the existing privacy rules.

In 2015-2016, the Bankruptcy, Civil, Criminal, and Appellate Rules Committees considered a proposal that the privacy rules be amended so as to direct the redaction of the entirety of an individual's SSN or taxpayer-identification number. The proponent argued that for many SSNs, the portion of the SSN other than the last four digits can be deduced from other sources of data. In considering this suggestion, participants noted that the rules committee had considered this particular question when formulating the existing privacy rules, and that the rules committees had decided not to direct redaction of the last four digits because of the need for that information in bankruptcy proceedings and the value of a uniform approach across all the privacy rules. Based on continued agreement with that analysis, the advisory committees decided not to propose amendments to the privacy rules. The Appellate Rules Committee did, however, proceed with what would become the 2018 amendment to Appellate Form 4 (discussed in Part I.B, above).

In 2018, CACM raised a privacy concern regarding sensitive personal information made public in judicial opinions in Social Security and immigration cases. Noting that judicial opinions are not subject to Civil Rule 5.2(c)'s limits on remote electronic access, see Civil Rule 5.2(c)(1)(B), CACM's chair wrote to the chief judges and circuit and district clerks of the federal district courts and courts of appeals to suggest that courts consider redacting all but the first name and last initial of any nongovernment parties when writing opinions in such cases. In addition, CACM asked the Standing Committee to consider whether to adopt amendments to the privacy rules to address this issue. The Standing Committee referred this suggestion to the Civil and Appellate Rules Committees. Those committees discussed CACM's suggestion at their fall 2018 meetings and decided not to propose a rule amendment. Participants in the committee discussions expressed hesitation at the prospect of drafting rules that would tell courts how to write their opinions, and noted that the problem might be effectively addressed by changes in local court practices in response to CACM's suggestion.

C. Other Proposals

It remains to briefly mention four other items, relevant to the privacy rules, that did not result in proposals to amend the rules.

In 2012 and again in 2015-2016, the Bankruptcy Rules Committee decided not to amend Bankruptcy Rule 2002's requirement that the notice to creditors include the debtor's SSN. The Bankruptcy Rules Committee concluded in 2012 that creditors needed the full SSN in order to identify debtors. In response to a 2015 suggestion on the same topic, the Bankruptcy Rules Committee engaged in further study to gauge whether creditors were still reliant on having full

[5] Id. at 11.

SSNs. These inquiries confirmed the need to retain the full SSN on the notice to creditors. However, the form for the notice to creditors was amended in 2012 to feature a warning that the notice to creditors should not be filed with the court.[6]

In 2016-2017, the Civil, Criminal, and Appellate Rules Committees considered whether to adopt a provision similar to new Bankruptcy Rule 9037(h) that would address the process for seeking redactions in previously-filed documents; but the advisory committees concluded there was no need to adopt such a provision outside the bankruptcy context. Bankruptcy Rule 9037(h) took effect in 2019.[7]

In 2015-2016, the advisory committees considered a proposal that the rules be amended to provide that affidavits in support of applications to proceed IFP should be presumptively filed under seal. None of the advisory committees felt that rulemaking action on this topic was warranted. However, the Appellate Rules Committee did proceed with an amendment that narrowed the information requested by Appellate Form 4.[8] And a subsequent project to study the scope of disclosures required for IFP applications is ongoing in the Civil and Appellate Rules Committees.[9]

In 2018, the Civil and Criminal Rules Committees considered a suggestion by the National Association of Professional Background Screeners that the Civil and Criminal Rules be amended to require that parties who are natural persons file a "confidential disclosure statement" (containing the person's full name and date of birth) with the court clerk. The suggestion was that this information, once filed, could be input into the court's Public Access to Court Electronic Records ("PACER") system so that PACER users could search by a party's name and birth date. The Civil and Criminal Rules Committees decided not to proceed with such an amendment. Participants in the committees' discussions observed that the proposed amendment did not seem to serve any purpose that lay within the scope of the rules.

IV. Conclusion

In the years since the Judicial Conference's second report to Congress on the adequacy of the privacy rules, the rules committees have included considerations about the privacy and security of personal information in their study of multiple proposals to revise the privacy rules and other rules. As noted in Part I, a number of those proposals have borne fruit in amendments to particular rules or forms. Part II surveyed pending proposals that may touch upon privacy-related issues. As evidenced in Part III's discussion of deliberations that did not result in proposals to amend the rules, it is often the case that goals relating to the privacy and security of information filed with the court may be served through non-rules-based approaches that work together with the existing privacy rules. The rules committees will continue to work with other entities within and outside the judicial branch to monitor and address issues of privacy and security in the light of modern access to electronically-filed court documents.

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[6] See Part I.A.

[7] See Part I.C.

[8] See Part I.B.

[9] See Part II.B.