U.S. Department of Justice

Criminal Division

Office of Enforcement Operations *Washington, D.C. 20530*

VIA Electronic Mail

January 16, 2020

Jonathan Manes, Esq.
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Buffalo, NY 14260
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Request No. CRM-300680988
Privacy International et al., v. Federal Bureau of Investigation, et al.,18-cv-1488 (W.D.N.Y.)

Dear Mr. Manes:

This is the second installment of the Criminal Division's rolling production regarding your Freedom of Information Act request dated September 10, 2018, for certain records pertaining to "computer network exploitation" or "network investigative techniques." Your request is currently in litigation, Privacy International, et al. v. Federal Bureau of Investigation, et al.,18-cv-1488 (W.D.N.Y.). You should refer to this case number in any future correspondence with this Office. This request is being processed in accordance with the interpretation and parameters set forth by defendants in the July 12, 2019, letter to you from Senior Trial Counsel Marcia Sowles, as well as subsequent conversations regarding the Criminal Division's processing of the request.

Please be advised that a search has been conducted in the appropriate sections, and we are continuing to review and process potentially responsive records. After carefully reviewing 555 pages of records responsive to your request, I have determined that all of the material is appropriate for release in full, copies of which are enclosed.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

You may contact Senior Trial Counsel Marcia K. Sowles by phone at (202) 514-4960, by email at Marcia.Sowles@usdoj.gov, or by mail at the Civil Division, Federal Programs Branch, 1100 L Street, N.W., Room 10028, Washington, D.C. 20005, for any further assistance and to discuss any aspect of your request.

Although I am aware that your request is the subject of ongoing litigation and that appeals are not ordinarily acted on in such situations, I am required by statute and regulation to inform you of your right to an administrative appeal of this determination. If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director,

Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following website: https://foiaonline.gov/foiaonline/action/public/home. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

Gail Brodfuehrer for

Amanda Marchand Jones
Chief
FOIA/PA Unit

cc: Marcia K. Sowles
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Enclosures

U.S. Department of Justice

Criminal Division

Assistant Attorney General *Washington, D.C. 20530*

September 18, 2013

The Honorable Reena Raggi
Chair, Advisory Committee on the Criminal Rules
704S United States Courthouse
225 Cadman Plaza East
Brooklyn, NY 11201-1818

Dear Judge Raggi:

The Department of Justice recommends an amendment to Rule 41 of the Federal Rules of Criminal Procedure to update the provisions relating to the territorial limits for searches of electronic storage media. The amendment would establish a court-supervised framework through which law enforcement can successfully investigate and prosecute sophisticated Internet crimes, by authorizing a court in a district where activities related to a crime have occurred to issue a warrant – to be executed via remote access – for electronic storage media and electronically stored information located within or outside that district. The proposed amendment would better enable law enforcement to investigate and prosecute botnets and crimes involving Internet anonymizing technologies, both which pose substantial threats to members of the public.

Background

Rule 41(b) of the Federal Rules of Criminal Procedure authorizes magistrate judges to issue search warrants. In most circumstances, search warrants issue for property that is located within the judge's district. Currently, Rule 41(b) authorizes out-of-district search warrants for: (1) property in the district when the warrant is issued that might be moved outside the district before the warrant is executed; (2) tracking devices, which may be monitored outside the district if installed within the district; (3) investigations of domestic or international terrorism; and (4) property located in a United States territory or a United States diplomatic or consular mission.

Rule 41(b) does not directly address the special circumstances that arise when officers execute search warrants, via remote access, over modern communications networks such as the Internet. Rule 41 should be amended to address two increasingly common situations: (1) where the warrant sufficiently describes the computer to be searched but the district within which that computer is located is unknown, and (2) where the investigation requires law enforcement to coordinate searches of numerous computers in numerous districts.

The first of these circumstances – where investigators can identify the target computer, but not the district in which it is located – is occurring with greater frequency in recent years. Criminals are increasingly using sophisticated anonymizing technologies when they engage in crime over the Internet. For example, a fraudster exchanging email with an intended victim or a child abuser sharing child pornography over the Internet may use proxy services designed to hide his or her true IP address. Proxy services function as intermediaries for Internet communications: when one communicates through an anonymizing proxy service, the communications pass through the proxy, and the recipient of the communications receives the proxy's IP address, rather than the originator's true IP address. There is a substantial public interest in catching and prosecuting criminals who use anonymizing technologies, but locating them can be impossible for law enforcement absent the ability to conduct a remote search of the criminal's computer. Law enforcement may in some circumstances employ software that enables it through a remote search to determine the true IP address or other identifying information associated with the criminal's computer.

Yet even when investigators can satisfy the Fourth Amendment's threshold for obtaining a warrant for the remote search – by describing the computer to be searched with particularity and demonstrating probable cause to believe that the evidence sought via the remote search will aid in a particular apprehension or conviction for a particular offense – a magistrate judge may decline to issue the requested warrant. For example, in a fraud investigation, one magistrate judge recently ruled that an application for a warrant for a remote search did not satisfy the territorial jurisdiction requirements of Rule 41. *See In re Warrant to Search a Target Computer at Premises Unknown,* ___ F. Supp. 2d ___, 2013 WL 1729765 (S.D. Tex. Apr. 22, 2013) (noting that "there may well be a good reason to update the territorial limits of that rule in light of advancing computer search technology").

Second, criminals are using multiple computers in many districts simultaneously as part of complex criminal schemes, and effective investigation and disruption of these schemes often requires remote access to Internet-connected computers in many different districts. For example, thefts in one district may be facilitated by sophisticated attacks launched from computers in multiple other districts. An increasingly common form of online crime involves the surreptitious infection of multiple computers with malicious software that makes them part of a "botnet" – a collection of compromised computers under the remote command and control of a criminal. Botnets may range in size from hundreds to millions of compromised computers, including home, business, and government systems. Botnets are a significant threat to the public: they are used to conduct large-scale denial of service attacks, steal personal and financial data, and distribute malware designed to invade the privacy of users of the host computers.

Effective investigations of these sophisticated crimes often require law enforcement to act in many judicial districts simultaneously. Under the current Rule 41, however, except in cases of domestic or international terrorism, investigators may need to coordinate with agents,

prosecutors, and magistrate judges in every judicial district in which the computers are known to be located to obtain warrants authorizing the remote access of those computers. For example, a large botnet investigation is likely to require action in all 94 districts, but coordinating 94 simultaneous warrants in the 94 districts would be impossible as a practical matter. At a minimum, requiring so many magistrate judges to review virtually identical probable cause affidavits wastes judicial and investigative resources and creates delays that may have adverse consequences for the investigation. Authorizing a court in a district where activities related to a crime have occurred to issue a warrant for electronic storage media within or outside the district would better align Rule 41 with the extent of constitutionally permissible warrants and remove an unnecessary obstruction currently impairing the ability of law enforcement to investigate botnets and other multi-district Internet crimes.

Thus, while the Fourth Amendment permits warrants to issue for remote access to electronic storage media or electronically stored information, Rule 41's language does not anticipate those types of warrants in all cases. Amendment is necessary to clarify the procedural rules that the government should follow when it wishes to apply for these types of warrant.

Language of Proposed Amendment

Our proposed amendment includes two parts. First, we propose adding the following language at the end of subsection (b):

> and (6) a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant, to be executed via remote access, for electronic storage media or electronically stored information located within or outside that district.

Second, we propose adding the following language at the end of subsection (f)(1)(C):

> In a case involving a warrant for remote access to electronic storage media or electronically stored information, the officer executing the warrant must make reasonable efforts to serve a copy of the warrant on an owner or operator of the storage media. Service may be accomplished by any means, including electronic means, reasonably calculated to reach the owner or operator of the storage media. Upon request of the government, the magistrate judge may delay notice as provided in Rule 41(f)(3).

Discussion of Proposed Amendment

The proposed amendment authorizes a court with jurisdiction over the offense being investigated to issue a warrant to remotely search a computer if activities related to the crime under investigation have occurred in the court's district. In other circumstances, the Rules or federal law recognize that it can be appropriate to give magistrate judges nationwide authority to issue search warrants. For example, in terrorism investigations, the current Rule 41(b)(3) allows a magistrate judge "in any district in which activities related to the terrorism may have occurred" to issue a warrant "for a person or property within or outside that district." This approach is also similar to the current rule for a warrant requiring communication service providers to disclose electronic communications: a court with "jurisdiction over the offense being investigated" can issue such a warrant. *See* 18 U.S.C. §§ 2703(a) & 2711(3)(A)(I); *United States v. Bansal,* 663 F.3d 634, 662 (3d Cir. 2011); *United States v. Berkos*, 543 F.3d 392, 397-98 (7th Cir. 2008). Mobile tracking device warrants may authorize the use of tracking devices outside the jurisdiction of the court, so long as the device was installed in that jurisdiction. Fed. R. Crim. P. 41(b)(4); 18 U.S.C. § 3117(a). In the proposed amendment, the phrase "any district where activities related to a crime may have occurred" is the same as the language setting out the jurisdictional scope of Rule 41(b)(3).

The amendment provides that notice of the warrant may be accomplished by any means reasonably calculated to reach an owner or operator of the computer or – as stated in the amendment, which uses existing Rule 41 language – the "storage media or electronically stored information." In many cases, notice is likely to be accomplished electronically; law enforcement may not have a computer owner's name and street address to provide notice through traditional mechanisms. The amendment also requires that the executing officer make reasonable efforts to provide notice. This standard recognizes that in unusual cases, such as where the officer cannot reasonably determine the identity or whereabouts of the owner of the storage media, the officer may be unable to provide notice of the warrant. *Cf.* 18 U.S.C. § 3771(c)(1) (officers "shall make their best efforts to see that the crime victims are notified of … the rights described in subsection (a)").

In light of the presumption against international extraterritorial application, and consistent with the existing language of Rule 41(b)(3), this amendment does not purport to authorize courts to issue warrants that authorize the search of electronic storage media located in a foreign country or countries. The Fourth Amendment does not apply to searches of the property of non-United States persons outside the United States, *see United States v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990), and the Fourth Amendment's warrant requirement does not apply to searches of United States persons outside the United States. *See United States v. Stokes*, ___ F.3d ___, 2013 WL 3948949 at *8-*9 (7th Cir. Aug. 1, 2013); *In re Terrorist Bombings*, 552 F.3d 157, 170-71 (2d Cir. 2008). Instead, extraterritorial searches of United States persons are subject to the Fourth Amendment's "basic requirement of reasonableness." *Stokes*, 2013 WL 3948949 at

*9; *see also In re Terrorist Bombings*, 552 F.3d at 170 n.7. Under this proposed amendment, law enforcement could seek a warrant either where the electronic media to be searched are within the United States or where the location of the electronic media is unknown. In the latter case, should the media searched prove to be outside the United States, the warrant would have no extraterritorial effect, but the existence of the warrant would support the reasonableness of the search.

* * *

We believe that timely and thorough consideration of this proposed amendment by the Advisory Committee is appropriate. We therefore ask that the Committee act at its November meeting to establish a subcommittee to examine this important issue. Criminals are increasingly using sophisticated technologies that pose technical challenges to law enforcement, and remote searches of computers are often essential to the successful investigation of botnets and crimes involving Internet anonymizing technologies. Moreover, this proposal would ensure a court-supervised framework through which law enforcement could successfully investigate and prosecute such crimes.

We look forward to discussing this with you and the Committee.

Sincerely,

Mythili Raman

Mythili Raman
Acting Assistant Attorney General

cc: Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter

ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
March 16-17, Orlando, Florida

I. Attendance and Preliminary Matters

The Criminal Rules Advisory Committee ("Committee") met in Orlando, Florida on March 16-17, 2015. The following persons were in attendance:

Judge Reena Raggi, Chair
Hon. David Bitkower[1]
Judge James C. Dever
Judge Gary S. Feinerman
Mark Filip, Esq.
Chief Justice David E. Gilbertson
Professor Orin S. Kerr
Judge Raymond M. Kethledge
Judge David M. Lawson
Judge Timothy R. Rice
John S. Siffert, Esq.
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter
Professor Daniel R. Coquillette, Standing Committee Reporter
Judge Amy J. St. Eve, Standing Committee Liaison
James N. Hatten, Clerk of Court Liaison[2]

In addition, the following members participated by telephone:

Carol A. Brook, Esq.
Judge Morrison C. England, Jr.

And the following persons were present to support the Committee:

Rebecca A. Womeldorf, Rules Committee Officer and Secretary to the Committee on Practice and Procedure
Bridget M. Healy, Rules Office Attorney
Frances F. Skillman, Rules Committee Support Office
Laural L. Hooper, Federal Judicial Center

[1] The Department of Justice was also represented throughout the meeting by Jonathan Wroblewski, Director of the Criminal Division's Office of Policy & Legislation.

[2] Mr. Hatten was present only on March 17.

II. CHAIR'S REMARKS AND OPENING BUSINESS

A. Chair's Remarks

Judge Raggi introduced Rebecca Womeldorf, the new Rules Committee Officer and Secretary to the Committee on Practice and Procedure. She welcomed observers Peter Goldberger of the National Association of Criminal Defense Lawyers and Robert Welsh of the American College of Trial Lawyers. She also thanked all of the staff members who made the arrangements for the meeting and the hearings.

B. Minutes of November 2014 Meeting

Judge Raggi reminded Committee members that the minutes, which were included in the Agenda Book, were approved last fall before their inclusion in the Agenda Book for the Standing Committee's January meeting.

III. CRIMINAL RULES ACTIONS

A. Proposed Amendment to Rule 41

Judge Kethledge, chair of the Rule 41 Subcommittee, reported on the history of the proposed amendment, the Subcommittee's review of the responses submitted during the public comment period, and its recommendations.

In September 2013 the Department of Justice came to the Advisory Committee with two problems. The current version of Rule 41 provides (1) no venue to apply for a warrant to search a computer whose physical location is unknown because of anonymizing technology, and (2) only a cumbersome procedure to apply for warrants to search computers that have been damaged by botnets that extend over many districts. Judge Kethledge emphasized these are procedural—not substantive—problems. The Department proposed an amendment to address these procedural problems.

In April 2014, the Advisory Committee significantly revised the Justice Department's original proposal, crafting a narrowly tailored proposed amendment that closely tracked the contours of the two problems that gave rise to it. The Standing Committee approved the publication of the proposed amendment for public comment.

The Rule 41 Subcommittee received and gave careful consideration to the public comments, including more than 40 written comments and three additional memoranda from the Department of Justice. Several hours of public comments were also presented at hearings before the full Advisory Committee in November 2014. The Subcommittee then held three conference calls in which it discussed the testimony, the written comments, the Department's memoranda, and its own concerns about some of the language of the published amendment.

After careful consideration, the Subcommittee unanimously recommended that the Advisory Committee approve several proposed revisions to the amendment as published, and

approve the revised amendment for transmittal to the Standing Committee.

Judge Kethledge summarized the issues raised in the public comments before stating the Subcommittee's specific recommendations for revisions.

In general, the concerns of those opposing the amendment are substantive, not procedural. Commenters argued that searches conducted under the proposed amendment would not satisfy the Fourth Amendment's particularity requirement, or would be conducted in an unreasonably destructive manner, or would violate Title III's restrictions on wiretaps. These are all substantive concerns on which the amendment expressly takes no position. The amendment leaves these issues for the courts to decide on a case-by-case basis, applying the Fourth Amendment to each application for a warrant.

Similarly, arguments that any changes should be left to Congress are unpersuasive. Venue is not substance. It is process, and Congress has authorized the courts "to prescribe general rules of practice and procedure." This amendment would be an exercise of that authority. Judge Kethledge noted that the Department of Justice had acted in conformity with Judicial Conference policy by using the Rules Enabling Act for these procedural issues rather than going to Congress.

The Department came to the Committee with a procedural problem that is impairing its ability to investigate serious computer crimes that are occurring now. Judge Kethledge respectfully submitted that it would be irresponsible for the Advisory Committee not to provide a venue for the government to make a showing to a judicial officer as to the lawfulness of these searches. He then invited other members of the Subcommittee (Judge Dever, Judge Lawson, Judge Rice, Mr. Filip, Professor Kerr, and the representatives of the Department of Justice) to comment.

Subcommittee members noted that the deliberative process had worked well: the proposed amendment had been narrowed to address the problems created by the current rule, and all of the comments had been reviewed and considered with great care. They expressed support for the amendment (with the proposed revisions to be discussed), and agreed that it addresses procedural—not substantive—issues. One member noted that a proposed revision to be discussed later in the meeting, using the term "venue" in the caption, may help to make this clear to the public. Responding to the concern that these matters should be left to Congress, Judge Raggi commented that under the Rules Enabling Act, Congress will necessarily play a significant role: any proposed amendment must be submitted to Congress before it can go into effect.

Professor Beale stated that the proposed amendment also includes provisions describing how notice of remote electronic searches is to be given. This portion of the proposed amendment will be applicable to all remote electronic searches, including those now being made under Rule 41 when the location of the device to be searched is known. The current notice provisions of Rule 41 are not well adapted to searches of this nature, because they refer to leaving a copy of the warrant and a receipt "at the place where the officer took the property." She noted that some of the comments focused on the adequacy of the proposed notice provisions, and that several of the

Subcommittee's proposed revisions of the amendment concerned the notice provisions.

Professor Beale thanked Ms. Healy for her work in the preparation of the agenda book, and noted that members had before them a hard copy replacement for one tab in the section on Rule 41.

Judge Raggi noted that the Subcommittee members and the staff had worked heroically to review the large number of comments received, including many at the very end of the comment period, and to prepare the agenda book under significant time constraints due to the short interval between the end of the comment period and the date for publication of the Agenda Book. Judge Kethledge concurred and also thanked the reporters.

Judge Raggi then invited comments from members not on the Rule 41 Subcommittee, asking members to focus first on the general issues raised by the proposed amendment. She confirmed that the members on the telephone could hear all of the discussion.

One member, acknowledging the care and hard work that had gone into the drafting and revision of the proposed amendment, nonetheless opposed it, raising concerns heard from the defense community as well as those who filed public comments. The member disagreed with the characterization of this as a procedural rule, arguing that it has too many substantive effects to be regarded as merely procedural. In effect, it opens the door to judges making ex parte decisions about core privacy concerns, and the defense does not participate until too late in the process, in back-end litigation. This is too great a risk. Authority tends to expand, and it is not possible to predict exactly how this authority will develop. Given the importance of the privacy concerns and the many unknowns, it is preferable for Congress to act first, as it did in Title III. In this member's view, the commenters who opposed did not misunderstand the amendment, because the result will not be narrow. In response to an observation that the defense role would be the same under the amendment as it would be for all other searches, the member expressed the view that the privacy concerns are greater here. For many people, computers are their lives, and these privacy concerns should be considered by Congress.

Another member said he was not hearing the same concerns from the criminal defense bar. He emphasized the public's interest in protections against new ways criminals can use technology to jeopardize the economy, national security, and individual privacy by identity theft, terrorism, corporate espionage, child pornography, and other serious offenses. Defense lawyers agree the government must be able to do its job in protecting society. For example, if a trade secret is lost, it is gone forever. The risk of such criminal activity is clear and present. In this member's view, the commenters who opposed the amendment did not recognize that the government must demonstrate probable cause to obtain a warrant, and they did not recognize the importance of affording the government a venue to show that it is entitled to a warrant to take the necessary actions to respond to these threats. There are risks that individual privacy will be invaded, but the greater risk to privacy comes from burgeoning electronic criminal activity, often shielded by anonymizing software, rather than government search warrants that must satisfy probable cause regardless of venue.

Judge Kethledge stated that it is the Committee's role and responsibility to address new problems when they arise, and this venue concern is a serious new procedural problem. There is a gap in Rule 41 that may prevent the government from obtaining a warrant because there is no way to identify the court that would have venue to consider the warrant application. The Committee should act to remedy this gap, which will allow the case law on the constitutional issues to develop in an orderly process as courts review warrant applications, rather than after the fact following warrantless searches based on exigent circumstances. If the New York Stock Exchange were to be hacked tomorrow using anonymizing software, under current Rule 41 there is no district in which the government could seek a warrant, and it would likely conduct a warrantless search under the exigent search doctrine, without prior judicial review.

Judge Raggi agreed that if the New York Stock Exchange were to be hacked by a computer using anonymizing software, it would be preferable to allow the government to seek a warrant from the court where the investigation is taking place, rather than conducting an exigent warrantless search. Concerns that judges may be uninformed about the technology to be used in the searches could be addressed by judicial education. The Federal Judicial Center has recently prepared some materials about topics such as cloud computing, and additional materials could be developed to help judges review applications for remote electronic searches.

A member observed that much of the public response is based, incorrectly, on the view that the amendment itself authorizes remote electronic searches. In fact, courts now issue such warrants under the current rules when the government knows the location of the subject computer. The only question addressed by this rule is how to proceed when anonymizing technology prevents the government from learning the computer's location so that it may go to the proper court to seek a warrant. Judge Raggi agreed, but noted that providing venue when anonymizing technology has been used may increase the number of warrant applications, and we cannot know how many such searches there will be, or how frequently they will be used in various kinds of cases.

Judge Kethledge and another member both noted that commenters who opposed the rule offered no alternative solution to the real venue problem the government has presented. A member noted that some opponents stated candidly that they did not want to provide a forum. This may immunize people who use anonymizing technology to commit serious crimes. Given the serious nature of the criminal threats requiring investigation, it would be irresponsible for the Committee to decline to take action to fill the current gap in the venue provisions. Here, as in many other situations, judges reviewing search warrants in any venue will have the duty to apply the substantive law to new situations.

On behalf of the government, Mr. Bitkower addressed the opponents' privacy concerns. He challenged the apparent assumption of many commenters that digital privacy concerns are greater than traditional privacy concerns. To the contrary, he said, cases such as the Supreme Court's decision in *Riley v. California* (2014) have recognized that the privacy rights in technology may be *on a par with* traditional privacy rights in the physical world. In the

government's view we should apply the same rules, as much possible, to technology as to the physical world: the same probable cause rules, the same particularity rules, and as much as possible the same procedural rules. Remote searches are conducted today, and by themselves do not present new issues. What is new is the ease with which someone can conceal his location by anonymizing technology, and the amendment addresses the venue gap created by that reality. The proposed amendment is privacy enhancing, because it provides a venue in which the government can seek advance judicial authorization of a search, just as it would before conducting a search of someone's home. This process allows the courts to apply the basic principles of the Fourth Amendment to new forms of technology, as they have done, for example, with heat sensors and tracking devices. The government's goal here is to secure a warrant, a privacy enhancing process.

Although several commenters argued that the Committee should follow the precedent of Title III and wait for Congress to act, Professor Beale observed that the history of Title III cuts the other way. Title III was enacted *after* the case law on wiretaps developed, just as the case law is doing now with other forms of technology in cases such as *Riley v. California*. In general, Congress has legislated after a sufficient number of cases have been litigated to shed light on the policy issues. In the case of new technology, the courts are grappling with questions of what information is protected by the Fourth Amendment as well as how requirements such as particularity apply in new contexts. The proposed venue provision would permit the same process to operate with remote electronic searches, allowing the courts to rule on the issues of concern to the commenters. Although it is possible that providing venue will increase the number of remote searches, Professor Beale noted that it may instead increase the number of remote searches reviewed by the courts ex ante in the warrant application process, rather than only ex post following a search yielding information that the government seeks to introduce at trial.

Judge Sutton complimented the Committee on narrowing the proposed amendment and being responsive to the public concerns. He observed that approving venue for warrant applications is not the same as approving remote electronic searches. Rather, it permits more litigation as to search warrants that will shed light on the process and issues. He emphasized that the Rules Enabling Act tells the judiciary to promulgate rules of procedure, not to wait for Congress to act first. Instead, Congress responds to proposed rules.

The member who had stated opposition to the proposed amendment acknowledged that courts must deal with the issues raised by new technology but remained unable to support the amendment, characterizing it as substantive and reiterating there are many unknowns.

Discussion turned to the question what would be known or unknown in the warrant applications covered by the amendment. Mr. Bitkower noted that to obtain any warrant the government must know what crime it is investigating and what it is looking for. In the anonymizing software cases covered by the amendment, the only new unknown is the physical location of the device to be searched. Because Rule 41 currently provides no venue for a warrant application in such cases, if the government deems a situation serious but not "exigent," it must

now either wait or pursue other investigative techniques that may in some cases be more invasive. In botnet cases, he noted, the problem is the large number of computers, not the lack of information.

A member expressed the view that the most significant unknowns would arise in the botnet cases: what information might be sought from thousands or even millions of computers that had been hacked. Moreover, the technology required for different botnets may vary. He also noted that the Committee was being forward thinking in addressing these issues, since there have been relatively few botnet investigations and only one decision holding that a court cannot issue a warrant when anonymizing software has disguised the location of the device to be searched. It was sensible, he concluded, to address both problems with a narrowly tailored "surgical" amendment.

Agreeing that each criminal botnet is unique, Mr. Bitkower explained that one function of warrants under the proposed amendment could be to map a botnet before seeking to shut it down, collecting the IP addresses of the affected computers to determine the botnet's size and where the computers are located. In previous botnet investigations, the cumbersome requirement of seeking a warrant in each district played a role in determining the government's strategy, and civil injunctions were used. He also noted that warrant applications under the amendment would vary widely: in some cases they may be quite simple and narrow (as in the case of a single email account when the government has already obtained the password), but in other cases there will be more significant complications and new issues on which courts will have to rule.

Members compared the procedural options under the current rule and the proposed amendment in the investigation of the hacking of a major corporation or institution such as the New York Stock Exchange. If the NYSE were hacked and anonymizing software disguised the location of a device the government had probable cause to search, members speculated that the government would conduct a search under some legal theory. They identified three possible scenarios under the current rule: (1) the government might persuade a court in the Southern District of New York to grant the warrant, and then claim good faith reliance if the warrant were later invalidated for lack of venue; (2) a court in the Southern District might find probable cause but determine it had no authority to issue a warrant, in which case the government might conduct a warrantless search and argue that the failure to obtain a warrant was harmless error because the search was nevertheless supported by probable cause; or (3) the government might search without a warrant under a claim of exigent circumstances. Members expressed the view that these examples showed why it would be preferable to amend Rule 41 to provide venue for warrant applications, so that courts asked to approve such warrants would be able to focus on the constitutional issues presented by remote computer searches. Concerns about the judiciary's understanding of the technology could be addressed by judicial education.

In response to the question how frequently the government expects to seek warrants under the proposed amendment, Mr. Bitkower noted the use of anonymizing technology by criminals is likely to become much more common. Until recently only sophisticated criminals employed

anonymizing software, but the technology is now more readily available and easier to use. In the case of botnets, in prior cases the government used non-criminal tools, but the lack of efficient venue provisions skewed the government's choices. So that authority might be employed in future cases.

Judge Raggi then called for a vote on the question whether to move forward with the proposed amendment.

By a vote of 11 to 1, the Committee voted to approve the amendment for transmission to the Standing Committee (subject to further discussion of the minor revisions proposed by the Subcommittee).

At Judge Kethledge's request, Professor Beale described the revisions proposed by the Subcommittee. The first revision was to substitute "Venue for a Warrant Application" for the current caption "Authority to Issue a Warrant." This proposal responded to the many comments that assumed the amendment would allow a remote search in any case falling within the proposed amendment (for example, any case in which an individual had used anonymizing technology such as a VPN). These commenters mistakenly viewed the amendment as providing substantive authority for such remote electronic searches, which they strongly opposed.

Beale noted that after the final Subcommittee call agreeing to amend the caption, Professor Kimble, the style consultant, first opposed making any change on the ground that no reasonable reader of Rule 41 as a whole could fail to see the many additional requirements. When advised that much of the opposition to the rule was founded on this misunderstanding, Kimble proposed an alternative caption "District from Which a Warrant May Issue." Professor King suggested that Professor Kimble may have believed this language would be clearer to lay readers than the term "venue."

Discussion focused on the need for a change in the caption, and the difference between the alternative captions. Professor Beale reminded the Committee that if there were no substantive difference, but only a question of style, it would ordinarily accept the style consultant's proposed language.

Judge Kethledge stated his strong support for amending the caption and using the Subcommittee's language. The current caption is overbroad and misleading, seeming to state an unqualified "authority" to issue warrants meeting the criteria of any of the subsections. Although Professor Kimble suggested this reading would be unreasonable, Judge Kethledge asserted that the current caption is unclear and is causing serious public opposition. By retaining the reference to "issu[ing]" warrants, Professor Kimble's language may perpetuate the misunderstanding. "Venue" is much clearer.

Members discussed the impact of different words and phrases. Several expressed support for the use of "venue," though another noted that it may not be known to non-lawyers and "venue" for the filing of a criminal case is defined differently than "venue" for the warrant applications under Rule 41(b). Judge Raggi observed that "venue" would be very clear to the

judges applying the rule. A member who agreed with the Subcommittee's recommendation also noted that other references to "authority" in the existing subsections of Rule 41(b) are also unclear; he observed that at some point it might be helpful for the Committee to revise and clarify all of the subsections.

Professor Coquillette commented that the discussion had made it clear that the Committee was grappling with a question of substance, not mere style.

The Committee voted unanimously to amend the caption of Rule 41(b) to "Venue for a Warrant Application."

Professor Beale explained that the Subcommittee also recommended two small changes in the notice provisions, Rule 41(f)(1)(C), both of which are intended to make notice of remote electronic searches parallel to the notice provided for physical searches to the extent possible.

The first change adds the requirement that the government serve a "receipt" for any property taken (as well as the warrant authorizing the search). In drafting the published notice provisions, the Committee had inadvertently omitted this requirement. Since this addition would parallel the requirements Rule 41(f)(1)(C) now imposes when the government makes a physical search and provide an additional protection for privacy, the reporters were confident it would not require republication.

The second change rephrased the obligation to provide notice to "the person whose property was searched or <u>who possessed the information that was seized or copied</u>." Again, the Subcommittee's intent was to parallel the requirement for physical searches. The Subcommittee rejected the suggestion in some public comments that the government should be required to provide notice to both "the person whose property was searched" <u>and</u> whoever "possessed the information that was seized or copied," since that is not required in the case of physical searches. For example, if the Chicago Board of Trade is served with a warrant and files containing information regarding many customers are seized, the government may give notice of the search only to the Board of Trade, and not to each of the customers whose information may be included in one or more files. The same should be true in the case of remote electronic searches. Discussion followed on how the current notice provisions applied to various hypotheticals.

The Committee voted unanimously to revise the amendment as published to require the government to serve a "receipt" as well as the warrant, and to provide notice to "the person whose property was searched or <u>who possessed the information that was seized or copied</u>."

Professor Beale then turned to two proposed revisions to the Committee Note. The first addition explained the new caption:

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

Members emphasized that the first sentence was not inconsistent with their earlier conclusion that the language of the caption presented a substantive, not merely a style issue. The

point made in the Committee Note is that the change in the caption does not alter the meaning of the existing provisions in Rule 41(b). Rather, it clarifies the effect of the amendment, making clear what the amendment does and does not do. The last sentence responds directly to the many public comments misunderstanding the effect of the amendment, stating that there are also constitutional requirements that must be met. A member suggested that the meaning would be clearer if the last sentence were revised to state that the constitutional requirements must "still" be met, and Judge Kethledge accepted this as a friendly amendment.

The Committee voted unanimously to add the following language to the Committee Note:

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

Finally, Professor Beale asked for approval of the Subcommittee's proposed addition to the Committee Note regarding notice. The proposed addition explains the changes after publication, and also responds to the many comments that criticized the proposed notice provisions as insufficiently protective because they required only reasonable efforts to provide notice. The addition draws attention to the other provisions of Rule 41 that preclude delayed notice except when authorized by statute and then provides a citation to the relevant statute. Professor Coquillette commented that because of the widespread confusion on this point in the public comments, the proposed addition was an appropriate exception to the general rule that committee notes should not be used to help practitioners. Members agreed that the citation "See" is appropriate because at present the statute referenced is the only authority for delayed searches (though other provisions might at some point be added).

The Committee voted unanimously to add the underlined language to the Committee Note:

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

B. Proposed Amendment to Rule 4

Judge Lawson, chair of the Rule 4 Subcommittee, described the public comments on the proposed amendment and the Subcommittee's recommendation that the amendment be approved as published and transmitted to the Standing Committee. One speaker at the hearings in November 2014 supported the proposed amendment, and there were six written comments. One comment urged that the proposal be withdrawn. The others supported the amendment, though some suggested modifications in the text or committee note. The Subcommittee met by telephone to consider the comments.

Judge Lawson reminded the Committee that the proposed amendment is intended to fill a

gap in the current rules, which provide no means of service on an institutional defendant that has committed a criminal offense in the United States but has no physical presence here.

Judge Lawson explained the Subcommittee's views on various issues raised by the law firm of Quinn Emanuel Urquhart & Sullivan (which represents a foreign corporation that the Justice Department has been unable to serve) in support of its recommendation that the proposed amendment should be withdrawn. First, Quinn argued, by stating that any means which provides actual notice is sufficient, the rule creates a situation in which any institutional defendant that appears to contest service has in effect admitted it has been served. The Subcommittee agreed with the Justice Department's response: the point of the amendment is to provide a means of service that gives notice, and there is no legitimate interest in allowing a procedure in which an institutional defendant can feign lack of notice. If the amendment were adopted, there would be, however, objections an institutional defendant might assert by a special appearance (such as a constitutional attack on Rule 4, an objection to a retroactive application of the amendment, or a claim that an institutional defendant has been dissolved.) And, Judge Lawson said, the Subcommittee also found unpersuasive the Quinn law firm's reliance on the Supreme Court's decision in *Omni Capital Int'l v. Wolff*. The Court simply required that service be made in compliance with the Rules of Civil Procedure. Here, by amending Rule 4 to provide for service, the amendment will allow the government to make service in a manner provided for in the Rules of Criminal Procedure.

The Subcommittee was not persuaded by comments of the Quinn firm and the National Association of Criminal Defense Lawyers (NACDL) expressing concern about the consequences of not honoring a summons, particularly a concern that this would permit trials in absentia. Judge Lawson noted that Rule 43 generally prohibits trial in absentia. Institutional defendants may appear by counsel, but their counsel must be present. NACDL suggested that the amendment or Committee Note be revised to include a reference to Rule 43. Noting the general principle that the Rules are to be read as a whole, the Subcommittee concluded it would not be wise to cross reference here to a single rule. Indeed, doing so might have negative implications when other provisions are not cross referenced. Judge Lawson also noted that trial in absentia was not among the long list of possible remedies that the Department of Justice identified in the August 2013 memorandum (included on pages 79-84 of the Agenda Book), which included criminal contempt, injunctive relief, the appointment of counsel, seizure and forfeiture of assets, as well as a variety of non-judicial sanctions (such as economic and trade sanctions, diplomatic consequences, and debarment from government contracting).

The Subcommittee also declined to adopt suggestions that the amendment be revised to provide an order of preference among the permitted methods of service. This issue, Judge Lawson noted, had been considered by the full committee, which previously determined that a requirement of this nature could generate burdensome litigation. The Subcommittee agreed.

The Subcommittee declined the Federal Magistrate Judges Association's suggestion that the committee note be revised to state that the manner of service must comply with Due Process. Judge Lawson explained the Subcommittee's view that this was unnecessary, since the Constitution must always be honored.

The Quinn law firm argued that the amendment was unwise because it would lead to reciprocal action by foreign governments against U.S. firms. Judge Lawson reminded the

Committee that it had discussed this issue at length before voting to approve the amendment for publication. As explained by the Justice Department's representatives and described in detail in the Department's August 2013 memorandum, federal prosecutors would be required to consult with the Justice Department's Office of International Affairs (which consults with the Department of State) in effecting international service.

Judge Lawson noted a final suggestion by NADCL fell outside the current proposal.

After considering all of the comments, Judge Lawson said, the Subcommittee voted unanimously to recommend that the proposed amendment be approved as published and transmitted to the Standing Committee. He then called on the Subcommittee members, Judge Rice, Mr. Siffert, and Mr. Wroblewski (representing the Department of Justice) for any additional comments.

Mr. Wroblewski thanked Judge Lawson, the Subcommittee members, and the reporters for their efforts, and he noted that the Justice Department's original proposal had been revised and improved. He commented on the reciprocity concerns, noting that federal prosecutors face reciprocity concerns every day in a variety of contexts, such as arrests and witness interviews. The United States Attorneys' Manual provides that whenever a federal prosecutor attempts to do any act outside the United States relating to a criminal investigation or prosecution or takes any other action with foreign policy implications the prosecutor is required to consult with the Office of International Affairs.

Judge Raggi observed that because that the government cannot try a defendant who has not filed a notice of appearance, the amendment might not result in a significant increase in prosecutions if non-U.S. entities don't file a notice of appearance. In such cases, however, if service has been made the government will be able to take a variety of collateral actions. The amendment is not radical. It simply provides a means of service, filling a gap in the rules.

Professor Coquillette recalled occasions when foreign governments raised objections to proposed amendments for the first time very late in the process (even at the point of Congressional consideration). He was happy to hear that the Departments of Justice and State had already consulted about this rule, and he urged the Department of Justice to do whatever it could to encourage counterparts at the State Department to bring to light now any possible objections from other nations. The Department's representatives agreed this was important, noting there had been long discussions between the Departments of State and Justice before the proposal was submitted, and throughout its consideration.

Judge Lawson added one final observation. The Quinn law firm proposed withdrawing the amendment without providing any alternative, which would mean that it would not be possible to make effective service on entities such as the Pangang Group (which the government has been unable to serve under the current rules). He noted that the Quinn law firm represents the Pangang Group, and in effect was seeking to defend it by preventing the initiation of the prosecution. This case, he said, demonstrates the necessity for the amendment. Without it, foreign entities can violate U.S. law with impunity.

Judge Sutton inquired into the breadth of the language in the proposed amendment to Rule 4(a), allowing the court to take "any action authorized by United States law" if an organization defendant fails to appear after service. Should it be limited to actions against the organizational defendant? Judge Raggi explained that not all appropriate responses would be actions against the organizational defendant itself. Notably, in rem sanctions might be available. And Professor Beale noted that United States law would not authorize sanctions that lacked a sufficient connection to the organizational defendant. Judge Sutton indicated he was satisfied that the broad language was appropriate.

On Judge Lawson's motion, the Committee voted unanimously to approve the proposed amendment as published and transmit it to the Standing Committee.

C. Proposed amendment to Rule 45

Judge Lawson, chair of the CM/ECF Subcommittee, presented the Subcommittee's recommendations regarding the previously published amendment to Rule 45 that would eliminate the three extra days provided after electronic service. The amendment reflects the view that electronic transmission and filing are now commonplace and no longer warrant additional time for action after service. It was published for comment in the fall of 2014. Similar proposals will be considered at the spring meetings of the other Rules Committees.

Judge Raggi noted that with this and other uniform rule changes being considered by all of the Rules Committees, the Criminal Rules Committee ought to consider whether criminal cases require different treatment. For example, in criminal cases there may have to be more play in the procedural joints, both as a matter of fundamental fairness when someone's liberty is at stake, and to avoid collateral challenges when convictions are obtained.

Judge Lawson discussed the Subcommittee's review of the comments received on the amendment to Rule 45. He first noted that the Subcommittee had rejected the Federal Magistrate Judges Association's suggestion either to eliminate all of the parentheticals in the proposed rule or to revise the rule to refer to "(F) (other means consented to except electronic service)." The Subcommittee concluded that the parentheticals were helpful, not confusing, and that the Committee Note clearly states that no extra time is provided after electronic service.

The Subcommittee recommended one change to the Committee Note that was published for comment and two changes to the text.

Judge Lawson first addressed the Subcommittee's recommended change to the Committee Note, which responded to concerns raised in the public comments. The Pennsylvania Bar Association and the National Association of Criminal Defense Lawyers had opposed the proposed amendment's elimination of the additional three days because of the difficulty it would cause practitioners and their clients. They emphasized that many criminal defense counsel are solo practitioners or in very small firms, where they have little clerical help, and do not see their ECF notices the day they are received. The Department of Justice expressed a similar concern

about situations in which service after business hours or from a location in a different time zone, or an intervening weekend or holiday, may significantly reduce the time available to prepare a response. In those circumstances, a responding party may need to seek an extension.

The Subcommittee recommended that in light of these legitimate concerns, the Committee Note to Rule 45(c) be revised to include language addressing this problem drafted by the Department of Justice:

This amendment is not intended to discourage courts from providing additional time to respond in appropriate circumstances. When, for example, electronic service is effected in a manner that will shorten the time to respond, such as service after business hours or from a location in a different time zone, or an intervening weekend or holiday, that service may significantly reduce the time available to prepare a response. In those circumstances, a responding party may need to seek an extension.

Judge Lawson noted that the Subcommittee thought added language encouraging judges to be flexible when appropriate and to expand those deadlines would allow judges to address matters on the merits. This was consistent with the position the Committee adopted for Rule 12. Liberality is especially important in the criminal context, he explained, because overly rigid application would inevitably result in Section 2255 motions and other collateral attacks. The note language keeps the text of the rule the same among committees but recognizes the particular need for flexibility in this context.

A member opposed to the amendment objected to this "compromise," arguing that Note language is not the same as leaving the extra three days in the text of the Rule. A client may be incarcerated and cannot be reached, and if the lawyer learns about it late Friday night, but the judge says no once there is a chance to seek an extension on Monday, three or four days to respond is not enough. Another member noted that local rules may have seven day limitations even if there are no seven day limitations in the Criminal Rules.

Professor Coquillette asked the Committee to focus on why the criminal rule should be different, if the other committees are comfortable with the elimination of the three extra days after electronic service. A member explained that the client in a criminal case is often incarcerated, which restricts counsel's access, and that responses often must be run by the client face to face in order to be accurate. Another member voiced opposition to eliminating the three days in criminal cases for two reasons. First, it is much more difficult to talk to the client before filing a response because of the distance to the location where the client is incarcerated and second, in some places local rules are interpreted liberally and some not.

Judge Raggi emphasized that there is a strong preference for uniform timing rules, so that a departure for the Criminal Rules must be justified.

After a short break, a member previously expressing opposition to the amendment to the text of the Rule withdrew that opposition based on the expectation that the note language would be included.

The Committee then unanimously approved adding to the Committee Note as published the additional language concerning extensions that had been proposed by the Department of Justice.

Professor Beale noted that the chair and reporters might need some latitude in moving forward with the new note language, given that each of the other committees will be considering this in the weeks to come and some tweaks might be necessary to achieve uniformity.

Judge Lawson then presented the Subcommittee's two recommendations to modify the text of the published amendment, each based on comments received during the publication period. The Subcommittee did not believe either change required republication.

The first recommended change was to eliminate the added phrase "Time for Motion Papers" from the caption of Rule 45, and keep the caption as it is now. Rule 12 deals extensively with the time for motions and Rule 45 does not.

The second recommendation was to modify the language of Rule 45(c) to parallel the language used in other sets of rules, referring to action "within a specified time after being served" instead of "after service." There was no reason for different phrasing in the Criminal Rule.

A motion was made to approve the text of the rule as published, with these two changes, and adopted unanimously.

D. CM/ECF Subcommittee

Judge Lawson presented the Subcommittee's recommendation regarding a mandatory electronic filing amendment being considered by the Civil Rules Committee (as well as the Appellate and Bankruptcy Committees). He explained that the proposed Civil amendment is of particular concern to the Criminal Rules Committee because Criminal Rule 49 now incorporates the Civil Rules governing service and filing. Rule 49(b) provides that "Service must be made in the manner provided for a civil action," and Rule 49(d) states "A paper must be filed in a manner provided for in a civil action." Accordingly, changes in the Civil Rules regarding service and filing will be incorporated by reference into the Criminal Rules. Also, the Criminal Rules Committee has traditionally taken responsibility for amending the Rules Governing 2254 Cases and 2255 Cases, and these rules also incorporate Civil Rules.

Judge Lawson explained that the Civil Rules Committee is considering a proposal mandating e-filing that does not exempt as a class pro se filers or inmates. Exemption is allowed either by local rule or by a showing of good cause. There are a number of districts that do not permit pro se e-filing except upon motion, and particularly discourage prisoners from e-filing because of the potential for mischief. There are also issues regarding electronic signatures. The question for the Committee is whether criminal cases warrant a different rule than that being considered by the Civil and Appellate Committees.

Professor King added that the issue is on the agenda now so that the Criminal Rules Committee's views on these issues can be conveyed to the other committees which will be considering this in the weeks to come. Also, she noted that the CM/ECF Subcommittee discussed the pro se issue and was unanimous in rejecting for criminal cases any rule that would require either a local rule or a showing of good cause in order to exempt pro se and prisoner filers. The reporters have conveyed our Subcommittee's view to those working on the rules for the other committees but so far they have not been sympathetic. Professor Beale added that the members of the working group for the Civil Committee preferred allowing districts to handle rules for pro se filers on a district-by-district basis.

The Committee's Clerk of Court Liaison, Mr. Hatten, who had been asked to share his views and experience on this issue with the Committee, presented several concerns raised by a rule that did not include an exception for pro se or inmate filers.

Mr. Hatten noted that because the CM/ECF system is a national platform that individual districts cannot modify, problems raised by extending e-filing to pro se filers will become embedded, and allowing courts to opt out will not avoid those structural problems. He noted various districts have been able to extend e-filing at their own pace, adapting to resource constraints and local challenges, and he knows of no court that extends e-filing to prisoners. Among the variations are differences in whether attorney filers may e-file sealed documents and case initiating documents.

As to pro se electronic filing, Mr. Hatten doubted the system was ready for a mandatory rule. We do not know the number of courts that presently allow this, and the extent of their experience. Many courts, perhaps even a majority, do not allow any electronic filing by pro se litigants. We really don't know how this would work because the experience with it has not been evaluated. He reviewed the history of the development of the CM/ECF system, designed for attorney use, and expressed the concern that many courts may find as a matter of policy that e-filing by pro se litigants is inappropriate or that the system is inadequate. A transition to pro se e-filing, he suggested, would not be facilitated by an opt-out rule, but instead would require further study and adequate resources, including staff resources.

Next, Mr. Hatten reviewed a number of potential problems that might arise. First, the current system anticipates a certain level of legal training and knowledge on the part of the person using the system, including knowledge of the rules as to what to file, when, and in what format. Non-lawyer, untrained filers may incorrectly characterize or describe their filings, tasks that are already a challenge for some lawyers. Pro se filers may file the same thing multiple times, fail to attach required documents, or attach the wrong document. This difficulty would be enhanced if the person is not a recurring user. Judges must use these designations, which may not be clear. Lawyers who must respond to the filing also may experience additional burdens. Court staff review docket entries for accuracy, and if there is an error, the staff must make a separate entry to rename the docket entry; they do not change the original filing. Increased errors would require increased staff resources for review and correction of docket entries. His court has had experience with pro se filers inferring some nefarious motive on the part of court staff when a docket entry is changed. This is in addition to the increased resources needed to train pro se filers.

Judge Raggi asked whether electronic filing or paper filing is a more efficient use of clerk's office staff. Mr. Hatten responded that for attorney filers there is a great advantage in electronic filing, but there will not be the same advantages for pro se filers. Pro se filers will be calling staff with normal questions you would expect from someone with less experience about how to file and other aspects of the system. And the quality control will be a very significant burden because pro se litigants will not understand the significance of what they are filing.

Mr. Hatten continued that in contrast to paper documents which can be screened before entry in the system, there is no ability to pre-screen materials before they are e-filed to identify any pornographic, confidential, libelous, or otherwise offensive or objectionable materials. E-filing results in immediate access via the internet to whatever is filed, through PACER or through subscription services such as Lexis or RSS feeds. There is no filter on the PACER system, which anyone can use. There are services that provide to a subscriber instantaneous access to anything filed in a particular case. Once captured and broadcast by these services, documents cannot be re-captured. This could lead to the release of personal data or materials that should not have been filed. Because electronic filings made late Friday are not reviewed by staff until Monday, there is a period of time when the unreviewed information would be available to anyone. Issues created by a pro se filer's use of the system could be addressed by a court after the fact, but any harm through unretrievable dissemination of offensive, confidential, or sealed materials would already have taken place. If the filing was in paper and screened first, the staff would review the document, then scan it, give it an appropriate name, and docket it.

Additionally, Mr. Hatten raised the potential of the "loss of docket integrity" if login and password information is made available to non-lawyers. Once issued a password in CM/ECF, any individual using that login information may access and file in any case in the system, regardless whether that person is a party to the case or whether the case is open or closed. For example they can file in any defendant's case. That login and password could be used by anyone who obtains it. There are no means to verify the identity of the actual individual accessing the system, if someone were to suggest that the login information was used without authorization. Potentially, with login information, someone unconstrained by the rules governing attorneys could maliciously interfere in unrelated cases. Expanded access by non-attorneys could even lead to denial of service attacks on the system, he noted, emphasizing that this was speculation. He did not know if expanding access would raise the risk of the introduction of malware or other viruses into the system, which until now has been very reliable. He noted that courts can block use of a password, but it would be "shutting the door after the cow's left the barn." Any information, such as information about a victim, or sealed materials that someone had filed electronically after obtaining them in paper form, would have already been released.

Judge Raggi asked if this ability to file in any case has been the subject of previous discussion. Mr. Hatten noted that it hadn't been a problem as far as he knew, because all filers were attorneys. Judge Lawson noted that this was one of the main reasons his district restricted CM/ECF access to attorneys.

Mr. Hatten continued that electronic notice of filing requires an individual email account, and it is not known whether pro se filers filing from an institution will be able to receive such notices, because of capacity limits or spam filters. Even in instances with a good lawyer email address, those email accounts are sometimes so full the court gets a bounce back. Sources a pro se party may use for filing, such as a public library, may be unavailable to receive email. The CM/ECF system requires the ability to contact a filer regarding missing information such as address or phone number. If delivery is not available, a paper notice would be required, which would reduce any advantage from e-filing.

Electronic filing, Mr. Hatten observed, may also require that the filer qualify for electronic payment. Those who lack credit cards, such as inmates, may not be able to file case-initiating documents.

Another concern, Mr. Hatten stated, was that the round-the-clock availability of the e-filing system. Past experience with some pro se paper filings suggests that extending e-filing to pro se litigants would significantly increase the volume of prisoner and pro se filings. Courts have experience measuring the filings of vexatious litigants in pounds not pages. Many examples are readily available. He mentioned two in his district: one, using paper filings only, filed 964 appeals in eleven regional circuits and the Federal Circuit and 2637 civil actions nationwide; another, using paper filings only, filed 76 appeals in four circuits, and 33 civil actions in 17 districts.

Perhaps extending e-filing to pro se filers could overcome some of these issues if the system could be modified to allow pro se filings to drop into a box so that court staff could review them before anybody else would see them. That might be better, but it is not possible in the existing system. Moreover, there are no resources available to court staff to implement a program of this potential magnitude, he said.

Mr. Hatten also raised the concern that if the rule changed to require e-filing unless there was a local rule or a showing of good cause, courts may expect demands by pro se and prisoner filers that they are entitled to access CM/ECF. Finally he raised a concern about the language of the proposed change to the Civil Rule referring to the electronic signature.

Judge Raggi asked the Department of Justice to share its views about extending e-filing to pro se and prisoner filers. Mr. Wroblewski stated that it seems clear the CM/ECF system is just not ready to handle all of the types of cases the Department sees, especially the Section 2255 cases. For example, the courts are in the middle of a retroactive guideline change, and in many districts the prisoners have no attorneys, but all are required to file, and although many have access to email, none have access to the internet. And there are tens of thousands of prisoners who are being held by the Marshal's Service, mostly in county jails, not federal facilities, with no computer access. We are just not ready for this, he stated, and are very concerned that we need to provide access to the courts for all of the pro se litigants, including those incarcerated.

On the electronic signature issue, he noted, there had been concern that it might cause problems with prosecuting bankruptcy fraud, but the Department doesn't see a huge problem with the criminal filings, at this point. But they are not ready to jump to a mandatory system.

In response to a question whether the Department thought the proposed rule provides enough flexibility, Mr. Wroblewski stated they will defer to the courts, but just want to make sure that all criminal litigants, including Section 2254 filers, have a way to access to the courts. If courts want to opt out of a new rule, and guarantee access that way, that is fine, but the courts must be open to these litigants.

Judge Raggi noted that the electronic filing proposal is being advanced with great vigor by the other Committees, but no one has indicated what the fallback plan would be should the system fail, either from an attack on the system itself or some other disaster. There is a real need for courts to operate in times of emergency, such as 9-11 or Hurricane Sandy, but there seems to be no fallback plan should the computers fail. District judges no longer maintain their own dockets, but are subject to the dictates of nationwide technology. She urged that in working with other committees, we should keep in mind that the Criminal Rules' unique concern with liberty. She also observed that requiring e-filing may put more distance between those who use the courts and the courts, and that the added resources needed to allow this to work aggravates these concerns. But the fundamental point is that these are criminal litigants in proceedings about liberty. She encouraged members to think about what is the advantage to them or us of having those papers filed electronically as opposed to hard copy.

In response to her request for input from members about whether this could be handled at the local level, one member related that in his district 10% of pro se filings are being filed electronically. As to pro se filers, this member reported, they have not had any problems. If a pro se filer does not want to file in CM/ECF, it is simple to opt out, and 90% of pro se's do opt out and file with paper. They file a form requesting they not have to file electronically and the magistrate routinely grants it. The good cause is usually "I don't have access to the Internet."

His district also has two state prisons, the member continued, and the state department of corrections has a very new limited pilot program allowing prisoners to file electronically in Section 1983 cases, not habeas actions. This is a good thing, he reported, because it has cut down the many, many pages of hard to decipher handwriting. Prisoners use a computer station to file these documents, so they come in typed in a standard format. Prisoners have time allotted to go to that location and file that document. He noted that there were so many prisoner filings, more than half of the docket, and the program was driven by that volume. He reiterated that the program is in "an infant stage," and that it could go sideways.

Another member noted that her district allows pro se filing in civil cases but requires training first, and she thought that a few districts were working on pilot projects allowing persons in custody to make filings. But this member could not imagine how this could possibly be required in habeas cases because state facilities don't give access.

Another member noted that if there is a top-down rule that says e-filing is required but you can opt out, at least 92 districts will opt out. Those who are detained but not yet convicted are in county jails in his district, with no computers. The state doesn't even have electronic filing for lawyers, and his district doesn't allow pro se e-filing, for some of the reasons stated before. There are ways to work toward this gradually, but having a top-down rule that everyone opts out of is not

good process, and reflects badly on the credibility of the rules process.

Professor Coquillette noted that local rules have been a matter of concern for Congress for decades, because they don't have the oversight provided by the Rules Enabling Act. Sometimes, however, there is a national rule that says go out and make local rules. This occurs in two situations: where there are real differences district to district, and where the subject matter is so premature it requires experimentation. Both of those conditions may apply here.

Another member noted that in 90% of situations the mandatory e-filing rule is ill advised and out of touch for people in county jails. His state has a tremendous budget crisis, won't fund providing prisoners with facilities to file electronically, and prisoners would file suits alleging denial of access to the courts. It is a top-down rule to fix a problem that doesn't exist. Already there are functioning local rules, and no need for this massive energy to change a system that seems to be working. This member was not aware of any reason that providing internet access to prisoners would be a priority, or that prisoner filings should be lock step with filings in civil cases.

Professor Beale suggested that we could amend Rule 49 in various ways to accommodate a different rule for criminal cases if the Civil Rules Committee proceeds with the existing draft. However, the Civil Rules Committee might put their proposed rule on hold, and study it more, or decide it is ready to publish something now, but agree to slow down later.

Professor Coquillette stated that the Standing Committee would want to hear what the Criminal Rules Committee thinks is best for criminal cases.

Judge Raggi asked the Subcommittee to meet again before the Standing Committee meets to consider what sections might be amended to deal with these concerns as to Rule 49 and also the 2254 and 2255 Rules to the extent we are responsible for them.

A member added that our goal would be to have our own amendment to Rule 49 take effect before 92 districts had to opt out of a mandate.

Judge Lawson expressed appreciation for Mr. Hatten's contribution. He noted the Subcommittee was comfortable with requiring e-filing for lawyers, and had not addressed prisoner filings in 1983 cases. The Subcommittee opposed a Civil Rules amendment that provided no carve out for pro se or prisoner filers. He agreed with the many concerns discussed, and noted that not all of those who file in criminal cases are parties. Witnesses, law enforcement, and third party owners would not necessarily have CM/ECF access. Most importantly, he argued, the rule implicates constitutional rights that do not arise in civil cases, and requiring pro se prisoner filers to demonstrate good cause before they can access the courts would probably raise constitutional issues. He asked the Committee to convey its preference for an approach that carves out pro se filers from any mandatory rule.

A member noted that he is in favor of that motion, that in his district this is not done, and that a top-down rule is a bad idea if clerks and local committees in almost every district wonder how out of touch this is. On the ground, pro se litigants are not filing through CM/ECF.

Judge Raggi agreed we can make these suggestions to the Civil Rules Committee, and she favored doing so, noting that a litigant who wants to go into every case in a judge's docket could cause a fair amount of trouble. But she also urged that the Criminal Rules Committee should also have an alternative plan in reserve.

A member said our alternative should be to work on delinking our rule from the Civil Rules. Another member noted the Committee may have to recommend amendments to 49(b) and (d), and a third noted that 49(e) may need work as well.

There was discussion about whether the Committee favored retaining current Rule 49(e), to preserve status quo. Judge Lawson thought there may need to be different treatment for those who are incarcerated and those who are not, and said that his initial proposal was not to preserve status quo.

A member stated he was unprepared to vote on specifics. He did not favor going beyond conveying the Committee's concerns to the other Committee at this point. He specifically did not agree with any rule stating pro se or prisoners may have CM/ECF access.

Judge Lawson agreed with Judge Raggi's suggestion that the committee vote on whether to inform the other committees that the Criminal Rules Committee has reservations about requiring mandatory electronic filing for pro se litigants and pro se criminal litigants, because we predict that almost every district would create an exception.

A member agreed that if a Rules Committee gets out in front of what is happening on the ground in 92 of 94 districts, that's a problem. Now Rule 49 allows local rulemaking, and all districts have local rules that are working well. It doesn't make sense to require the local rules committees in all of these districts to reconvene and do something else.

The resolution of the sense of the Committee was adopted unanimously.

Judge Raggi stated that she would voice these concerns,[3] and our Subcommittee will continue to look at our own rule.

E. Proposed Amendment to Rule 35 (15-CR-A)

In a law review article submitted to the Committee in February, Professor Kevin Bennardo urged that Rule 35 be amended to bar appeal waivers before sentencing. Judge Dever, the chair of the subcommittee that reviewed another recent proposal to amend Rule 35, was asked to comment

[3] Following the meeting, the reporters and chair conveyed these concerns. The chairs, reporters, and members working on the proposed Civil Rule and parallel changes in the Bankruptcy and Appellate Rules were very responsive to the Advisory Committee's concerns, and a revised version of the proposed Civil Rule excluding persons not represented by counsel was presented to the Advisory Committee on Civil Rules. Representatives of all committees will continue to collaborate as the rules on electronic service, filing, and signature move forward.

on Professor Bennardo's proposal.

Judge Dever concluded that the proposal is trying to solve a nonexistent problem by creating a second Rule 11 process that will not save the appellate courts any time. He recommended that the proposal not be referred to a subcommittee and that it not be pursued further. He noted several problems with the assumptions underlying the proposal. First, the circuits uniformly accept waivers of appeal in plea agreements, rejecting one of the article's central premises, namely that there cannot be a knowing waiver of appeal until the sentence is imposed. Second, the article erroneously assumes that judges do not consider the Section 3553(a) factors if there is an appellate waiver. Finally, the proposal is intended to save the appellate courts time, because it assumes that the appeal would be stayed while the government negotiations an appeal waiver after sentencing, after which there would be a new process in the trial court by which the defendant will receive a lower sentence. The article also asserted that this will lead to fewer defendants who breach the appeal waiver by asking their lawyer to file the notice of appeal.

Judge Raggi asked for members to comment. Hearing no comment, she called for a vote on the recommendation not to pursue this further.

The motion not to pursue the proposal passed unanimously.

F. Proposed Amendment to Rule 35 (14-CR-E)

The New York Council of Defense Lawyers submitted a proposal to amend Rule 35 to permit a judge to reduce a sentence of a defendant who has served two thirds of his incarceration and establishes one of the following circumstances by clear and convincing evidence: (1) newly discovered scientific evidence that raises a substantial question about the validity of his conviction; (2) substantial rehabilitation during confinement; or (3) deterioration of condition (providing an alternative to compassionate relief). Following brief discussion at the November 2014 meeting, Judge Raggi appointed a subcommittee, chaired by Judge Dever, to consider the proposal.

Judge Dever presented the report of the Subcommittee, which concluded that the proposed amendment to Rule 35 involved changes beyond the Committee's purview and recommended that the Committee take no further action on the proposal.

The motion not to pursue the proposal passed unanimously.

G. Other Business

Judge Raggi stated that if the Rule 41 changes are adopted, that would be a good time to help the Federal Judicial Center work on a primer on how electronic searches work. She stated that Judge Kethledge, Chair of the Rule 41 Subcommittee, Professor Kerr, the Department of Justice, Mr. Siffert and she would work with the FJC on this project.

Finally, Judge Raggi noted the next meeting of the Committee will be September 28-29 in Seattle, Washington.

The meeting was adjourned.

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

January 17, 2014

MEMORANDUM

TO: Judge John F. Keenan
Chair, Subcommittee on Rule 41

FROM: Jonathan J. Wroblewski, Director
Office of Policy and Legislation

SUBJECT: Proposed Amendment to Rule 41 of the Federal Rules of Criminal Procedure

This memorandum is a follow-up to the Subcommittee's December 16th conference call and the request for examples of warrants that would be covered under the Department's proposal to amend Rule 41 of the Federal Rules of Criminal Procedure. The proposed amendment would authorize a court in a district where activities related to a crime have occurred to issue a warrant, to be executed by remote access, for electronic storage media and electronically stored information located within or outside that district. We have attached three warrant examples to this memorandum: two relate to crime involving the use of Internet anonymizing technologies, and one relates to crime involving the use of a botnet.

The first example is based on a warrant used in an investigation of a series of bomb threats and threats of other violent crimes. In this and similar cases, investigators may know that the suspect has used a particular email address, but because the suspect also uses anonymizing technologies, law enforcement may not be able to identify the suspect without the use of a network investigative technique ("NIT"). The warrant authorizes the government to use the NIT to collect the IP address, MAC address, and other similar identifying information from the computer that is accessing the email account. Ultimately, in the case upon which this warrant is based, investigators were able to use the NIT to identify the individual making the threats. It should be noted that in this case, the court had clear jurisdiction to issue the warrant under Rule 41(b)(3), as the investigation involved hoaxes and threats related to terrorism. The Department's proposal is intended to clarify that the issuance of such a warrant is proper in other criminal investigations as well.

The second example is based on a warrant used in an investigation of a child pornography website operating as a "hidden service" on the Tor network. Tor masks its users' actual IP addresses by routing their communications through a distributed network of relay computers run by volunteers around the world. In this case, law enforcement knew the physical location of the server used to host the hidden service. However, without use of a NIT, investigators could not identify the administrators or users of the hidden service. This warrant would authorize the collection of IP addresses, MAC addresses, and other similar information from users and administrators of the website.

The final example is based on the sort of warrant we anticipate seeking in a botnet investigation. For identified computers in the botnet, the warrant would authorize law enforcement to search for and seize particular information, which would in turn enable law enforcement to gather further evidence about the scope of the botnet and how the botnet might be dismantled.

- - -

We hope these documents are responsive to the Subcommittee's request. We look forward to discussing all of this with the Subcommittee on our call next week. Please let us know if there is any further information we can provide.

April 28, 2016

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

Dear Mr. Speaker:

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

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

Sincerely,

/s/ John G. Roberts

April 28, 2016

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

Dear Mr. President:

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

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

Sincerely,

/s/ John G. Roberts

Corrected April 28, 2016

SUPREME COURT OF THE UNITED STATES

ORDERED:

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

[*See infra* pp. ___ ___ ___.]

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

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

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

* * * * *

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

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

* * * * *

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

(1) If an institution has a system designed for legal mail, an inmate confined there must use that

system to receive the benefit of this Rule 4(c)(1). If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

(A) it is accompanied by:

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

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

(B) the court of appeals exercises its discretion to permit the later filing of a declaration or

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

* * * * *

Rule 5. Appeal by Permission

* * * * *

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

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

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

* * * * *

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

* * * * *

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

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

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

Rule 25. Filing and Service

(a) Filing.

* * * * *

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

* * * * *

(C) **Inmate Filing.** If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 25(a)(2)(C). A paper filed by an inmate is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

(i) it is accompanied by:

- a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of

deposit and stating that first-class postage is being prepaid; or

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

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

* * * * *

Rule 26. Computing and Extending Time

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

* * * * *

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

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

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

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

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

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

* * * * *

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

Rule 27. Motions

* * * * *

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

* * * * *

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

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

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

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

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

* * * * *

Rule 28. Briefs

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

* * * * *

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

* * * * *

Rule 28.1. Cross-Appeals

* * * * *

(e) Length.

(1) **Page Limitation.** Unless it complies with Rule 28.1(e)(2), the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

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

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if it:

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

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

(B) The appellee's principal and response brief is acceptable if it:

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

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

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

* * * * *

Rule 29. Brief of an Amicus Curiae

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

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

(2) **When Permitted.** The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

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

(A) the movant's interest; and

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

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

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

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

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

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

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

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

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

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

(iii) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended

to fund preparing or submitting the brief and, if so, identifies each such person;

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

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

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

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

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

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

(b) During Consideration of Whether to Grant Rehearing.

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

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

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

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

(5) **Time for Filing.** An amicus curiae supporting the petition for rehearing or supporting neither

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

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

(a) Form of a Brief.

* * * * *

(7) **Length.**

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

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

(i) A principal brief is acceptable if it:

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

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

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

* * * * *

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

(f) Items Excluded from Length. In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

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

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

(g) Certificate of Compliance.

(1) **Briefs and Papers That Require a Certificate.** A brief submitted under Rules 28.1(e)(2), 29(b)(4), or 32(a)(7)(B)—and a paper submitted under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A), 27(d)(2)(C), 35(b)(2)(A), or 40(b)(1)—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation. The person

preparing the certificate may rely on the word or line count of the word-processing system used to prepare the document. The certificate must state the number of words—or the number of lines of monospaced type—in the document.

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

Rule 35. En Banc Determination

* * * * *

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

* * * * *

(2) Except by the court's permission:

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

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

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

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

* * * * *

Rule 40. Petition for Panel Rehearing

* * * * *

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

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

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

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

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

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

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

(s) _____
Attorney for _____
Address:_____

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

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

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

United States District Court for the _____
District of _____

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

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

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

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

Dated _____
Signed _____
Attorney for Appellant
Address: _____
_____

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

Form 6. Certificate of Compliance With Type-Volume Limit

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

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

☐ this document contains [*state the number of*] words, **or**

☐ this brief uses a monospaced typeface and contains [*state the number of*] lines of text.

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

☐ this document has been prepared in a proportionally spaced typeface using [*state name and version of word-processing program*] in [*state font size and name of type style*], **or**

☐ this document has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state*

number of characters per inch and name of type style].

(s)_____

Attorney for _____

Dated: _____

Form 7. Declaration of Inmate Filing

_____

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

A.B., Plaintiff

v.

C.D., Defendant

Case No. _____

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

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

Sign your name here_____

Signed on _____ [*insert date*]

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

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

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

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

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

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

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

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

October 9, 2015

MEMORANDUM

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

From: James C. Duff

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

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

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

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 4. Appeal as of Right—When Taken

* * * * *

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

(1) <u>If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1).</u> If an inmate ~~confined in an institution~~ files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing~~. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in~~

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

~~compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.~~ and:

(A) it is accompanied by:

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

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

(B) the court of appeals exercises its discretion to permit the later filing of a declaration or

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

* * * * *

Committee Note

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

The Rule requires the inmate to show timely deposit and prepayment of postage. The Rule is amended to specify that a notice is timely if it is accompanied by a declaration or notarized statement stating the date the notice was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as directed by the former Rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution's mail system. New Form 7 in the Appendix of Forms sets out a suggested form of the declaration.

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

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

Rule 25. Filing and Service

(a) Filing.

* * * * *

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

* * * * *

(C) **Inmate F~~f~~iling.** If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 25(a)(2)(C). A paper filed by an inmate ~~confined in an institution~~ is timely if it is deposited in the institution's internal mail~~ing~~ system on or before the last day for filing~~. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in~~

~~compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.~~ and:

(i) it is accompanied by:

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

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

declaration or notarized statement that satisfies Rule 25(a)(2)(C)(i).

* * * * *

Committee Note

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

The Rule requires the inmate to show timely deposit and prepayment of postage. The Rule is amended to specify that a paper is timely if it is accompanied by a declaration or notarized statement stating the date the paper was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as directed by the former Rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution's mail system. New Form 7 in the Appendix of Forms sets out a suggested form of the declaration.

The amended rule also provides that a paper is timely without a declaration or notarized statement if other evidence accompanying the paper shows that the paper was deposited on or before the due date and that postage was prepaid. If the paper is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the court of appeals has discretion to accept a declaration or notarized statement at a later date. The Rule uses the phrase "exercises its discretion to permit"—rather than

simply "permits"—to help ensure that pro se inmate litigants are aware that a court will not necessarily forgive a failure to provide the declaration initially.

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

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

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

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

(s) _____
Attorney for _____
Address:_____

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

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

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

United States District Court for the _____
District of _____

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

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

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

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

Dated _____

Signed _____

Attorney for Appellant

Address: _____

_____

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

Form 7. Declaration of Inmate Filing

_____

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

A.B., Plaintiff

v.

C.D., Defendant

Case No. _____

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

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

Sign your name here_____

Signed on _____ [*insert date*]

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

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

* * * * *

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

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

* * * * *

Committee Note

A clarifying amendment is made to subdivision (a)(4). Former Rule 4(a)(4) provided that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Responding to a circuit split concerning the meaning of "timely" in this provision, the amendment adopts the majority approach and rejects the approach taken in

National Ecological Foundation v. Alexander, 496 F.3d 466 (6th Cir. 2007). A motion made after the time allowed by the Civil Rules will not qualify as a motion that, under Rule 4(a)(4)(A), re-starts the appeal time—and that fact is not altered by, for example, a court order that sets a due date that is later than permitted by the Civil Rules, another party's consent or failure to object to the motion's lateness, or the court's disposition of the motion without explicit reliance on untimeliness.

Rule 5. Appeal by Permission

* * * * *

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

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

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

* * * * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes the accompanying documents required by Rule 5(b)(1)(E) and any items listed in Rule 32(f).

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

* * * * *

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

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

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

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes the accompanying documents required by Rule 21(a)(2)(C) and any items listed in Rule 32(f).

Rule 27. Motions

* * * * *

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

* * * * *

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

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

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

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

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

* * * * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes the accompanying documents required by Rule 27(a)(2)(B) and any items listed in Rule 32(f).

Rule 28. Briefs

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

* * * * *

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

* * * * *

Committee Note

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

Rule 28.1. Cross-Appeals

* * * * *

(e) Length.

(1) **Page Limitation.** Unless it complies with Rule 28.1(e)(2) ~~and (3)~~, the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

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

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if it:

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

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

(B) The appellee's principal and response brief is acceptable if it:

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

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

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

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

* * * * *

Committee Note

When Rule 28.1 was adopted in 2005, it modeled its type-volume limits on those set forth in Rule 32(a)(7) for briefs in cases that did not involve a cross-appeal. At that time, Rule 32(a)(7)(B) set word limits based on an estimate of 280 words per page.

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

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

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

(a) Form of a Brief.

* * * * *

(7) **Length.**

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

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

(i) A principal brief is acceptable if it:

- ~~it~~ contains no more than ~~14,000~~13,000 words; or
- ~~it~~ uses a monospaced face and contains no more than 1,300 lines of text.

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

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

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

~~(C) Certificate of compliance.~~

~~(i) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief~~

~~complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:~~

- ~~the number of words in the brief;~~

~~or~~

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

~~(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rules 28.1(e)(3) and 32(a)(7)(C)(i).~~

* * * * *

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

(f) Items Excluded from Length. In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- the cover page;
- a corporate disclosure statement;
- a table of contents;
- a table of citations;
- a statement regarding oral argument;
- an addendum containing statutes, rules, or regulations;

- certificates of counsel;
- the signature block;
- the proof of service; and
- any item specifically excluded by these rules or by local rule.

(g) Certificate of Compliance.

(1) **Briefs and Papers That Require a Certificate.** A brief submitted under Rules 28.1(e)(2), 29(b)(4), or 32(a)(7)(B)—and a paper submitted under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A), 27(d)(2)(C), 35(b)(2)(A), or 40(b)(1)—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the document. The certificate must state

the number of words—or the number of lines of monospaced type—in the document.

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

Committee Note

When Rule 32(a)(7)(B)'s type-volume limits for briefs were adopted in 1998, the word limits were based on an estimate of 280 words per page. In the course of adopting word limits for the length limits in Rules 5, 21, 27, 35, and 40, and responding to concern about the length of briefs, the Committee has reevaluated the conversion ratio (from pages to words) and decided to apply a conversion ratio of 260 words per page. Rules 28.1 and 32(a)(7)(B) are amended to reduce the word limits accordingly.

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

Subdivision (e) is amended to make clear a court's ability (by local rule or order in a case) to increase the

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

A new subdivision (f) is added to set out a global list of items excluded from length computations, and the list of exclusions in former subdivision (a)(7)(B)(iii) is deleted. The certificate-of-compliance provision formerly in Rule 32(a)(7)(C) is relocated to a new Rule 32(g) and now applies to filings under all type-volume limits (other than Rule 28(j)'s word limit)—including the new word limits in Rules 5, 21, 27, 29, 35, and 40. Conforming amendments are made to Form 6.

Rule 35. En Banc Determination

* * * * *

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

* * * * *

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

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

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

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

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

* * * * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes any items listed in Rule 32(f).

Rule 40. Petition for Panel Rehearing

* * * * *

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

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

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

Committee Note

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

certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes any items listed in Rule 32(f).

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

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

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

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

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

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

☐ this ~~brief~~document has been prepared in a proportionally spaced typeface using [*state name and version of word-processing program*] in [*state font size and name of type style*], **or**

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

(s)_____

Attorney for _____

Dated: _____

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

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

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

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

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

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

Rule 29. Brief of an Amicus Curiae

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

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

(2) **When Permitted.** The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

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

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

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

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

~~(1)~~ (A) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

~~(2)~~ (B) a table of contents, with page references;

~~(3)~~ (C) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—

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

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

~~(5)~~ (E) unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), a statement that indicates whether:

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

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

~~(C)~~ (iii) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended

to fund preparing or submitting the brief and, if so, identifies each such person;

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

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

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

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

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

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

(b) During Consideration of Whether to Grant Rehearing.

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

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

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

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

(5) **Time for Filing.** An amicus curiae supporting the petition for rehearing or supporting neither

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

Committee Note

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

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

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

New subdivision (b) is added to address amicus filings in connection with a petition for panel rehearing or rehearing en banc. Subdivision (b) sets default rules that apply when a court does not provide otherwise by local rule or by order in a case. A court remains free to adopt different rules governing whether amicus filings are permitted in connection with petitions for rehearing, and governing the procedures when such filings are permitted.

Rule 26. Computing and Extending Time

* * * * *

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

Committee Note

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

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

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

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

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

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

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

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

Rule 26. Computing and Extending Time

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

* * * * *

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

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

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

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

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

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

* * * * *

Committee Note

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

EXCERPT FROM THE SEPTEMBER 2015
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

* * * * *

FEDERAL RULES OF APPELLATE PROCEDURE

Rules and Forms Recommended for Approval and Transmission

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

Inmate-Filing Rules

Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7. Proposed amendments to Rules 4(c)(1) and 25(a)(2)(C), and Forms 1 and 5, and proposed new Form 7, are designed to clarify and improve the inmate-filing rules. Proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions. The amendments further clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid. New Form 7 is a suggested form of declaration. Forms 1 and 5, which are suggested forms of notices of appeal, are revised to include a reference alerting inmate filers to the existence of new Form 7. The amendments also clarify that if sufficient evidence

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

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

Appeal Time After Post-judgment Motions

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

Rule 4(a)(4) provides that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Five circuits have held that a motion is "timely" only if it is filed within the deadline set by the rules. One circuit, however, ruled that if a district court mistakenly extends the time for filing a post-judgment motion (contrary to the prohibition in Civil Rule 6(b)), then the motion is "timely" for purposes of Rule 4(a)(4).

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

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

Length Limits

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

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

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

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

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

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

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

Amicus Filings in Connection with Rehearing

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

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

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

3-Day Rule

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

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

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

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

Technical Amendment

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

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

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

* * * * *

Respectfully submitted,

Jeffrey S. Sutton, Chair

Dean C. Colson	Patrick J. Schiltz
Brent E. Dickson	Amy J. St. Eve
Roy T. Englert, Jr.	Larry D. Thompson
Gregory G. Garre	Richard C. Wesley
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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

DATE: May 4, 2015

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

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

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

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

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

* * * * *

II. Action Items—for Final Approval

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

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

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

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

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

1. Text of proposed amendments and Committee Note

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

2. Changes made after publication and comment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Text of proposed amendment and Committee Note

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

2. Changes made after publication and comment

No changes were made after publication and comment.

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

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

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

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

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

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

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

* * *

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

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

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

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

1. Text of proposed amendment and Committee Note

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

2. Changes made after publication and comment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Amicus filings in connection with rehearing: Rule 29

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

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

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

1. Text of proposed amendment and Committee Note

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

2. Changes made after publication and comment

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

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

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

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

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

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

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

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

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

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

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

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

1. Text of proposed amendment and Committee Note

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

2. Changes made after publication and comment

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

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

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

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

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

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

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

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

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

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

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

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

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April 28, 2016

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

Dear Mr. Speaker:

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

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

Sincerely,

/s/ John G. Roberts

April 28, 2016

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

Dear Mr. President:

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

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

Sincerely,

/s/ John G. Roberts

_____, 2016

SUPREME COURT OF THE UNITED STATES

ORDERED:

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

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

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

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

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 1010. Service of Involuntary Petition and Summons

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

* * * * *

Rule 1011. Responsive Pleading or Motion in Involuntary Cases

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

* * * * *

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

Rule 1012. Responsive Pleading in Cross-Border Cases

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

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

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

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

* * * * *

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

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

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

* * * * *

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

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

* * * * *

Rule 7008. General Rules of Pleading

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

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

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

Rule 7016. Pretrial Procedures

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

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

(1) to hear and determine the proceeding;

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

(3) to take some other action.

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

* * * * *

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

* * * * *

Rule 9027. Removal

(a) NOTICE OF REMOVAL.

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

* * * * *

(e) PROCEDURE AFTER REMOVAL.

* * * * *

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

* * * * *

Rule 9033. Proposed Findings of Fact and Conclusions of Law

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

* * * * *

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

October 9, 2015

MEMORANDUM

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

From: James C. Duff

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

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

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

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

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

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

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

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

* * * * *

Committee Note

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

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

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

* * * * *

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

Committee Note

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

Rule 1012. Responsive Pleading in Cross-Border Cases

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

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

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

Committee Note

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

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

* * * * *

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

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

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

* * * * *

Committee Note

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

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

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

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

* * * * *

Committee Note

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

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

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

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

* * * * *

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

* * * * *

Committee Note

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

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

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

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

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

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

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

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

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

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

EXCERPT FROM THE SEPTEMBER 2015
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

* * * * *

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules * * * * * Recommended for Approval and Transmission

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

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

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

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

Rule 3002.1

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

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

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

Rule 9006(f)

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

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

* * * * *

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

Recommendation: That the Judicial Conference:

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

* * * * *

Respectfully submitted,

Jeffrey S. Sutton, Chair

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

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

MEMORANDUM

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

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

DATE: May 6, 2015

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

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

* * * * *

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

* * * * *

II. Action Items

A. Items for Final Approval

* * * * *

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

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

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

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

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

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

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

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

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

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

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

* * * * *

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

October 29, 2015

MEMORANDUM

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

From: James C. Duff

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

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

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

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

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 7008. General Rules of Pleading

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

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

Committee Note

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

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

* * * * *

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

Committee Note

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

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

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

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

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

(1) to hear and determine the proceeding;

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

(3) to take some other action.

Committee Note

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

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

Rule 9027. Removal

(a) NOTICE OF REMOVAL.

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

* * * * *

(e) PROCEDURE AFTER REMOVAL.

* * * * *

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

to every other party to the removed claim or cause of action.

* * * * *

Committee Note

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

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

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

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

* * * * *

Committee Note

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

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

WILLIAM B. TRAXLER, JR.
CHAIRMAN, EXECUTIVE COMMITTEE

(864) 241-2730
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Memorandum of Action

Executive Committee
Judicial Conference of the United States

October 20, 2015

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

The Executive Committee acted on the following matter:

Amendments to the Federal Rules of Bankruptcy Procedure

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

William B. Traxler, Jr.

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

10/22/2015

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

JEFFREY S. SUTTON
CHAIR

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DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS, III
EVIDENCE RULES

October 16, 2015

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

Dear Chief Judge Traxler:

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

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

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

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

Sincerely,

/s/

Jeffrey S. Sutton

JSS:jmf
Attachments

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

MEMORANDUM

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

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

DATE: October 14, 2015

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

I. Introduction

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

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

II. The *Stern* Amendments

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

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

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

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

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

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

III. The Supreme Court Upholds Consent in *Wellness*

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

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

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

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[2] *Arkison* did, however, confirm that *Stern* claims could be treated as non-core under 28 U.S.C. § 157(c), as the rule amendments had assumed. *See* 134 S. Ct. at 2174 ("Accordingly, because these *Stern* claims fit comfortably within the category of claims governed by § 157(c)(1), the Bankruptcy Court would have been permitted to follow the procedures required by that provision, *i.e.*, to submit proposed findings of fact and conclusions of law to the District Court to be reviewed *de novo*.").

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

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

IV. The Committee's Analysis and Conclusion

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

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

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

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

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

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

V. The Committee's Recommendation

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

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

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

Attachment

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

September 27, 2013

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

FROM: Jeffrey S. Sutton

SUBJECT: Summary of Proposed Amendments to the Federal Rules

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

I. Proposed Amendments of Significant Interest

A. Federal Rules of Bankruptcy Procedure

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

a. Brief Description

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

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

b. Arguments in Favor

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

c. Objections/Comments

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

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

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

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

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

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

d. The Advisory Committee's Reasoning

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

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

e. *Arkison*

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

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

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

Date: May 8, 2013

Re: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

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

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

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

* * * * *

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

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

* * * * *

II. Action Items

A. Items for Final Approval

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

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

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

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

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

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

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

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

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

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

* * * * *

April 28, 2016

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

Dear Mr. Speaker:

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

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

Sincerely,

/s/ John G. Roberts

April 28, 2016

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

Dear Mr. President:

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

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

Sincerely,

/s/ John G. Roberts

_____, 2016

SUPREME COURT OF THE UNITED STATES

ORDERED:

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

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

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

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

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 4. Summons

* * * * *

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

* * * * *

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

* * * * *

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

Rule 82. Jurisdiction and Venue Unaffected

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

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

October 9, 2015

MEMORANDUM

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

From: James C. Duff

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

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

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

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 4. Summons

* * * * *

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

* * * * *

Committee Note

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

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

The amendment resolves this possible ambiguity.

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

* * * * *

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

Committee Note

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

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

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

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

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

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

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

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

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

Rule 82. Jurisdiction and Venue Unaffected

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

Committee Note

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

EXCERPT FROM THE SEPTEMBER 2015
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

* * * * *

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

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

Rule 4(m)

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

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

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

3-Day Rule

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

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

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

Rule 82

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

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

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

* * * * *

Respectfully submitted,

Jeffrey S. Sutton, Chair

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

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

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

JEFFREY S. SUTTON
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

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

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

DATE: May 2, 2015

RE: Report of the Advisory Committee on Civil Rules

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* * * * *

I. RECOMMENDATIONS TO APPROVE FOR ADOPTION

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

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

Rule 4. Summons

* * * * *

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

* * * * *

COMMITTEE NOTE

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

The amendment resolves this possible ambiguity.

Gap Report

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

I.B. RULE 6(d)

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

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

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

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

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

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

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

* * * * *

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

COMMITTEE NOTE

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

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

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

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

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

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

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

Gap Report

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

I.C. RULE 82

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

Rule 82. Jurisdiction and Venue Unaffected

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

COMMITTEE NOTE

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

Gap Report

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

* * * * *

April 28, 2016

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

Dear Mr. Speaker:

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

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

Sincerely,

/s/ John G. Roberts

April 28, 2016

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

Dear Mr. President:

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

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

Sincerely,

/s/ John G. Roberts

Corrected April 28, 2016

SUPREME COURT OF THE UNITED STATES

ORDERED:

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

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

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

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

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 4. Arrest Warrant or Summons on a Complaint

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

* * * * *

(c) Execution or Service, and Return.

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

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

(3) ***Manner.***

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

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

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

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

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

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

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

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

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

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

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

(a) stipulated by the parties;

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

(c) permitted by an applicable international agreement.

* * * * *

Rule 41. Search and Seizure

* * * * *

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

* * * * *

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

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

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

* * * * *

(f) Executing and Returning the Warrant.

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

* * * * *

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

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

* * * * *

Rule 45. Computing and Extending Time

* * * * *

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

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

October 9, 2015

MEMORANDUM

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

From: James C. Duff

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

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

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

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 4. Arrest Warrant or Summons on a Complaint

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

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

to a summons, a judge may take any action authorized by United States law.

* * * * *

(c) Execution or Service, and Return.

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

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

(3) ***Manner*****.**

(A) A warrant is executed by arresting the

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

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

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

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

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

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

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

(i) by delivering a copy, in a manner authorized by the foreign jurisdiction's law, to an officer, to a managing or general agent, or to an agent appointed or legally authorized to receive service of process; or

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

(a) stipulated by the parties;

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

(c) permitted by an applicable international agreement.

* * * * *

Committee Note

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 41. Search and Seizure

* * * * *

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

* * * * *

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

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

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

* * * * *

(f) Executing and Returning the Warrant.

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

* * * * *

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

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

* * * * *

Committee Note

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

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

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

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

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

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

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

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

Rule 45. Computing and Extending Time

* * * * *

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

Committee Note

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

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

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

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

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

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

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

EXCERPT FROM THE SEPTEMBER 2015
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

* * * * *

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

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

Rule 4

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

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

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

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

Rule 41

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

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

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

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

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

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

3-Day Rule

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

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

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

* * * * *

Respectfully submitted,

Jeffrey S. Sutton, Chair

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

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

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

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

DATE: May 6, 2015

RE: Report of the Advisory Committee on Criminal Rules

I. INTRODUCTION

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

* * * * *

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

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

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

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

* * * * *

II. ACTION ITEMS

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

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

1. Reasons for the proposal

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

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

2. The proposed amendment

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

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

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

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

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

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

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

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

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

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

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

3. Public Comments and Subcommittee Review

a. Public comments

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

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

b. The Subcommittee's review and recommendations

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

4. Recommended action

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

a. Opposition to the proposed amendment

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

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

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

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

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

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

b. Suggested revisions

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

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

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

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

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

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

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

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

1. Reasons for the proposed amendment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Public Comments and Subcommittee Review

a. The public comments

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

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

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

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

(i) Fourth Amendment concerns

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

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

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

(ii) Title III

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

(iii) Extraterritoriality and international law concerns

Some comments focused on the possibility that the devices to be searched–whose location was by definition unknown–might be located outside the United States. They urged that the courts should not authorize searches outside the United States that would violate international law and the sovereignty of other nations, as well as any applicable mutual legal assistance treaties.

(iv) The role of Congress

An additional theme running through many of these comments was that the proposed amendment raised policy issues that should be resolved by Congress, not through procedural rulemaking. Some comments argued that only Congress could balance the competing policies and adopt appropriate safeguards. Others urged that the proposed amendment exceeded the authority granted by the Rules Enabling Act.

(v) Notice concerns

Finally, multiple comments expressed concern that the notice provisions were insufficiently protective, because they required only that reasonable efforts be made to provide notice. This, commenters argued, might lead to no notice being given to parties who were subject to remote electronic searches, or to long delays in giving notice. Some commenters also argued that all parties whose rights were affected by a search must be given notice, not either the person whose property was searched or whose information was seized or copied.

b. The Subcommittee's review and recommendation

The Rule 41 Subcommittee, chaired by Judge Raymond Kethledge, received both summaries and the full text of all comments, and it held multiple teleconferences to review the comments. The Subcommittee unanimously recommended that, with several minor revisions, the Advisory Committee should approve the proposed amendment and transmit it to the Judicial Conference.

4. Recommended action

After extended discussion, the Advisory Committee concurred in the recommendation that the proposed amendment, with minor revisions proposed by the Subcommittee, should be approved for transmission to the Standing Committee.

a. Opposition to the proposed amendment

In general the Committee concluded that the concerns of those opposing the amendment were about the substantive limits on government searches, which are not affected by the proposed amendment. Opposition comments did not address the procedure for designating the district in which a court will initially decide whether substantive requirements have been satisfied in the two circumstances prompting the amendment. Thus they furnished no basis for withdrawing the proposed amendment. The Committee is confident that judges will address Fourth Amendment requirements on a case-by-case basis both in issuing warrants under these amendments and in reviewing them when challenges are made thereafter.

Much of the opposition to the amendment reflected a misunderstanding of current law, the scope of the amendment, and the serious problems that it addresses. First, many commenters who opposed the rule did not recognize that the government must demonstrate probable cause to obtain a warrant. As noted below, the Committee recommends a revision to the caption of the relevant section referring to "venue" in order to draw attention to the limited scope of the amendment. Second, many commenters incorrectly assumed that the amendment created the authority for remote electronic searches. To the contrary, remote electronic searches are currently taking place when the government can identify the district in which an application should be made and satisfy the probable cause requirements for a warrant. Third, the opposing comments do not take account of the real need for amendment to allow the government to respond effectively to the threats posed by technology. Technology now provides the means for identity theft, corporate espionage, terrorism, child pornography, and other serious offenses to jeopardize the economy, national security, and individual privacy. The government can itself use technology to identify the perpetrators of such crimes but needs a rule clarifying the venue where it should make the Fourth Amendment showing necessary for a warrant. At the hearings, those who opposed the amendment were candid in admitting that they could offer no alternative to the proposed amendment (other than the hope that Congress might study the general issues and respond).

The Committee concluded that it was important to provide venue, thus allowing the case law on potential constitutional issues to develop in an orderly process as courts review warrant applications. This is far preferable than after-the-fact rulings on the legality of warrantless searches for which the government claims exigent circumstances. If the New York Stock Exchange were to be hacked tomorrow using anonymizing software, under current Rule 41 there is no district in which the government could seek a warrant. It would be preferable, the Committee concluded, to allow the government to seek a warrant from the court where the investigation is taking place, rather than conducting a warrantless search. Judicial review of warrant applications better ensures Fourth Amendment rights and enhances privacy. Any concern that judges may be uninformed about the technology to be used in the searches could be addressed by judicial education. The Federal Judicial Center has recently prepared some information materials about topics such as cloud computing, and additional materials could be developed to help judges review applications for remote electronic searches.

In botnet investigations, the amendment provides venue in one district for the warrant applications, eliminating the burden of attempting to secure multiple warrants in numerous

districts and allowing a single judge to oversee the investigation. In prior botnet investigations, the burden of seeking warrants in multiple districts played a role in the government's strategy, providing a strong incentive to rely on civil processes. Again, the amendment addresses only a procedural issue, not the underlying substantive law regulating these searches. Allowing venue in a single district in no way alters the constitutional requirements that must be met before search warrants can be issued.

The Committee declined to make any major changes in the provisions governing notice. However, as noted below, it adopted several small changes recommended by the Subcommittee and also revised the Committee Note to address concerns made in the public comments.

Finally, the Committee concluded that arguments urging that the matter be left to Congress are not persuasive. Venue is not substance. Venue is process, and Rules Enabling Act tells the judiciary to promulgate rules of practice and procedure, not to wait for Congress to act. Instead, Congress responds to proposed rules. The Department came to the Committee with two procedural problems, created by the language of the existing Rule, not by the Constitution or other statute, that are impairing its ability to investigate ongoing, serious computer crimes. The Advisory Committee's role under the Rules Enabling Act is to propose amendments that address these problems and provide a forum for the government to determine the lawfulness of these searches.

One member dissented from the Committee's conclusions on these points and voted against forwarding the amendment to the Standing Committee. The dissenting member thought that the amendment is substantive, not procedural, because it has such important substantive effects, allowing judges to make ex parte determinations about core privacy concerns. The amendment, this member argued, would not permit adversarial testing of the underlying substantive law because defense counsel would not participate until too late in the process, in back-end litigation. For many people, computers are their lives, and the member concluded that these privacy concerns should be considered in the first instance by Congress. The remainder of the Committee was not persuaded; computers are no more sacrosanct than homes, and search warrants for homes have long been issued ex parte and reviewed in back-end litigation.

b. Proposed revisions

The Committee unanimously accepted the Subcommittee's recommendations for several revisions in the rule as published, none of which require republication.

(i) The caption

The Committee accepted the Subcommittee's recommendation for a change in the caption of the affected subdivision of Rule 41, substituting "Venue for a Warrant Application" for the current caption "Authority to Issue a Warrant." This change responds to the many comments that assumed the amendment would allow a remote search in any case falling within the proposed amendment (for example, any case in which an individual had used anonymizing technology such as a VPN). The current caption seems to state an unqualified "authority" to issue warrants meeting the criteria of any of the subsections. Many commenters mistakenly

interpreted the rule in this fashion, and strongly opposed it on this ground. The Committee considered and declined to adopt alternative language suggested by our style consultant, Professor Kimble, because it would less clearly indicate the limited purpose and effect of the amendment.

The Committee also adopted the Subcommittee's proposed addition to the Committee Note explaining the change in the caption. The new Note explicitly addresses the common misunderstanding in the public comments, stating what the amendment does (and does not) do: "the word 'venue' makes clear that Rule 41(b) identifies the courts that may consider an application for a warrant, not the constitutional requirements for the issuance of a warrant, which must still be met."

(ii) Notice

The Committee adopted the Subcommittee's two proposed revisions to the notice provisions for remote electronic searches and the accompanying Committee Note. The purpose of both revisions to the text is to parallel, as closely as possible, the requirements for physical searches. The addition to the Committee Note explains the changes to the text, and also responds to a common misunderstanding that underpinned multiple comments criticizing the proposed notice provisions.

The Committee added a requirement that the government provide a "receipt" for any property taken or copied (as well as a copy of the warrant authorizing the search). This parallels the current requirement that a receipt be provided for any property taken in a physical search. The Committee agreed that the omission of this requirement in the published rule was an oversight that should be remedied.

The Committee also rephrased the obligation to provide notice to "the person whose property was searched or <u>who possessed the information that was seized or copied</u>." Again, the purpose was to parallel the requirement for physical searches.

On the other hand, the Committee rejected the suggestion in some public comments that the government should be required to provide notice to both "the person whose property was searched" <u>and</u> whoever "possessed the information that was seized or copied, since that is not required in the case of physical searches. For example, if the Chicago Board of Trade is served with a warrant and files containing information regarding many customers are seized, the government may give notice of the search only to the Board of Trade, and not to each of the customers whose information may be included in one or more files. The same should be true in the case of remote electronic searches.

Finally, the Committee endorsed the Subcommittee's proposed addition to the Committee Note explaining the changes made in the notice provisions after publication, and also responding to the many comments that criticized the proposed notice provisions as insufficiently protective. The addition to the Note draws attention to the other provisions of Rule 41 that preclude delayed notice except when authorized by statute and provides a citation to the relevant statute. Professor Coquillette commented that because of the widespread confusion on this point in the public

comments, the proposed addition was an appropriate exception to the general rule that committee notes should not be used to help practitioner.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 41 be approved as amended and transmitted to the Judicial Conference.

C. ACTION ITEM—Rule 45 (additional time after certain kinds of service)

After review of the public comments, the Advisory Committee voted unanimously to recommend that the Standing Committee approve the proposed amendment to Rule 45(c), with three revisions from the published version and transmit it to the Judicial Conference. The proposed amendment is at Tab E.

1. Reasons for the proposal

The proposed amendment to Rule 45(c) is a product of the Standing Committee's CM/ECF Subcommittee; parallel amendments to the civil, criminal, bankruptcy and appellate rules were published for comment. The proposed amendment would abrogate the rule providing for an additional three days whenever service is made by electronic means. It reflects the CM/ECF Subcommittee's conclusion that the reasons for allowing extra time to respond in this situation no longer exist. Concerns about delayed transmission, inaccessible attachments, and consent to service have been alleviated by advances in technology and extensive experience with electronic transmission. In addition, eliminating the extra three days would also simplify time computation. The proposed amendment, as well as the parallel amendments to the other Rules, includes new parenthetical descriptions of the forms of service for which three days will still be added.

2. Public Comments

The public comments are summarized at Tab E.

The Pennsylvania Bar Association and the National Association of Criminal Defense Lawyers (NACDL) opposed the amendment. Each noted that the three added days are particularly valuable when a filing is electronically served at inconvenient times. NACDL emphasized that many criminal defense counsel are solo practitioners or in very small firms, where they have little clerical help, and often do not see their ECF notices the day they are received. The Department of Justice expressed a similar concern about situations in which service after business hours, from a location in a different time zone, or during a weekend or holiday may significantly reduce the time available to prepare a response. The Department did not oppose the amendment, however, and instead suggested language be added to the Committee Note to address this issue.

NACDL also questioned the addition of the phrase "Time for Motion Papers" to the caption to Rule 45(c), suggesting that it may lead to confusion.

Ms. Cheryl Siler suggested that as part of the revision the existing language of Rule 45(c) should be amended to parallel Fed. R. Civ. P. 6(d), FRAP 26(c) and Fed. R. Bank. P. 9006(f). In contrast to Rule 45(c), which requires action "within a specified time *after service*," the parallel Civil and Bankruptcy Rules require action "within a specified [or prescribed] time *after being served*." Siler expressed concern that practitioners may interpret the current rule to mean the party serving a document (as well as the party being served) is entitled to 3 extra days.

The Federal Magistrate Judges Association (FMJA) expressed concern that readers of the amended rule might think that three days are still added after electronic service because of the cross reference to Civil Rule 5(b)(2)(F) "(other means consented to)." It suggested either eliminating all of the parentheticals in the proposed rule or revising the rule to refer to "(F) (other means consented to except electronic service)."

The Advisory Committee's CM/ECF Subcommittee, chaired by Judge David Lawson, held a telephone conference to consider the comments. After discussing the FMJA's concerns it decided not to recommend a change in the published rule. The likelihood of confusion did not seem significant, and any confusion that might arise would be short lived because of the efforts underway to eliminate the requirement for consent to electronic service. The parentheticals will be helpful to practitioners, and any revision to the parenthetical reference would require further amendment in the near future. Language in the proposed Committee Note directly addresses this issue. The Subcommittee recommended to the Criminal Advisory Committee that no change be made in the published rule on this issue, and the Advisory Committee agreed with that recommendation at its March meeting.

The Advisory Committee did approve three other revisions to the proposal, each recommended by its Subcommittee.

3. Suggested Revisions

a. Addition to Committee Note.

The first change is a proposed addition to the Committee Note that addresses the potential need to grant an extension to the time allowed for responding after electronic service. At the Advisory Committee's March meeting, two members initially opposed forwarding the published amendment to the Standing Committee, finding that the concerns voiced by the Pennsylvania Bar Association, NACDL, and the Department of Justice counseled against an amendment that would eliminate the three added days after electronic service. These members noted that the three added days are important for criminal practitioners because it is often necessary to speak directly with clients before filing responses, but speaking with incarcerated clients takes more time, particularly when clients are incarcerated in distant locations. However, the Committee eventually achieved unanimity on a compromise approach: adding language to the Committee Note. The Committee approved an addition to the Note drafted by the Department of Justice and recommended by the Advisory Committee's CM/ECF Subcommittee. The Committee decided that adding language to the Committee Note that mentioned the potential need for extensions was important not only for the reasons voiced by defense attorneys and the Department of Justice, but also because district court discretion to adjust deadlines in criminal cases is essential in order to

address matters on the merits when appropriate. Such flexibility is particularly important when a person's liberty is at stake. Granting extensions in some circumstances may also be more efficient because of collateral challenges that frequently follow missed deadlines. This principal was among those that guided the Committee's recent work on Rule 12. The amendments to Rule 12 emphasized the district court's discretion to extend or modify motion deadlines so that issues can be most efficiently resolved on their merits before trial, avoiding litigation under Section 2255.

To facilitate uniformity in the Committee Note that would accompany the parallel rules making their way through the various Advisory Committees, the Criminal Advisory Committee approved the revised Note language with the understanding that modifications may be required. Indeed, subsequent to the March meeting, a much shorter version of the addition was approved by the Criminal Advisory Committee's Subcommittee on CM-ECF, and then by the Chairs of each Advisory Committee. That new language has been added to the published Committee Note in each Committees' parallel proposal. It reads: "Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice."

b. Change to the Caption

The Advisory Committee also agreed to amend the caption of the Rule published for comment to eliminate the additional words "Time for Motion Papers." These words do not appear in the caption of the existing Rule 45, and were included in the proposed amendment in order to parallel the current caption of Civil Rule 6, on which Rule 45 was patterned, as well as the caption to Bankruptcy Rule 9006. However, the added words do not describe the text of Rule 45. Instead, Rule 12 deals extensively with the time for motions.

c. Substituting "being served" for "service"

Finally, the Advisory Committee agreed to amend the proposed text of the amendment to Rule 45 as published so that it is parallel to the language of the other rules, referring to action "within a specified time after *being served*" instead of "time after *service*." The Committee is unaware of any substantive reason for the slightly different wording of Rule 45 as compared to the Civil and Bankruptcy Rules. The Committee believes it is prudent to revise the language of Rule 45(c) to eliminate the discrepancy while other changes are being made in Rule 45(c).

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 45 be approved as amended and transmitted to the Judicial Conference.

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U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

February 7, 2014

MEMORANDUM

TO: Judge John F. Keenan
Chair, Subcommittee on Rule 41

FROM: Jonathan J. Wroblewski, Director
Office of Policy and Legislation

SUBJECT: Proposed Amendment to Rule 41 of the Federal Rules of Criminal Procedure

We very much appreciate Professor Kerr laying out in his memorandum his concerns surrounding the Department's proposal to amend Rule 41. Professor Kerr endorses part of the proposal but then suggests deferring consideration of another important part. Specifically, he suggests the Subcommittee leave unaddressed whether a federal judge should be authorized to issue a warrant for a remote search of electronic media located in a known location outside her district, including in those cases when a search would require coordination of simultaneous action in many districts at once such as when law enforcement confronts a botnet.

On process – We think the Committee should address Professor Kerr's concerns on our upcoming call and not defer consideration indefinitely. As you know, the rules amendment process, at its fastest, spans three years from proposal to full enactment. Further, the Standing Committee has indicated in the past that repeatedly revisiting a single procedural rule for amendment is to be avoided because it creates unnecessary confusion for the users of the rules. The Standing Committee has suggested that if a Committee is considering a procedural issue, it should address all aspects of that issue at once rather than in a piecemeal basis. As the ability to effectively and efficiently investigate data stored in multiple jurisdictions is a present and growing issue, we think the Subcommittee should take the time necessary to consider a better rule now to deal with these issues.[1]

[1] *On language* – Professor Kerr repeatedly uses the word "hacking" in his memorandum to describe what the government is seeking to do here. The Merriam-Webster Dictionary definition of a hacker is "a person who illegally gains access to and sometimes tampers with information in a computer system." *See*, m-w.com. As in the physical world, the government will, from time to time, need to search computers involved in criminal activity in order to fulfill its public safety mission. We have made our proposal to the Committee to facilitate the process of seeking court authorization for such searches where required under the law.

On the substance of Professor Kerr's concerns – Professor Kerr's chief concern surrounds the constitutional requirements for warrants for searches of electronic information. For example, Professor Kerr is concerned with searches of multiple computers through a single warrant. We recognize that this is an important issue and may be litigated in an appropriate case. But as we discussed before in exploring some members' concerns over the particularity requirement for warrants for electronic information, the proposed amendment cannot and does not address substantive constitutional questions. The language of our proposed rule does not address the question of multiple searches using a single warrant. And as requested, we have drafted Committee Note language with the Committee reporters to ease the concerns that the amendment might be read as an attempt to influence resolution of this or other constitutional issues.

On the other hand, we are indeed seeking a rule that would authorize a federal judge to issue a warrant for a remote search of electronic media located in a known – or unknown – location outside her district where the crime occurred in the district, including for those cases when a search would require coordination of simultaneous action in many districts at once. Despite Professor Kerr's concerns, we think this is the right policy and the right rule for several reasons.

First, Congress and the federal courts have already recognized that because of the very nature of electronic information, multijurisdictional judicial authorization for obtaining such information is good public policy. In the context of pen registers, wiretaps and the Electronic Communications Privacy Act, multijurisdictional authorization for obtaining electronic information is already the law.

For example, Professor Kerr notes in his memorandum that the proposed amendment could be used to obtain warrants in multi-district cases that do not involve botnets, such as where a suspect uses a Dropbox account to store information. He is correct. In such cases, however, Congress has already authorized a judge in the district where the crime occurred – rather than in the district where the data is stored – to issue an order for law enforcement to obtain the information. *See* 18 U.S.C. §§ 2703(a), (b)(1)(A), (c)(1)(A) and 2711(3)(A) (authorizing a court with "jurisdiction over the offense being investigated" to issue an order requiring an online service provider to disclose information it stores regarding a customer). These existing multijurisdictional authorizations have raised no serious concerns and our proposal is consistent with them.

Second, as we have previously indicated, investigations that require obtaining warrants in multiple districts for searches of computers involved in a single crime create serious practical obstacles for law enforcement while also wasting judicial resources. Rule 41 already recognizes these realities in terrorism cases and provides for multijurisdictional reach in those cases.

Third, providing multijurisdictional reach for searches of electronic media will facilitate a more robust review of the warrant applications. It will permit a single judge with knowledge of the investigation – in the district where the investigation is taking place – to review all warrant

requests related to the case. That judge will be in a better position to question – face-to-face if need be – the investigators leading the case.[2]

Moreover, we have serious concerns with Professor Kerr's proposal which would require agents seeking a warrant to establish that "the district (if any) in which the electronic storage media is located cannot reasonably be ascertained." It is unclear how law enforcement would satisfy this requirement in practice. The proposal might require a showing that other investigatory means have been tried and failed or are unlikely to succeed. Warrants issued under such a provision would likely routinely result in *Franks* hearings on whether agents disclosed every fact that might have suggested a possible location of the computer, and would also draw courts into a determination of which investigative steps are "reasonable" in a given type of case. Moreover, the requirement would preclude use of the new amendment in cases, such as botnet cases, where the location of the computer is actually known.

- - -

We appreciate the opportunity to address Professor Kerr's concerns before our call. We encourage the Subcommittee to fully consider them. We also believe, though, that the Subcommittee should adopt the proposal we circulated earlier this week for the reasons discussed in this memorandum and on our previous calls. We look forward to our discussion on Monday.

[2] Professor Kerr raises questions about the meaning of the phrase "any district where activities related to the crime may have occurred." As Professor Kerr recognizes, though, the Department's proposed language is drawn from existing Rule 41(b)(3) and (b)(5). This language has not caused confusion or concerns with courts or commentators to date, and we see no reason to believe it will in the future in the vast majority of cases. Moreover, Professor Kerr himself retains this very language in his own proposal.

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

March 5, 2014

MEMORANDUM

TO: Judge John F. Keenan
Chair, Subcommittee on Rule 41

FROM: Jonathan J. Wroblewski, Director
Office of Policy and Legislation

SUBJECT: Proposed Amendment to Rule 41 of the Federal Rules of Criminal Procedure

This memorandum responds to several issues raised on our recent conference call and in several subsequent email messages from subcommittee members. We continue to believe the amendment language we proposed – together with the Committee Note addressing the concerns raised on our prior calls – should be published for public comment.[1] We hope this memorandum will help forge a consensus in our subcommittee that will in turn help move this proposal forward.

Notice

In his February 10, 2014 email message, Judge Kethledge asked whether the Department's Rule 41 amendment proposal would affect existing law or practice with respect to the notice given when the government searches multiple computers whose locations are known. We do not think so. The Department's proposal concerning which courts have authority to issue warrants does not impact the standards for when notice may appropriately be delayed with the approval of the issuing court. *See* 18 U.S.C. § 3103a. Further, the Department believes that its proposal is unlikely to substantially impact existing practice with respect to notice of such warrants.

First, the Department's proposal regarding which courts can authorize search warrants permitting remote searches does not work any change in the delayed-notice statute, 18 U.S.C. § 3103a. The issuing court still must find "reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result (as defined in section

[1] As described below, we have made one small amendment to our proposal to make clear that it was not intended to work any change to the constitutional particularity standard.

2705, except if the adverse results consist only of unduly delaying a trial)." 18 U.S.C. § 3103a(b)(1). Nothing in this standard distinguishes physical searches from remote electronic searches. In addition, a court cannot authorize the seizure of either physical evidence or electronic information pursuant to a delayed-notice warrant without a judicial finding of reasonable necessity. *See* 18 U.S.C. § 3103a(b)(2) (requiring that a delayed-notice warrant must prohibit "the seizure of any tangible property, any wire or electronic communication (as defined in section 2510), or, except as expressly provided in chapter 121, any stored wire or electronic information, except where the court finds reasonable necessity for the seizure"). Significantly, this provision treats "stored wire or electronic information" in precisely the same manner as "any tangible property."[2] In practice, the Department has interpreted "seizure . . . of any stored wire or electronic information" in § 3103a(b)(2) broadly to include the copying of information stored on a computer.

In accordance with this view, the Department advises against copying even the most basic electronic information pursuant to a delayed-notice warrant without a finding of "reasonable necessity." For example, on February 5th, the Department circulated to the subcommittee an affidavit for a remote-access search warrant obtained in the Eastern District of Pennsylvania. Paragraph 63 of that affidavit includes the following:

> To the extent that use of a CIPAV to obtain an IP address, "variables," the MAC address and the registry information can be characterized as a seizure of an electronic communication or electronic information under 18 U.S.C. § 3103a(b)(2), such a seizure is reasonably necessary for the reasons that I have set forth above in paragraphs 53 to 59.

We anticipate the Department will continue to use this approach: we will seek a judicial finding of "reasonable necessity" to obtain stored electronic information in those cases where a delay of notice is warranted.

Second, under the existing Rule 41, a remote search of a computer whose location is known can already be done, at least where the warrant is issued from the district where the computer is located. Thus if conducting a remote search of a computer offers the government practical advantages over conducting a physical search of the same computer, nothing in Rule 41 prevents the government from opting for the remote search. By the same token, nothing in the government's proposed amendment would make it easier for the government to opt for the remote search, with the exception that the amendment would make clear that the government could seek the warrant from the district where the investigation is taking place.

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[2] In his February 8, 2014 memorandum, Professor Kerr suggested that the delayed notice standard of 18 U.S.C. § 3103a is easier to meet for electronic searches than for physical searches. He stated that "the delayed notice provision only applies when no tangible evidence is seized," and that "[b]ecause no tangible evidence is seized [in the case of remote searches], the standard of § 3103a(b) is easy to meet." As explained above, the Department interprets § 3103a differently and we disagree with Professor Kerr on this point. In any event, as explained below, even if Professor Kerr is correct that notice can be more easily delayed in remote searches, nothing in the Department's proposal affects the availability of remote searches in cases where the location of the computer is already known; rather, the proposal only affects which district can authorize the remote search.

In his February 10, 2014 email message, Professor Kerr also inquired about the Department's practices for delaying notice when it obtains remote access warrants. Currently, the Department obtains remote access warrants primarily to combat Internet anonymizing techniques. In such investigations, delayed notice is normally sought because of the nature of the investigation. Where we are trying to identify an online criminal who is taking steps to avoid identification, there will typically be reasonable necessity for delaying notice of the search. On the other hand, if the Department were to use remote access warrants in circumstances that did not involve the same risk of an adverse result such as flight or destruction of evidence, the Department would be less likely to invoke the delayed notice procedures of § 3103a. Alternatively, the Department might request a delay of shorter duration, limited to the amount of time necessary to complete the initial, critical stage of a remote operation before a subject could destroy evidence, modify malicious code, change servers or hosting services, or take other countermeasures.

Problems the Department Intends to Address

In his February 11, 2014 email message, Judge Filip asked about the specific problems the Department intends to address by this proposal. In its initial letter to Judge Raggi on September 18, 2013, the Department described two problems it intended the proposal to address. First, the proposal is intended to enable investigators to obtain warrants where the location of the computer to be searched is unknown. Second, the proposal is intended to enable investigators to obtain warrants to search computers in many districts simultaneously. For example, a large botnet investigation may require action in all 94 districts simultaneously, but obtaining simultaneous search warrants from 94 different magistrates is nearly impossible as a practical matter.

Addressing these two circumstances remains the Department's top priorities in this proposal. However, there is a third circumstance that our proposal would address and that we believe Rule 41 should speak to. When law enforcement obtains a warrant authorizing a physical search of a particular location, it should be able to obtain a warrant that authorizes it to simultaneously search documents that are accessible from a computer at that location even if they are actually stored remotely in another district. For example, suppose that officers execute a warrant to search a business located in San Francisco and that, upon entry, they discover that the business stores its documents with a cloud-based server. Under the current version of Rule 41 (assuming the requisite probable cause and particularity requirements are met), a magistrate in the Northern District of California could issue a warrant authorizing agents to search the business and, while they are present at the business, access any cloud-based storage located within the district (such as a DropBox account). Our proposed amendment would clarify that the magistrate could equally authorize the agents to access such storage in any district, including an unknown district. We think such a provision would be sound policy; if, upon identifying a remote storage account, agents were required to obtain a subsequent warrant in another district, their ability to obtain the records in that account may be lost. By the time a subsequent warrant could be obtained, the documents may be deleted or encrypted. We believe courts in the district

where criminal activities have taken place should have authority to issue warrants for all such records accessible from the premises.[3]

Particularity

In our subcommittee calls, concerns have been raised on several occasions concerning whether a single warrant for electronic information could be used to search multiple computers. As we've stated, our proposal is not intended to address, and does not address, the constitutional standard of particularity required in any search warrant, and we have deleted the words "or both" from section (b)(6) of our proposed amendment to clarify that no such change was intended. Existing case law around physical searches permits multiple locations to be included in a single warrant in certain circumstances so long as adequate probable cause exists for searching each of the locations. We are unaware of any case law directly addressing this issue in virtual searches. Even to the extent that current law does place limits on the number or combination of premises or pieces of property that may be searched pursuant to one warrant, of course, our proposed amendment still offers the substantial advantage that the requisite number of warrant applications can all be simultaneously presented to the same magistrate.[4]

The particularity requirement of the Fourth Amendment for search warrants is a well-established doctrine. It demands that "warrants must particularly describe the things to be seized, as well as the place to be searched." *Dalia v. United States*, 441 U.S. 238, 255 (1979); *see also Go-Bart Importing Co. v United States*, 282 U.S. 344, 357 (1931); *Coolidge v. New Hampshire*, 403 U.S. 443, 471 (1971); *Andersen v. Maryland*, 427 U.S. 463, 480 (1976). The rationale underlying the particularity requirement is to prevent the issuance of warrants based on vague information, and to protect against the use of general warrants. *Go-Bart Importing Co.*, 282 U.S. 357. A warrant has described the place to be searched with sufficient particularity when "the description is such that the officer with a search warrant can, with reasonable effort ascertain and identify the place intended." *Steele v. United States*, 267 U.S. 498, 503 (1925) (approving as sufficient the most common practice of identifying the location by street address). If the warrant does not particularly describe the place where a search is to be conducted, police

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[3] As discussed below, the benefits of permitting an out-of-district search are present whether the government is allowed to proceed by a single warrant authorizing both physical and remote search or required to submit separate warrant applications for each.

[4] We note that in a 2010 law review article, Professor Kerr argued that the Fourth Amendment's particularity requirement should allow searches of multiple accounts pursuant to a single showing of probable cause:

> How should the particularity requirement apply to Internet evidence collection? The best answer is that the particularity requirement should apply to a particular person rather than a specific account. When the government establishes probable cause to believe that a person has or will use the Internet to store, transmit, or receive specific evidence of criminal activity, any account that the person has or will use – and that therefore might plausibly contain the evidence sought – should be included within the scope of the warrant. In other words, the particularity requirement should apply to Internet users, not Internet accounts.

Orin S. Kerr, *Applying the Fourth Amendment to the Internet: a General Approach*, 62 Stan. L. Rev. 1005, 1045-46 (2010).

do not have the authority under that warrant to search that location, even if belongings listed on the warrant are found at that location. *United States v. Alberts*, 721 F.2d 636, 639 (8th Cir. 1983) (finding a warrant deficient where it authorized the search of effects thought to be contained in bags and located at one residence when the bags were in fact found at another).

Although a warrant must normally specify the place to be searched, the Supreme Court explained in a tracking device case, *United States v. Karo*, 468 U.S. 705 (1984), that this requirement would be excused where the purpose of the search is to discover the very place to be searched:

> The Government contends that it would be impossible to describe the "place" to be searched, because the location of the place is precisely what is sought to be discovered through the search. However true that may be, it will still be possible to describe the object into which the beeper is to be placed, the circumstances that led agents to wish to install the beeper, and the length of time for which beeper surveillance is requested. In our view, this information will suffice to permit issuance of a warrant authorizing beeper installation and surveillance.

Id. at 718.

Current Fourth Amendment particularity jurisprudence allows for a single warrant to describe and authorize the search of more than one physical location or piece of property. *See, e.g., United States v. Burkhart*, 602 F.3d 1202, 1208 (10th Cir. 2010) (*obiter dictum*, citing *United States v. Rios*, 611 F.2d 1335, 1347 (10th Cir. 1979) (four separate structures)); *United States v. Pennington*, 287 F.3d 739, 744-45 (8th Cir. 2002) (three specific buildings one property); *United States v. Johnson*, 26 F.3d 669, 694 (7th Cir. 1994) (two units within one house); *United States v. Hillyard*, 677 F.2d 1336, 1339 (9th Cir. 1982) (two warrants, each listing two vehicles). As one court said in approving a search warrant that covered multiple, non-adjacent buildings occupied by the same person, "A separate warrant for each suspected place to be searched is not called for either by the letter or the spirit of the constitution . . . To require it would occasion useless delay and expense, and tend to defeat the salutary objects of the law." *Williams v. State*, 95 Okla. Crim. 131, 136 (Okla. Ct. Crim. App. 1952) (quoting *Gray v. Davis*, 27 Conn. 447, 455 (Conn. 1858)).

One important constraint on the rule allowing a single warrant to list multiple locations is that adequate probable cause must exist for searching each of the locations or pieces of property. *See, e.g., Johnson*, 26 F.3d 692; *Greenstreet v. County of San Bernardino*, 41 F.3d 1306, 1309 (9th Cir. 1994); *United States v. Gonzales*, 697 F.2d 155, 156 (6th Cir. 1983); *Rios*, 611 F.2d 1347.

We anticipate that the law surrounding the particularity requirement and virtual searches will continue to evolve both in the context of searches of individual computers or servers and in the context of searches of multiple computers. As we've stated, our proposal is not intended to address, and does not address, the constitutional standard of particularity required in any search

warrant, and we support adding Committee Note language to make clear that none of this is addressed in the rule amendment.

Conclusion

We hope that this memorandum will make the subcommittee members more comfortable with publishing our original amendment proposal for public comment. We look forward to discussing all of this with the subcommittee next week. Please let us know if there is any further information we can provide to you.

Proposed Amendment to Rule 41

* * *

(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:

* * *

(6) a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize electronically stored information that are located within or outside that district.

* * *

(f) Executing and Returning the Warrant:

(1) Warrant to Search for and Seize a Person or Property

* * *

(C) Receipt. The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property. In a case involving a warrant authorized by Rule 41(b)(6) to use remote access to search electronic storage media and seize electronically stored information, the officer executing the warrant must make reasonable efforts to serve a copy of the warrant on the person whose information was seized or whose property was searched. Service may be accomplished by any means, including electronic means, reasonably calculated to reach the person whose information was seized or whose property was searched. Upon request of the government, the magistrate judge may delay notice as provided in Rule 41(f)(3).

COMMITTEE NOTE

Subdivision (b)(6). The amendment adding Rule 41(b)(6) is intended to clarify that a magistrate judge with authority in a district where the activities related to a crime may have occurred may issue a warrant to use remote access to search electronic storage media and seize electronically stored information even when that media or information is located outside of the district. The amendment does not address constitutional questions, such as the specificity of description that the Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing electronically stored information, leaving the application of this and other constitutional standards to ongoing case law development.

Subdivision (f)(1)(C). The amendment to Rule 41(f)(1)(C) is intended to ensure that reasonable efforts are made to provide notice of the search or seizure to the person whose information was seized or whose property was searched.

PRESS PACKET REGARDING AMENDMENTS TO RULE 41 VENUE PROVISIONS
U.S. DEPARTMENT OF JUSTICE, OFFICE OF PUBLIC AFFAIRS

Contents

RULE 41 CHANGES ENSURE A JUDGE MAY CONSIDER WARRANTS FOR CERTAIN REMOTE SEARCHES

Blog post courtesy of Assistant Attorney General Leslie R. Caldwell of the Criminal Division

Congress is currently considering proposed amendments to Rule 41, which are scheduled to take effect on Dec. 1, 2016.

This marks the end of a three-year deliberation process, which included extensive written comments and public testimony. After hearing the public's views, the federal judiciary's Advisory Committee on the Federal Rules of Criminal Procedure, which includes federal and state judges, law professors, attorneys in private practice and others in the legal community, rejected criticisms of the proposal as misinformed and approved the amendments. The amendments were then considered and unanimously approved by the Standing Committee on Rules and the Judicial Conference, and adopted by the U.S. Supreme Court.

The amendments do not change any of the traditional protections and procedures under the Fourth Amendment, such as the requirement that the government establish probable cause. Rather, the amendments would merely ensure that at least one court is available to consider whether a particular warrant application comports with the Fourth Amendment.

The amendments would not authorize the government to undertake any search or seizure or use any remote search technique, whether inside or outside the United States, that is not already permitted under current law. The use of remote searches is not new and warrants for remote searches are currently issued under Rule 41. In addition, most courts already permit the search of multiple computers pursuant to a single warrant so long as necessary legal requirements are met.

The amendments would apply in two narrow circumstances:

First, where a suspect has hidden the location of his or her computer using technological means, the changes to Rule 41 would ensure that federal agents know which judge to go to in order to apply for a warrant. For example, if agents are investigating criminals who are sexually exploiting children and uploading videos of that exploitation for others to see—but concealing their locations through anonymizing technology—agents will be able to apply for a search warrant to discover where they are located. A recent investigation that utilized this type of search warrant identified dozens of children who suffered sexual abuse at the hands of the offenders. While some federal courts hearing cases arising from this investigation have upheld the warrant as lawful, others have ordered the suppression of evidence based solely on the lack of clear venue in the current version of the rule.

And second, where the crime involves criminals hacking computers located in five or more different judicial districts, the changes to Rule 41 would ensure that federal agents may identify one judge to review an application for a search warrant rather than be required to submit separate warrant applications in each district—up to 94—where a computer is affected. For example, agents may seek a search warrant to assist in the investigation of a ransomware scheme facilitated by a botnet that enables criminals abroad to extort thousands of Americans. Absent the amendments, the requirement to obtain up to 94 simultaneous search warrants may prevent investigators from taking needed action to liberate computers infected with malware. This change would not permit indiscriminate surveillance of thousands of victim computers—that is against the law now and it would continue to be prohibited if the amendment goes into effect.

These changes would ensure a court-supervised framework through which law enforcement can successfully investigate and prosecute these instances of cybercrime.

FACT SHEET: CASES RELYING ON RULE 41 VENUE TO OBTAIN WARRANTS FOR JUDICIALLY AUTHORIZED DEPLOYMENT OF REMOTE INVESTIGATIVE TECHNIQUES

I. Operation Pacifier – Producer Cases

Where a suspect has hidden the location of his or her computer using technological means, the changes to Rule 41 would ensure that federal agents know which judge to go to in order to apply for a warrant. For example, if agents are investigating criminals who are sexually exploiting children and uploading videos of that exploitation for others to see—but concealing their locations through anonymizing technology—agents will be able to apply for a search warrant to discover where they are located. A recent investigation that utilized this type of search warrant identified dozens of children who suffered sexual abuse at the hands of the offenders. The following are examples.

- *United States v. Colin Boyle and Anngela Boyle*, Eastern District of Michigan, No. 15-cr-20741.

  In November of 2015, FBI executed a search at the Boyles' home in West Lake, Michigan, based in part upon IP address information obtained pursuant to a search warrant authorizing the remote deployment of a Network Investigative Technique ("NIT") to the computers of users who accessed the "Playpen" child pornography website in FBI's Operation Pacifier. A federal indictment alleges that Colin Boyle is a twice-previously-convicted sex offender. A federal complaint filed in connection with Boyle's arrest further alleges that, upon executing a search warrant at that home and examining seized digital devices, law enforcement discovered evidence that Boyle and his wife had been engaging in the ongoing sexual abuse of – and production of child pornography with – two children in the household, ages one and three. Those children have been rescued from that ongoing abuse.

- *United States v. Thomas Duncan*, District of Oregon, No. 15-cr-414.

  In October of 2015, FBI executed a search at Duncan's Gregham, Oregon, home based in part upon IP address information obtained pursuant to a search warrant authorizing the remote deployment of a Network Investigative Technique ("NIT") to the computers of users who accessed the "Playpen" child pornography website in FBI's Operation Pacifier. A federal complaint filed in connection with Duncan's arrest alleges that during the course of the search, Duncan admitted to sexually abusing a then 12-year-old minor child in the household in 2014 and to creating images and videos of the abuse; that many such images and videos were located on his computer during the search; and that another member of the household had discovered the images and sexual abuse one-and-a-half years ago, but did not report the abuse and allowed the defendant to continue to live in the household with that victim and another prepubescent minor.

II. Botnet/Ransomware Cases

Where the crime involves criminals hacking computers located in five or more different judicial districts, the changes to Rule 41 would ensure that federal agents may identify one judge

to review an application for a search warrant rather than be required to submit separate warrant applications in each district—up to 94—where a computer is affected. For example, agents may seek a search warrant to assist in the investigation of a ransomware scheme facilitated by a botnet that enables criminals abroad to extort thousands of Americans**.** The following are examples of botnet operations.

- *GameOver Zeus Botnet/Cryptolocker Ransomware*

  The GameOver Zeus ("GOZ") botnet was a global network of infected victim computers used by cyber criminals to steal millions of dollars from businesses and consumers around the world. Security researchers have estimated that between 500,000 and one million computers worldwide were infected with GameOver Zeus and that approximately 25 percent of the infected computers were located in the United States. The FBI has estimated that GameOver Zeus is responsible for more than $100 million in losses.

  The GOZ botnet was also leveraged by hackers to deploy the Cryptolocker ransomware. Cryptolocker had infected more than 260,000 computers in just one year, with approximately half of those in the United States. One estimate indicates that more than $27 million in ransom payments were made in just the first two months after Cryptolocker emerged.

  The GameOver Zeus botnet operated silently on victim computers by directing those computers to reach out to receive commands from other computers in the botnet and to funnel stolen banking credentials back to the criminals who controlled the botnet. To disrupt the GOZ botnet and Cryptolocker operation, the United States obtained civil and criminal court orders in federal court in Pittsburgh authorizing measures to redirect the automated requests by victim computers for additional instructions away from the criminal operators to substitute servers established pursuant to court order. The order authorized the FBI to obtain the Internet protocol addresses of the victim computers reaching out to the substitute servers and to provide that information to US-CERT to distribute to other countries' CERTS and private industry to assist victims in removing the GameOver Zeus malware from their computers. At no point during the operation did the FBI or law enforcement access the content of any of the victims' computers or electronic communications.

- *Coreflood Botnet*

  The Coreflood botnet was used to steal usernames, passwords, and other private personal and financial information believed to be used by its operators for a variety of criminal purposes, including stealing funds from the compromised accounts. Coreflood was estimated to have infected more than 2 million victim computers and had operated for over a decade. In enforcement actions taken by the government pursuant to a temporary restraining order (TRO), five "command-and-control" (C&C) servers that remotely controlled hundreds of thousands of the infected Coreflood computers were seized, as were 29 domain names used by the Coreflood botnet to communicate with the C&C servers. As authorized by the TRO, the government replaced the illegal C&C servers with substitute servers to prevent Coreflood from causing further injury to the owners and users of infected computers and other third parties.

Screenshot from Child Exploitation Forum Hosted on the TOR Network (June 29, 2016)

Register Login

Board index < Producers Zone (0-5yo) < Application

Rules to join in the Producers zone

Locked

1 post • Page 1 of 1

Rules to join in the Producers zone

by [redacted] Tue Nov 10, 2015 11:31 pm

RULES

What you need to be a Child Porn Star?
- 1. Produce a set of at least 20 pics or a 2 minutes video in good quality, with a paper written **"your nickname" for** [redacted]
- 2. The child should hold the validation with their hands or it must be near them.
- 3. Only girls and boys of 0 to 5 years old are accepted at this category.
- 4. You can produce erotic NN*, SC, HC and stuff of our Fetish category.
- 5. You need to remove the Exif Data and edit the pictures to remove the things that can harm your safety.
- 6. If your validation is approved, you will be invited to the group.
- 7. You need to make a new validation once a month, or you will be banned from the group.
- 8. We do not accep just closeups!

*NN validations, must be of your kid in undies/panties or diapers in erotic poses or erotic content pics/videos.

ONLY Administrators and the producers of the Moderation Team and other producers (Child Porn Stars) have access to the Producers zone.

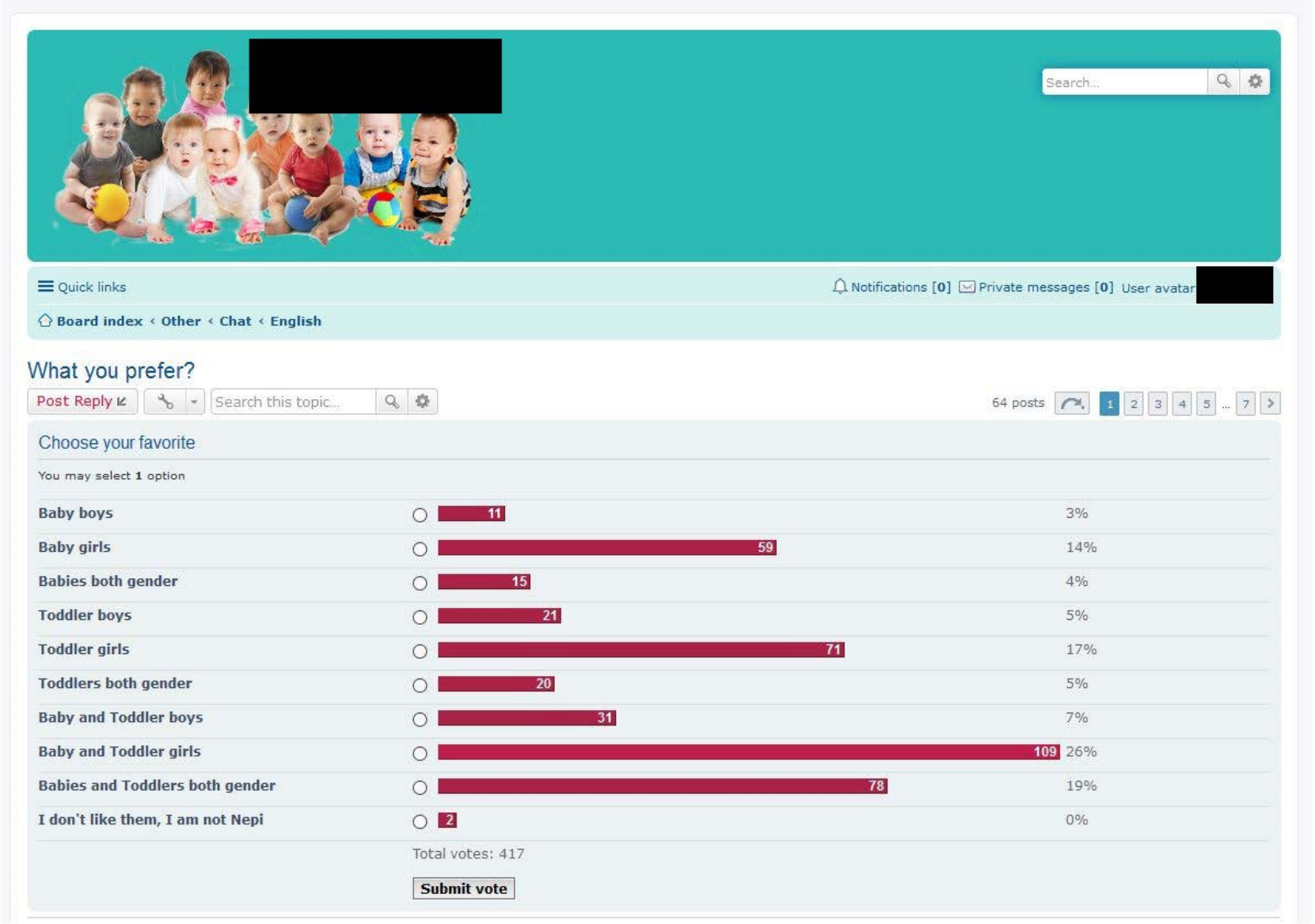
[redacted]

Staff Emeritus

Posts: 74
Joined: Tue Nov 10, 2015 10:52 pm
I like: Boys and Girls
AoA: 0-5yo
1st Fetish: Sissyboys
2nd Fetish: Diapers
Has thanked: 38 times
Been thanked: 191 times

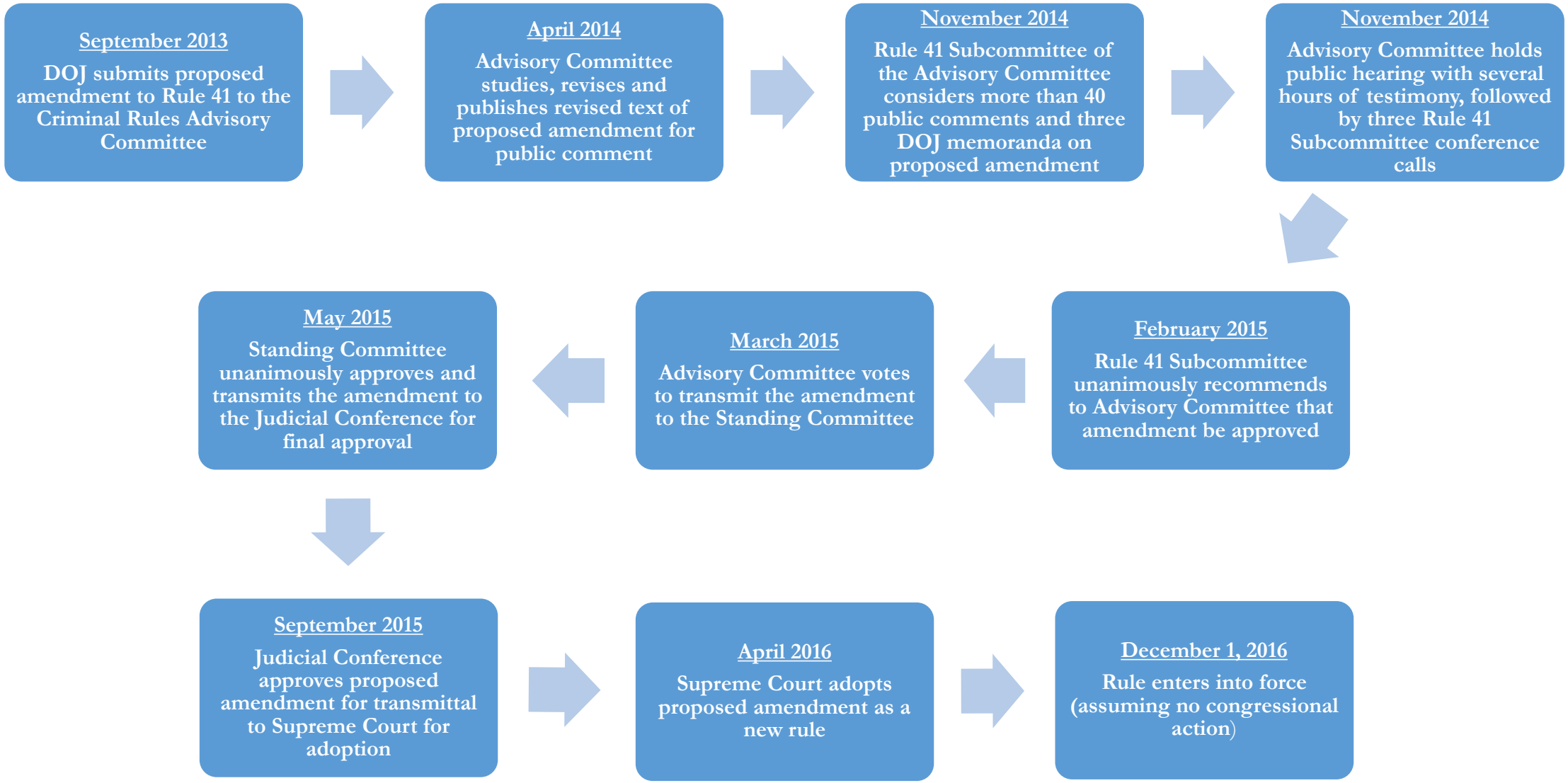
Note:
"NN" means non-nude
"SC" means soft-core
"HC" means hard-core
"AoA" means age of attraction

Screenshot from Child Exploitation Forum Hosted on the TOR Network (June 29, 2016)



Note:
Nepi is an abbreviation for nepiophile, a sub-type of pedophilia and refers to a sexual preference for infants and toddlers

Rules Committee Process: Amendment to Rule 41



For more on the rules process, visit: http://www.uscourts.gov/rules-policies/about-rulemaking-process.
For committee reports and meeting minutes, visit http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees.

Excerpts from Rule 41 Subcommittee Reporters Memorandum Regarding Public Comments

A. Concerns about privacy and the Fourth Amendment

The most common theme in the comments opposing the amendment was a concern that it relaxed or undercut the protections for personal privacy guaranteed by the Fourth Amendment. These concerns focus principally on proposed (b)(6)(A), which allows the court in a district in which activities related to a crime may have occurred to grant a warrant for remote access when anonymizing technology has been employed to conceal the location of the target device or information. Comments raising these concerns generally urged that the proposed amendment be withdrawn.

The Subcommittee recognizes that remote electronic searches are likely to raise novel difficult issues under the Fourth Amendment, but it concluded unanimously that these concerns do not justify withdrawing the amendment. Nothing in the current Federal Rules of Criminal Procedure precludes the issuance of warrants for remote electronic searches. Courts now issue warrants for remote electronic searches and resolve any constitutional questions on a case-by-case basis. At present, Rule 41(b)'s rigid venue requirement serves as a serious stumbling block into investigations of serious criminal conduct. The current venue requirements allow a person who has committed a crime to use anonymizing technology to prevent the issuance of a remote warrant even when all of the other requirements of the constitutional have been met. Indeed the government could not now obtain a warrant even by going to every one of the 94 judicial districts, since it would not be able to establish that the property to be searched was located in any of these districts. The Subcommittee concluded that the proper course of action is to amend the rule and allow the courts to rule on Fourth Amendment issues as they arise on a case by case basis. The Subcommittee's specific response to each concern is noted below in bold.

…

C. Forum Shopping

The Center for Democracy & Technology (CDT), CR-2014-0004-0009, argued at 5-6, that the proposal would allow for a new form of forum shopping, resulting in the issuance of warrants in courts remote from the individual whose electronic media was searched or seized. The National Association of Criminal Defense Lawyers (NACDL), CR-2014-0004-0038, also argued that a restriction to the "district where activities related to a crime may have occurred" is too broad and promotes forum shopping.

Another commentator, Keith Uhl, CR-2014-0004-0003, raised the question whether the defense must travel to the first district to challenge the warrant.

The Subcommittee's response. **Rule 41(g) provides that a person aggrieved by an unlawful search may move for the property's return in the district in which the property was seized. Alternatively, if an individual is indicted, he or she may move for the exclusion of the evidence in that proceeding.**

Excerpts from Rule 41 Subcommittee Reporters Memorandum Regarding Public Comments

H. Concerns about searches of victim computers

Access and the Electronic Frontier Foundation (Access and EFF), CR-2014-0004-0008, strongly oppose proposed (b)(6)(B), which would authorize a single warrant application in an investigation of a violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(5), when the media to be searched are protected computers that have been damaged in five or more judicial districts. This authority allows greater efficiency in the investigation of botnets. Access and EFF oppose the amendment on the ground that it expands the authority for searches and seizures beyond those who create and use unlawful botnets to those who are their victims. Access and EFF note that the victims of botnets are often journalists, dissidents, whistleblowers, lawmakers, world leaders and others in the U.S. and elsewhere, at 4. The amendment, they argue would subject the personal data of thousands of innocent users, as well as others who share a common server, to government surveillance. *Id.* at 5. These problems, they argue, are exacerbated by the government's overbroad application of the Computer Fraud and Abuse Act. *Id.* at 6-7. See also NACDL, CR-2014-0004-0038, at 8 (noting that (b)(6)(B) allows the privacy of "putative victims" to be invaded "with tools of unknown, but predictably harmful, effect").

The Subcommittee's response. **The proposed amendment focuses only on venue. It does not relax the other constitutional requirements for searches and seizures. It does not subject all victim computers to remote electronic searches. The Subcommittee's proposed revision in the caption for Rule 41(b), which would clearly label these as provisions governing the "Venue for a Warrant Application" (or Professor Kimble's proposed alternative, "District from Which a Warrant May Issue") may help allay the concerns raised by Access and EPP. Their concerns regarding the scope of the Computer Fraud and Abuse Act fall beyond the Committee's authority under the Rules Enabling Act.**

Available at www.uscourts.gov/file/17944/download.

Excerpt from Judicial Conference Memorandum to the Supreme Court

B. Venue to Obtain Warrants for Remote Electronic Searches

This proposed amendment addresses venue for obtaining warrants for certain types of remote electronic searches. At present, Rule 41 generally limits searches to locations within a district, with a few specified exceptions. The Department of Justice asked the Advisory Committee to amend Rule 41 to account for two increasingly common situations: (1) where the warrant sufficiently describes the computer to be searched but the district within which that computer is located is unknown; and (2) where the investigation requires law enforcement to coordinate searches of numerous computers in numerous districts.

The proposal addresses these gaps by amending Rule 41(b) to include two additional exceptions to the list of out-of-district searches permitted under the subsection. Language in a new subsection 41(b)(6) would authorize a court to issue a warrant to use remote access to search electronic storage media and seize electronically stored information inside or outside of the district: (1) when a suspect has used technology to conceal the location of the media to be searched; or (2) in an investigation into a violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(5), when the media to be searched include protected computers that have been damaged and are located in five or more districts. The proposal also amends Rule 41(f)(1)(C) to specify the process for providing notice of a remote access search.

This proposal generated considerable interest. The Advisory Committee received forty-four written comments, and eight witnesses testified at a public hearing. Much of the opposition reflected a misunderstanding of the scope of the proposal. The proposal addresses *venue*; it does not itself create authority for electronic searches or alter applicable statutory or constitutional requirements. In response to the public comments, the Advisory Committee approved revisions that clarified the procedural nature of the proposed amendment. It changed the published caption from "Authority to Issue a Warrant" to "Venue for a Warrant Application" and revised the Committee Note to state that the amendment does not alter the constitutional requirements for issuing a warrant. The Advisory Committee also approved revisions to the notice provision and accompanying Committee Note that respond to points raised by commentators. By an 11-1 vote, the Advisory Committee approved the amendment, and the Standing Committee unanimously approved it.

Available at http://www.uscourts.gov/file/18641/download.

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Effective: October 1, 2015
Federal Judicial Center

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

September 17, 2015

The Judicial Conference of the United States convened in Washington, D.C., on September 17, 2015, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. § 331. The Chief Justice presided, and the following members of the Conference were present:

First Circuit:

Chief Judge Jeffrey R. Howard
Judge Paul J. Barbadoro,
District of New Hampshire

Second Circuit:

Chief Judge Robert A. Katzmann
Judge William M. Skretny,
Western District of New York

Third Circuit:

Chief Judge Theodore A. McKee
Chief Judge Leonard P. Stark,
District of Delaware

Fourth Circuit:

Chief Judge William B. Traxler, Jr.
Judge Deborah K. Chasanow,
District of Maryland

Fifth Circuit:

Chief Judge Carl E. Stewart
Chief Judge Louis Guirola, Jr.,
Southern District of Mississippi

Sixth Circuit:

Chief Judge Ransey Guy Cole, Jr.
Judge Paul Lewis Maloney,
Western District of Michigan

Seventh Circuit:

Chief Judge Diane P. Wood
Chief Judge Rubén Castillo,
Northern District of Illinois

Eighth Circuit:

Chief Judge William Jay Riley
Judge Karen E. Schreier,
District of South Dakota

Ninth Circuit:

Chief Judge Sidney R. Thomas
Judge Robert S. Lasnik,
Western District of Washington

Tenth Circuit:

Chief Judge Mary Beck Briscoe
Judge Dee V. Benson,
District of Utah

Eleventh Circuit:

Chief Judge Ed Carnes
Judge Federico A. Moreno,
Southern District of Florida

District of Columbia Circuit:

Chief Judge Merrick B. Garland
Chief Judge Richard W. Roberts,
District of Columbia

JAMES C. DUFF
Director

JILL C. SAYENGA
Deputy Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

REBECCA A. WOMELDORF
Rules Committee Officer

Office of the General Counsel

October 9, 2015

MEMORANDUM

TO: Scott S. Harris, Clerk of the Supreme Court of the United States

FROM: Rebecca A. Womeldorf

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES

The enclosed memorandum from Judge Jeffrey S. Sutton summarizes proposed amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure approved by the Judicial Conference at its September 2015 session.

Each of the four sets of proposed amendments comes to the Court under a transmittal memorandum from Director Duff that provides (i) "clean" copies of the affected rules incorporating the proposed amendments and accompanying Committee Notes; (ii) a redline version of the same; (iii) the relevant excerpt from the September 2015 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) supporting reports from the Advisory Committee that recommended the proposed amendments.

I am sending eighteen copies of these materials to you for distribution to the Chief Justice, the Associate Justices, the Counselor to the Chief Justice, and anyone else you feel appropriate. Please call me if I can be of further assistance.

Enclosures

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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CHAIR

REBECCA A. WOMELDORF
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CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

October 9, 2015

M E M O R A N D U M

TO: Scott S. Harris, Clerk of the Supreme Court of the United States

FROM: Jeffrey S. Sutton

SUBJECT: Summary of Proposed Amendments to the Federal Rules

This memorandum summarizes proposed amendments to the Federal Rules of Practice and Procedure approved by the Judicial Conference of the United States on September 17, 2015. These amendments will take effect on December 1, 2016, if the Supreme Court adopts the proposed amendments and transmits them to Congress no later than May 1, 2016, and Congress takes no contrary action before the effective date.

I. Elimination of the Three-Day Rule for Items Served Electronically

The Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure have long added three extra days to calculate time periods measured from certain types of service, most notably for service by U.S. mail. For some time, the three extra days have applied to filings served electronically. Each Advisory Committee affected by this convention agrees that the time for treating electronic service like mail service has come and gone. They therefore propose to eliminate the 3-day rule when a party receives service of an item electronically. The resulting package would amend Appellate Rule 26(c), Bankruptcy Rule 9006(f), Civil Rule 6(d), and Criminal Rule 45(c) to eliminate the 3-day rule in cases of electronic service. Each of the amendments works in the same way—with one exception. The proposed amendment to Appellate Rule 26(c) differs slightly because, under current Rule 26(c), application of the 3-day rule depends on whether the paper in question is delivered on the date of service stated in the proof of service. The proposed amendment to Rule 26(c) deems a paper served electronically as delivered on the date of service stated in the proof of service.

With the approval of the Standing Committee, all of these amendments were published together. The key concern identified during the public comment period was that this modification of the 3-day rule might create hardships in some settings. The Advisory Committees as a result agreed to add parallel language to each Committee Note recognizing that extensions of time may be warranted to prevent prejudice in certain circumstances. All four Advisory Committees and the Standing Committee unanimously approved the final package of amendments.

II. Federal Rules of Appellate Procedure

A. Inmate-Filing Rules

The Advisory Committee proposed several amendments to clarify and improve the process for inmate litigation. Proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions. The amendments clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid. New Form 7 is a suggested form of declaration. The Advisory Committee proposes a minor change to Forms 1 and 5—existing notice-of-appeal forms—to include a reference alerting inmate filers to the existence of new Form 7. The amendments also clarify that, if sufficient evidence does not accompany the initial filing, the court of appeals may permit an inmate to submit a declaration or notarized statement to show timely deposit. The Advisory Committee and the Standing Committee unanimously approved the amendments.

B. Late Post-Judgment Motions and Appeal Time

The proposed amendment to Appellate Rule 4(a)(4) addresses a circuit split over whether a late motion filed under Civil Rules 50, 52, or 59 counts as timely filed under Appellate Rule 4(a)(4). Rule 4(a)(4) provides that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Five circuits take the view that a motion is "timely" only if filed within the deadline set by the rules. One circuit holds that, if a district court mistakenly extends the time for filing a post-judgment motion, the motion is "timely" for purposes of Rule 4(a)(4).

The proposed amendment addresses the split by adopting the majority view: A motion restarts the time for taking an appeal only if the relevant party filed the motion within the time allowed by the Civil Rules. The change ensures a uniform deadline for post-judgment motions and sets a definite point in time when litigation will end. The notice-and-comment process revealed substantial support for the proposal. A concern raised by the sole opponent of the amendment was its potential effect on unsophisticated litigants, which prompted the Advisory Committee to include examples in the Committee Note of motions that, under the Rule, would not restart the appeal time. The Advisory Committee and the Standing Committee unanimously approved the amendment.

C. Length Limits for Briefs and Other Documents

The proposed amendments affect length limits set by the Appellate Rules for briefs and other documents. The Advisory Committee undertook this project to address a concern that the length limits for petitions and motions should not be measured in pages but should be measured in words, as is already the case for briefs. The Committee agreed that technology made page limits vulnerable to manipulation and that word limits should be used across the board in the Appellate Rules. In considering how to convert page limits to word limits, the Committee examined the present length limit for briefs. In 1998, the length limit for principal briefs was converted from 50 pages to 14,000 words. In the intervening years, judges have expressed concern that briefs are too long. Others have questioned whether the 14,000-word limit (which reflects a conversion ratio of 280 words per page) is an accurate translation of the traditional 50-page limit. In studying the issue, the Advisory Committee concluded that many judges were justified in believing that briefs filed under the current rule often are too long, and that a reduction in the length limit for principal briefs would sharpen the presentation of legal arguments without interfering with the effective administration of justice.

The proposed amendments to Rules 5, 21, 27, 35, and 40 convert the existing page limits to word limits for motions and petitions prepared with a computer. The amendment uses a conversion ratio of 260 words per page in order to approximate traditional volume and to avoid increasing the length of documents such as motions, petitions for rehearing, and petitions for permission to appeal. For documents prepared without a computer, the proposed amendments retain the current page limits.

The proposed amendment to Rule 32 changes the word limits for briefs so that they reflect the pre-1998 page limits multiplied by 260 words per page. As a result, the current word limit for a party's principal brief would change from 14,000 to 13,000 words, and the word limit for a reply brief would change from 7,000 to 6,500 words. The proposal correspondingly reduces the word limits set by Rule 28.1 for cross-appeals.

New Rule 32(f) sets out a uniform list of the items that can be excluded when computing a document's length. A new appendix collects in one chart all length limits stated in the Appellate Rules. And Form 6, which addresses certificates of compliance, accounts for the proposed amendments to length limits.

The Advisory Committee received many public comments in response to the proposed reduction in the length limit for principal briefs, mainly by private practitioners concerned about whether the word limit would restrict their ability to present legal arguments in complex cases. The committee also received testimony from four appellate lawyers during a public hearing. The Solicitor General offered written comments generally supporting the proposal.

In response to the public comments, the Advisory Committee modified the proposal in two ways. First, the original proposal would have employed a conversion ratio of 250 words per page and reduced the word limit for principal briefs from 14,000 to 12,500 words, while the amended proposal would set a limit of 13,000 words. Second, the amended proposal highlights (in rule text and Committee Note) the authority of a court of appeals to allow longer briefs in appropriate cases. Taken together, the two pieces of the compromise allow courts of appeals to require shorter briefs if they wish or to keep the status quo if they prefer. As a point of

comparison, the Civil Rules do not contain any uniform length limits and thus permit district courts to establish their own customized length limits for briefs and motions. The Advisory Committee unanimously approved the modified proposal. The Standing Committee approved the modified proposal without dissent and with one abstention.

D. Amicus Filings in Connection with Rehearing

Proposed new Appellate Rule 29(b) establishes default rules for the treatment of amicus filings in connection with petitions for rehearing. There is no national rule that establishes a filing deadline or a length limit for amicus briefs in connection with petitions for rehearing. Most circuits do not have local rules on point. Attorneys reported confusion caused by the lack of guidance. The resulting amendment does not require courts to accept amicus briefs but establishes guidelines for filing such briefs when permitted. Most of the features of current Rule 29 are incorporated for the rehearing stage, including the authorization for certain governmental entities to file amicus briefs without party consent or court permission. Under the proposal, a circuit may alter the default federal rules on timing, length, and other matters by local rule or by order in a case.

Overall, commentators expressed support for amending Rule 29 to address amicus filings in connection with rehearing petitions and offered varying suggestions as to length and timing. Some commentators expressed concern about the length limits for the briefs, *see supra*, and time limits. In response to these comments, the Advisory Committee changed the length limit under Rule 29(b) from 2,000 to 2,600 words, and revised the deadline for amicus filings in support of a rehearing petition from three to seven days after the filing of the petition. The Advisory Committee and the Standing Committee unanimously approved the proposed amendment.

E. Technical Amendment

In 2013, then-existing Appellate Rule 13, governing appeals as of right from the Tax Court, became Rule 13(a). A new Rule 13(b)—providing that Rule 5 governs permissive appeals from the Tax Court—was added. Rule 26(a)(4)(C)'s reference to "filing by mail under Rule 13(b)" should have been amended to refer to "filing by mail under Rule 13(a)(2)." The proposed amendment to Rule 26(a)(4)(C) updates the cross-reference. The Advisory Committee and the Standing Committee unanimously approved the technical change.

III. Federal Rules of Bankruptcy Procedure

A. Procedures for International Bankruptcy Cases.

The Advisory Committee proposes amendments to facilitate the handling of international bankruptcy cases. Shortly after chapter 15 (Ancillary and Other Cross-Border Cases) was added to the Bankruptcy Code in 2005, the Bankruptcy Rules were amended to add provisions governing cross-border cases. Among the new provisions were changes to Rules 1010 and 1011, which previously governed only involuntary bankruptcy cases, and Rule 2002, which governs notice. The proposed new rule and amendments would: (1) remove the chapter 15-related provisions from Rules 1010 and 1011; (2) create a new Rule 1012 (Responsive Pleading in Cross-Border Cases) to govern responses to a chapter 15 petition; and (3) augment Rule 2002 to

clarify the procedures for giving notice in cross-border proceedings. The Advisory Committee and the Standing Committee unanimously approved the amendments.

B. Chapter 13 Notices

Bankruptcy Rule 3002.1 applies to chapter 13 cases and requires creditors whose claims are secured by a security interest in the debtor's principal residence to provide the debtor and the trustee notice of any changes in the periodic payment amount or the assessment of any fees or charges during the bankruptcy case. This rule was intended to ensure that debtors who attempt to maintain home mortgage payments while in chapter 13 have the information needed to do so.

The proposed amendments seek to clarify three matters over which courts have disagreed: (1) the rule applies whenever a debtor will make ongoing mortgage payments during the chapter 13 case, regardless of whether a prepetition default is being cured; (2) the rule applies regardless of whether it is the debtor or the trustee who makes the mortgage payments; and (3) the rule generally ceases to apply when an order granting relief from the stay becomes effective with respect to the debtor's residence. The notice-and-comment process did not generate any material criticism of the proposals. The Advisory Committee and the Standing Committee unanimously approved the amendments.

IV. Federal Rules of Civil Procedure

A. Service on a Foreign Corporation

The proposed amendment to Civil Rule 4(m), the rule addressing time limits for service, corrects an ambiguity regarding service abroad on a corporation. Many practitioners labor under the misimpression that the time for service set forth in Rule 4(m) applies to foreign corporations. This ambiguity arises because two exceptions for service on an individual in a foreign country under Rule 4(f) and for service on a foreign state under Rule 4(j)(1) are clearly referenced, while no such explicit reference is made to service on a corporation. Rule 4(h)(2) provides for service on a corporation at a place not within any judicial district of the United States in a "manner prescribed by Rule 4(f)." It is not clear whether this is service "under" Rule 4(f). The proposed amendment makes clear that the time limit set forth in Rule 4(m) does not include service under Rule 4(h)(2). The Advisory Committee and the Standing Committee unanimously approved the amendment.

B. Service

This proposed amendment to Civil Rule 6(d) substitutes the language "after being served" for "after service." The purpose of the amendment is to correct a potential ambiguity that was created when the "after service" language was included in the rule when it was amended in 2005. "[A]fter service" could be read to refer not only to a party that has been served but also to a party that has made service. The proposed amendment was published in August 2013, and approved unanimously by the Advisory and Standing Committees in 2014. It was held in abeyance for one year so that it could be submitted simultaneously with the 3-day rule package.

C. Venue Technical Amendment

This amendment is technical and conforming. Civil Rule 82 addresses venue for admiralty and maritime claims. The proposed amendment arises from legislation that added a new § 1390 to the venue statutes in Title 28 and repealed former § 1392 (local actions). The proposed amendment deletes the reference to § 1391 and to repealed § 1392 and adds a reference to new § 1390 in order to carry forward the purpose of integrating Rule 9(h) with the venue statutes through Rule 82. The Advisory Committee and the Standing Committee unanimously approved the amendment.

V. Federal Rules of Criminal Procedure

A. Service on Foreign Corporate Defendants

The proposed amendment to Criminal Rule 4 addresses service of a summons on organizational defendants that have no agent or principal place of business within the United States. The current rule provides for service of an arrest warrant or summons within a judicial district of the United States but poses an obstacle to the prosecution of foreign corporations that have committed offenses punishable in the United States. Such corporations often cannot be served because they have no last known address or principal place of business in the United States. Given the increasing number of criminal prosecutions involving foreign entities, the Advisory Committee agreed that the Criminal Rules should provide a mechanism for foreign service on an organization.

The proposed amendment makes several changes to Rule 4. First, it fills a gap in the current rule by specifying that the court may take any action authorized by existing laws (*e.g.*, statutes, treaties) if an organizational defendant fails to appear in response to a summons. Second, the amendment changes the mailing requirement for service of a summons on an organization within the United States by eliminating the requirement of a separate mailing to an organizational defendant when delivery has been made to an officer or to a managing or general agent, but requires mailing when delivery has been made to an agent authorized by statute, if the statute itself requires mailing to the organization. Third, the amendment authorizes service on an organizational defendant outside of the United States by prescribing a non-exclusive list of methods for service, including service in a manner authorized by the applicable foreign jurisdiction's law, stipulated by the parties, undertaken by foreign authority in response to a letter rogatory or similar request, or pursuant to an international agreement. In addition to these enumerated means of service, the proposal contains an open-ended provision that allows service "by any other means that gives notice." This provision provides flexibility for cases in which the Department of Justice concludes that service cannot be made (or made without undue difficulty) by the other means enumerated in the rule.

The Advisory Committee considered at length whether to require prior judicial approval before service of a criminal summons could be made in a foreign country by other unspecified means but ultimately concluded that the Criminal Rules should not adopt such a requirement. In its view, requiring prior judicial approval might raise difficult questions regarding the appropriate institutional roles of the courts and the executive branch as well as unripe questions of international law.

The Advisory Committee received six comments and one witness testified at a public hearing about the proposed amendment. In addition, the Department of Justice provided written responses to the issues raised by the comments. The commentators generally agreed with the proposal because it: (1) addresses a gap in the current rules that poses an obstacle to the prosecution of foreign corporations that have committed crimes in the United States; (2) provides methods of service that are reasonably calculated to provide notice and comply with applicable laws; and (3) gives courts appropriate discretion to fashion remedies. The Advisory Committee unanimously approved the proposed amendment, and so did the Standing Committee.

B. Venue to Obtain Warrants for Remote Electronic Searches

This proposed amendment addresses venue for obtaining warrants for certain types of remote electronic searches. At present, Rule 41 generally limits searches to locations within a district, with a few specified exceptions. The Department of Justice asked the Advisory Committee to amend Rule 41 to account for two increasingly common situations: (1) where the warrant sufficiently describes the computer to be searched but the district within which that computer is located is unknown; and (2) where the investigation requires law enforcement to coordinate searches of numerous computers in numerous districts.

The proposal addresses these gaps by amending Rule 41(b) to include two additional exceptions to the list of out-of-district searches permitted under the subsection. Language in a new subsection 41(b)(6) would authorize a court to issue a warrant to use remote access to search electronic storage media and seize electronically stored information inside or outside of the district: (1) when a suspect has used technology to conceal the location of the media to be searched; or (2) in an investigation into a violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(5), when the media to be searched include protected computers that have been damaged and are located in five or more districts. The proposal also amends Rule 41(f)(1)(C) to specify the process for providing notice of a remote access search.

This proposal generated considerable interest. The Advisory Committee received forty-four written comments, and eight witnesses testified at a public hearing. Much of the opposition reflected a misunderstanding of the scope of the proposal. The proposal addresses *venue*; it does not itself create authority for electronic searches or alter applicable statutory or constitutional requirements. In response to the public comments, the Advisory Committee approved revisions that clarified the procedural nature of the proposed amendment. It changed the published caption from "Authority to Issue a Warrant" to "Venue for a Warrant Application" and revised the Committee Note to state that the amendment does not alter the constitutional requirements for issuing a warrant. The Advisory Committee also approved revisions to the notice provision and accompanying Committee Note that respond to points raised by commentators. By an 11-1 vote, the Advisory Committee approved the amendment, and the Standing Committee unanimously approved it.

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

October 9, 2015

MEMORANDUM

To: The Chief Justice of the United States and
Associate Justices of the Supreme Court

From: James C. Duff

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6 of the Federal Rules of Appellate Procedure, along with proposed new Form 7 and new Appendix, which were approved by the Judicial Conference at its September 2015 session. The Judicial Conference recommends that the amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) "clean" copies of the affected rules and forms incorporating the proposed amendments and accompanying Committee Notes; (ii) a redline version of the same; (iii) an excerpt from the September 2015 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the May 2015 Report of the Advisory Committee on the Federal Rules of Appellate Procedure.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 4. Appeal as of Right—When Taken

* * * * *

(c) Appeal by an Inmate Confined in an Institution.

(1) If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1). If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

(A) it is accompanied by:

(i) a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of

deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 4(c)(1)(A)(i).

* * * * *

Committee Note

Rule 4(c)(1) is revised to streamline and clarify the operation of the inmate-filing rule.

The Rule requires the inmate to show timely deposit and prepayment of postage. The Rule is amended to specify that a notice is timely if it is accompanied by a declaration or notarized statement stating the date the notice was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being

prepaid," not (as directed by the former Rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution's mail system. New Form 7 in the Appendix of Forms sets out a suggested form of the declaration.

The amended rule also provides that a notice is timely without a declaration or notarized statement if other evidence accompanying the notice shows that the notice was deposited on or before the due date and that postage was prepaid. If the notice is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the court of appeals has discretion to accept a declaration or notarized statement at a later date. The Rule uses the phrase "exercises its discretion to permit"—rather than simply "permits"—to help ensure that pro se inmate litigants are aware that a court will not necessarily forgive a failure to provide the declaration initially.

Rule 25. Filing and Service

(a) Filing.

* * * * *

(2) **Filing: Method and Timeliness.**

* * * * *

(C) **Inmate Filing.** If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 25(a)(2)(C). A paper filed by an inmate is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

(i) it is accompanied by:

- a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of

deposit and stating that first-class postage is being prepaid; or

- evidence (such as a postmark or date stamp) showing that the paper was so deposited and that postage was prepaid; or

(ii) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 25(a)(2)(C)(i).

* * * * *

Committee Note

Rule 25(a)(2)(C) is revised to streamline and clarify the operation of the inmate-filing rule.

The Rule requires the inmate to show timely deposit and prepayment of postage. The Rule is amended to specify that a paper is timely if it is accompanied by a declaration or notarized statement stating the date the paper was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as

directed by the former Rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution's mail system. New Form 7 in the Appendix of Forms sets out a suggested form of the declaration.

The amended rule also provides that a paper is timely without a declaration or notarized statement if other evidence accompanying the paper shows that the paper was deposited on or before the due date and that postage was prepaid. If the paper is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the court of appeals has discretion to accept a declaration or notarized statement at a later date. The Rule uses the phrase "exercises its discretion to permit"—rather than simply "permits"—to help ensure that pro se inmate litigants are aware that a court will not necessarily forgive a failure to provide the declaration initially.

Form 1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court

United States District Court for the _____
District of _____
File Number _____

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

Notice is hereby given that ___(here name all parties taking the appeal)__, (plaintiffs) (defendants) in the above named case,* hereby appeal to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from an order (describing it)) entered in this action on the _____ day of _____, 20___.

(s) _____
Attorney for _____
Address:_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.*]

* See Rule 3(c) for permissible ways of identifying appellants.

Form 5. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court or a Bankruptcy Appellate Panel

United States District Court for the _____
District of _____

In re _____, Debtor _____, Plaintiff v. _____, Defendant	File No. _____

Notice of Appeal to United States Court of Appeals for the _____ Circuit

_____, the plaintiff [or defendant or other party] appeals to the United States Court of Appeals for the _____ Circuit from the final judgment [or order or decree] of the district court for the district of _____ [or bankruptcy appellate panel of the _____ circuit], entered in this case on _____, 20__ [here describe the judgment, order, or decree] _____

The parties to the judgment [or order or decree] appealed from and the names and addresses of their respective attorneys are as follows:

Dated _____
Signed _____
Attorney for Appellant
Address: _____
_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.*]

Form 7. Declaration of Inmate Filing

_____

[*insert name of court; for example, United States District Court for the District of Minnesota*]

A.B., Plaintiff

v.

C.D., Defendant

Case No. _____

I am an inmate confined in an institution. Today, _____ [*insert date*], I am depositing the _____ [*insert title of document; for example, "notice of appeal"*] in this case in the institution's internal mail system. First-class postage is being prepaid either by me or by the institution on my behalf.

I declare under penalty of perjury that the foregoing is true and correct (see 28 U.S.C. § 1746; 18 U.S.C. § 1621).

Sign your name here_____

Signed on _____ [*insert date*]

[***Note to inmate filers:*** *If your institution has a system designed for legal mail, you must use that system in order to receive the timing benefit of Fed. R. App. P. 4(c)(1) or Fed. R. App. P. 25(a)(2)(C).*]

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

* * * * *

(4) **Effect of a Motion on a Notice of Appeal.**

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

* * * * *

Committee Note

A clarifying amendment is made to subdivision (a)(4). Former Rule 4(a)(4) provided that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Responding to a circuit split concerning the meaning of "timely" in this provision, the amendment adopts the majority approach and rejects the approach taken in

National Ecological Foundation v. Alexander, 496 F.3d 466 (6th Cir. 2007). A motion made after the time allowed by the Civil Rules will not qualify as a motion that, under Rule 4(a)(4)(A), re-starts the appeal time—and that fact is not altered by, for example, a court order that sets a due date that is later than permitted by the Civil Rules, another party's consent or failure to object to the motion's lateness, or the court's disposition of the motion without explicit reliance on untimeliness.

Rule 5. Appeal by Permission

* * * * *

(c) Form of Papers; Number of Copies; Length Limits. All papers must conform to Rule 32(c)(2).—An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case. Except by the court's permission, and excluding the accompanying documents required by Rule 5(b)(1)(E):

(1) a paper produced using a computer must not exceed 5,200 words; and

(2) a handwritten or typewritten paper must not exceed 20 pages.

* * * * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word

limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes the accompanying documents required by Rule 5(b)(1)(E) and any items listed in Rule 32(f).

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

* * * * *

(d) Form of Papers; Number of Copies; Length Limits. All papers must conform to Rule 32(c)(2).—An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. Except by the court's permission, and excluding the accompanying documents required by Rule 21(a)(2)(C):

(1) a paper produced using a computer must not exceed 7,800 words; and

(2) a handwritten or typewritten paper must not exceed 30 pages.

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in

technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes the accompanying documents required by Rule 21(a)(2)(C) and any items listed in Rule 32(f).

Rule 27. Motions

* * * * *

(d) Form of Papers; Length Limits; Number of Copies.

* * * * *

(2) **Length Limits.** Except by the court's permission, and excluding the accompanying documents authorized by Rule 27(a)(2)(B):

(A) a motion or response to a motion produced using a computer must not exceed 5,200 words;

(B) a handwritten or typewritten motion or response to a motion must not exceed 20 pages;

(C) a reply produced using a computer must not exceed 2,600 words; and

(D) a handwritten or typewritten reply to a response must not exceed 10 pages.

* * * * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes the accompanying documents required by Rule 27(a)(2)(B) and any items listed in Rule 32(f).

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

* * * * *

(10) the certificate of compliance, if required by Rule 32(g)(1).

* * * * *

Committee Note

Rule 28(a)(10) is revised to refer to Rule 32(g)(1) instead of Rule 32(a)(7), to reflect the relocation of the certificate-of-compliance requirement.

Rule 28.1. Cross-Appeals

* * * * *

(e) Length.

(1) **Page Limitation.** Unless it complies with Rule 28.1(e)(2), the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) **Type-Volume Limitation.**

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if it:

(i) contains no more than 13,000 words; or

(ii) uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if it:

(i) contains no more than 15,300 words; or

(ii) uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

* * * * *

Committee Note

When Rule 28.1 was adopted in 2005, it modeled its type-volume limits on those set forth in Rule 32(a)(7) for briefs in cases that did not involve a cross-appeal. At that time, Rule 32(a)(7)(B) set word limits based on an estimate of 280 words per page.

In the course of adopting word limits for the length limits in Rules 5, 21, 27, 35, and 40, and responding to concern about the length of briefs, the Committee has reevaluated the conversion ratio (from pages to words) and decided to apply a conversion ratio of 260 words per page.

Rules 28.1 and 32(a)(7)(B) are amended to reduce the word limits accordingly.

In a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in these rules, such as to include unusually voluminous information explaining relevant background or legal provisions or to respond to multiple briefs by opposing parties or amici. The Committee expects that courts will accommodate those situations by granting leave to exceed the type-volume limitations as appropriate.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

* * * * *

(7) **Length.**

(A) **Page Limitation.** A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B).

(B) **Type-Volume Limitation.**

(i) A principal brief is acceptable if it:

- contains no more than 13,000 words; or
- uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type

volume specified in Rule 32(a)(7)(B)(i).

* * * * *

(e) Local Variation. Every court of appeals must accept documents that comply with the form requirements of this rule and the length limits set by these rules. By local rule or order in a particular case, a court of appeals may accept documents that do not meet all the form requirements of this rule or the length limits set by these rules.

(f) Items Excluded from Length. In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- the cover page;
- a corporate disclosure statement;
- a table of contents;
- a table of citations;

- a statement regarding oral argument;
- an addendum containing statutes, rules, or regulations;
- certificates of counsel;
- the signature block;
- the proof of service; and
- any item specifically excluded by these rules or by local rule.

(g) Certificate of Compliance.

(1) **Briefs and Papers That Require a Certificate.** A brief submitted under Rules 28.1(e)(2), 29(b)(4), or 32(a)(7)(B)—and a paper submitted under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A), 27(d)(2)(C), 35(b)(2)(A), or 40(b)(1)—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation. The person

preparing the certificate may rely on the word or line count of the word-processing system used to prepare the document. The certificate must state the number of words—or the number of lines of monospaced type—in the document.

(2) **Acceptable Form.** Form 6 in the Appendix of Forms meets the requirements for a certificate of compliance.

Committee Note

When Rule 32(a)(7)(B)'s type-volume limits for briefs were adopted in 1998, the word limits were based on an estimate of 280 words per page. In the course of adopting word limits for the length limits in Rules 5, 21, 27, 35, and 40, and responding to concern about the length of briefs, the Committee has reevaluated the conversion ratio (from pages to words) and decided to apply a conversion ratio of 260 words per page. Rules 28.1 and 32(a)(7)(B) are amended to reduce the word limits accordingly.

In a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in these rules, such as to include unusually voluminous information explaining relevant background or legal provisions or to respond to multiple briefs by opposing parties or amici.

The Committee expects that courts will accommodate those situations by granting leave to exceed the type-volume limitations as appropriate.

Subdivision (e) is amended to make clear a court's ability (by local rule or order in a case) to increase the length limits for briefs and other documents. Subdivision (e) already established this authority as to the length limits in Rule 32(a)(7); the amendment makes clear that this authority extends to all length limits in the Appellate Rules.

A new subdivision (f) is added to set out a global list of items excluded from length computations, and the list of exclusions in former subdivision (a)(7)(B)(iii) is deleted. The certificate-of-compliance provision formerly in Rule 32(a)(7)(C) is relocated to a new Rule 32(g) and now applies to filings under all type-volume limits (other than Rule 28(j)'s word limit)—including the new word limits in Rules 5, 21, 27, 29, 35, and 40. Conforming amendments are made to Form 6.

Rule 35. En Banc Determination

* * * * *

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc.

* * * * *

(2) Except by the court's permission:

(A) a petition for an en banc hearing or rehearing produced using a computer must not exceed 3,900 words; and

(B) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages.

(3) For purposes of the limits in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are

filed separately, unless separate filing is required by local rule.

* * * * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes any items listed in Rule 32(f).

Rule 40. Petition for Panel Rehearing

* * * * *

(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Except by the court's permission:

(1) a petition for panel rehearing produced using a computer must not exceed 3,900 words; and

(2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For

both the word limit and the page limit, the calculation excludes any items listed in Rule 32(f).

Form 6. Certificate of Compliance With Type-Volume Limit

Certificate of Compliance With Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

1. This document complies with [the type-volume limit of Fed. R. App. P. [*insert Rule citation; e.g., 32(a)(7)(B)*]] [the word limit of Fed. R. App. P. [*insert Rule citation; e.g., 5(c)(1)*]] because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) [and [*insert applicable Rule citation, if any*]]:

☐ this document contains [*state the number of*] words, **or**

☐ this brief uses a monospaced typeface and contains [*state the number of*] lines of text.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

☐ this document has been prepared in a proportionally spaced typeface using [*state name and version of word-processing program*] in [*state font size and name of type style*], **or**

☐ this document has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state*

number of characters per inch and name of type style].

(s)_____

Attorney for _____

Dated: _____

Appendix:
Length Limits Stated in the
Federal Rules of Appellate Procedure

This chart summarizes the length limits stated in the Federal Rules of Appellate Procedure. Please refer to the rules for precise requirements, and bear in mind the following:

- In computing these limits, you can exclude the items listed in Rule 32(f).
- If you use a word limit or a line limit (other than the word limit in Rule 28(j)), you must file the certificate required by Rule 32(g).
- For the limits in Rules 5, 21, 27, 35, and 40:
  - You must use the word limit if you produce your document on a computer; and
  - You must use the page limit if you handwrite your document or type it on a typewriter.
- For the limits in Rules 28.1, 29(a)(5), and 32:
  - You may use the word limit or page limit, regardless of how you produce the document; or
  - You may use the line limit if you type or print your document with a monospaced typeface. A typeface is monospaced when each character occupies the same amount of horizontal space.

	Rule	Document type	Word limit	Page limit	Line limit
Permission to appeal	5(c)	• Petition for permission to appeal • Answer in opposition • Cross-petition	5,200	20	Not applicable

	Rule	Document type	Word limit	Page limit	Line limit
Extraordinary writs	21(d)	• Petition for writ of mandamus or prohibition or other extraordinary writ • Answer	7,800	30	Not applicable
Motions	27(d)(2)	• Motion • Response to a motion	5,200	20	Not applicable
	27(d)(2)	• Reply to a response to a motion	2,600	10	Not applicable
Parties' briefs (where no cross-appeal)	32(a)(7)	• Principal brief	13,000	30	1,300
	32(a)(7)	• Reply brief	6,500	15	650
Parties' briefs (where cross-appeal)	28.1(e)	• Appellant's principal brief • Appellant's response and reply brief	13,000	30	1,300
	28.1(e)	• Appellee's principal and response brief	15,300	35	1,500
	28.1(e)	• Appellee's reply brief	6,500	15	650
Party's supplemental letter	28(j)	• Letter citing supplemental authorities	350	Not applicable	Not applicable

	Rule	Document type	Word limit	Page limit	Line limit
Amicus briefs	29(a)(5)	• Amicus brief during initial consideration of case on merits	One-half the length set by the Appellate Rules for a party's principal brief	One-half the length set by the Appellate Rules for a party's principal brief	One-half the length set by the Appellate Rules for a party's principal brief
	29(b)(4)	• Amicus brief during consideration of whether to grant rehearing	2,600	Not applicable	Not applicable
Rehearing and en banc filings	35(b)(2) & 40(b)	• Petition for hearing en banc • Petition for panel rehearing; petition for rehearing en banc	3,900	15	Not applicable

Rule 29. Brief of an Amicus Curiae

(a) During Initial Consideration of a Case on the Merits.

(1) **Applicability.** This Rule 29(a) governs amicus filings during a court's initial consideration of a case on the merits.

(2) **When Permitted.** The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

(3) **Motion for Leave to File.** The motion must be accompanied by the proposed brief and state:

(A) the movant's interest; and

(B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

(4) **Contents and Form.** An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following:

(A) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

(B) a table of contents, with page references;

(C) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—

with references to the pages of the brief where they are cited;

(D) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(E) unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), a statement that indicates whether:

(i) a party's counsel authored the brief in whole or in part;

(ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(iii) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended

to fund preparing or submitting the brief and, if so, identifies each such person;

(F) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

(G) a certificate of compliance under Rule 32(g)(1), if length is computed using a word or line limit.

(5) **Length.** Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(6) **Time for Filing.** An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

(7) **Reply Brief.** Except by the court's permission, an amicus curiae may not file a reply brief.

(8) **Oral Argument.** An amicus curiae may participate in oral argument only with the court's permission.

(b) During Consideration of Whether to Grant Rehearing.

(1) **Applicability.** This Rule 29(b) governs amicus filings during a court's consideration of whether to grant panel rehearing or rehearing en banc, unless a local rule or order in a case provides otherwise.

(2) **When Permitted.** The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court.

(3) **Motion for Leave to File.** Rule 29(a)(3) applies to a motion for leave.

(4) **Contents**, **Form**, **and Length**. Rule 29(a)(4) applies to the amicus brief. The brief must not exceed 2,600 words.

(5) **Time for Filing.** An amicus curiae supporting the petition for rehearing or supporting neither

party must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the petition is filed. An amicus curiae opposing the petition must file its brief, accompanied by a motion for filing when necessary, no later than the date set by the court for the response.

Committee Note

Rule 29 is amended to address amicus filings in connection with requests for panel rehearing and rehearing en banc.

Existing Rule 29 is renumbered Rule 29(a), and language is added to that subdivision (a) to state that its provisions apply to amicus filings during the court's initial consideration of a case on the merits. Rule 29(c)(7) becomes Rule 29(a)(4)(G) and is revised to accord with the relocation and revision of the certificate-of-compliance requirement. New Rule 32(g)(1) states that "[a] brief submitted under Rules 28.1(e)(2), 29(b)(4), or 32(a)(7)(B) . . . must include" a certificate of compliance. An amicus brief submitted during initial consideration of a case on the merits counts as a "brief submitted under Rule[] . . . 32(a)(7)(B)" if the amicus computes Rule 29(a)(5)'s length limit by taking half of a type-volume limit in

Rule 32(a)(7)(B). Rule 29(a)(4)(G) restates Rule 32(g)(1)'s requirement functionally, by providing that a certificate of compliance is required if an amicus brief's length is computed using a word or line limit.

New subdivision (b) is added to address amicus filings in connection with a petition for panel rehearing or rehearing en banc. Subdivision (b) sets default rules that apply when a court does not provide otherwise by local rule or by order in a case. A court remains free to adopt different rules governing whether amicus filings are permitted in connection with petitions for rehearing, and governing the procedures when such filings are permitted.

Rule 26. Computing and Extending Time

* * * * *

(c) Additional Time after Certain Kinds of Service. When a party may or must act within a specified time after being served, 3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is treated as delivered on the date of service stated in the proof of service.

Committee Note

Rule 26(c) is amended to remove service by electronic means under Rule 25(c)(1)(D) from the modes of service that allow 3 added days to act after being served.

Rule 25(c) was amended in 2002 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were

concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28- day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

Rule 26(c) has also been amended to refer to instances when a party "may or must act . . . after being served" rather than to instances when a party "may or must act . . . after service." If, in future, an Appellate Rule sets a

deadline for a party to act after *that party itself effects service* on another person, this change in language will clarify that Rule 26(c)'s three added days are not accorded to the party who effected service.

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

* * * * *

(4) **''Last Day'' Defined.** Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing in the district court, at midnight in the court's time zone;

(B) for electronic filing in the court of appeals, at midnight in the time zone of the circuit clerk's principal office;

(C) for filing under Rules 4(c)(1), 25(a)(2)(B), and 25(a)(2)(C)—and filing by mail under Rule 13(a)(2)—at the latest time for the

method chosen for delivery to the post office, third-party commercial carrier, or prison mailing system; and

(D) for filing by other means, when the clerk's office is scheduled to close.

* * * * *

Committee Note

Subdivision (a)(4)(C). The reference to Rule 13(b) is revised to refer to Rule 13(a)(2) in light of a 2013 amendment to Rule 13. The amendment to subdivision (a)(4)(C) is technical and no substantive change is intended.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 4. Appeal as of Right—When Taken

* * * * *

(c) Appeal by an Inmate Confined in an Institution.

(1) If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1). If an inmate ~~confined in an institution~~ files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing~~. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in~~

* New material is underlined; matter to be omitted is lined through.

~~compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.~~ and:

(A) it is accompanied by:

(i) a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the court of appeals exercises its discretion to permit the later filing of a declaration or

notarized statement that satisfies Rule 4(c)(1)(A)(i).

* * * * *

Committee Note

Rule 4(c)(1) is revised to streamline and clarify the operation of the inmate-filing rule.

The Rule requires the inmate to show timely deposit and prepayment of postage. The Rule is amended to specify that a notice is timely if it is accompanied by a declaration or notarized statement stating the date the notice was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as directed by the former Rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution's mail system. New Form 7 in the Appendix of Forms sets out a suggested form of the declaration.

The amended rule also provides that a notice is timely without a declaration or notarized statement if other evidence accompanying the notice shows that the notice was deposited on or before the due date and that postage was prepaid. If the notice is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the court of appeals has discretion to accept a declaration or notarized statement at a later date. The Rule

uses the phrase "exercises its discretion to permit"—rather than simply "permits"—to help ensure that pro se inmate litigants are aware that a court will not necessarily forgive a failure to provide the declaration initially.

Rule 25. Filing and Service

(a) Filing.

* * * * *

(2) **Filing: Method and Timeliness.**

* * * * *

(C) **Inmate F~~f~~iling.** If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 25(a)(2)(C). A paper filed by an inmate ~~confined in an institution~~ is timely if it is deposited in the institution's internal mail~~ing~~ system on or before the last day for filing~~. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a~~

~~declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.~~ and:

(i) it is accompanied by:

- a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or
- evidence (such as a postmark or date stamp) showing that the paper was so deposited and that postage was prepaid; or

(ii) the court of appeals exercises its discretion to permit the later filing of a

declaration or notarized statement that satisfies Rule 25(a)(2)(C)(i).

* * * * *

Committee Note

Rule 25(a)(2)(C) is revised to streamline and clarify the operation of the inmate-filing rule.

The Rule requires the inmate to show timely deposit and prepayment of postage. The Rule is amended to specify that a paper is timely if it is accompanied by a declaration or notarized statement stating the date the paper was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as directed by the former Rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution's mail system. New Form 7 in the Appendix of Forms sets out a suggested form of the declaration.

The amended rule also provides that a paper is timely without a declaration or notarized statement if other evidence accompanying the paper shows that the paper was deposited on or before the due date and that postage was prepaid. If the paper is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the court of appeals has discretion to accept a declaration or notarized statement at a later date. The Rule uses the phrase "exercises its discretion to permit"—rather than

simply "permits"—to help ensure that pro se inmate litigants are aware that a court will not necessarily forgive a failure to provide the declaration initially.

Form 1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court

United States District Court for the _____
District of _____
File Number _____

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

Notice is hereby given that ___(here name all parties taking the appeal)__, (plaintiffs) (defendants) in the above named case,* hereby appeal to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from an order (describing it)) entered in this action on the _____ day of _____, 20___.

(s) _____
Attorney for _____
Address:_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.*]

* See Rule 3(c) for permissible ways of identifying appellants.

Form 5. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court or a Bankruptcy Appellate Panel

United States District Court for the _____
District of _____

In re _____, Debtor _____, Plaintiff v. _____, Defendant	File No. _____

Notice of Appeal to United States Court of Appeals for the _____ Circuit

_____, the plaintiff [or defendant or other party] appeals to the United States Court of Appeals for the _____ Circuit from the final judgment [or order or decree] of the district court for the district of _____ [or bankruptcy appellate panel of the _____ circuit], entered in this case on _____, 20__ [here describe the judgment, order, or decree] _____

The parties to the judgment [or order or decree] appealed from and the names and addresses of their respective attorneys are as follows:

Dated _____

Signed _____

Attorney for Appellant

Address: _____

_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.*]

Form 7. Declaration of Inmate Filing

_____

[*insert name of court; for example,*
United States District Court for the District of Minnesota]

A.B., Plaintiff

v.

C.D., Defendant

Case No. _____

I am an inmate confined in an institution. Today, _____ [*insert date*], I am depositing the _____ [*insert title of document; for example, "notice of appeal"*] in this case in the institution's internal mail system. First-class postage is being prepaid either by me or by the institution on my behalf.

I declare under penalty of perjury that the foregoing is true and correct (see 28 U.S.C. § 1746; 18 U.S.C. § 1621).

Sign your name here_____

Signed on _____ [*insert date*]

[***Note to inmate filers:*** *If your institution has a system designed for legal mail, you must use that system in order to receive the timing benefit of Fed. R. App. P. 4(c)(1) or Fed. R. App. P. 25(a)(2)(C).*]

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

* * * * *

(4) **Effect of a Motion on a Notice of Appeal.**

(A) If a party ~~timely~~ files in the district court any of the following motions under the Federal Rules of Civil Procedure~~,~~ —and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

* * * * *

Committee Note

A clarifying amendment is made to subdivision (a)(4). Former Rule 4(a)(4) provided that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Responding to a circuit split concerning the meaning of "timely" in this provision, the amendment adopts the majority approach and rejects the approach taken in

National Ecological Foundation v. Alexander, 496 F.3d 466 (6th Cir. 2007). A motion made after the time allowed by the Civil Rules will not qualify as a motion that, under Rule 4(a)(4)(A), re-starts the appeal time—and that fact is not altered by, for example, a court order that sets a due date that is later than permitted by the Civil Rules, another party's consent or failure to object to the motion's lateness, or the court's disposition of the motion without explicit reliance on untimeliness.

Rule 5. Appeal by Permission

* * * * *

(c) Form of Papers; Number of Copies; Length Limits. All papers must conform to Rule 32(c)(2). ~~Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E).~~ An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case. Except by the court's permission, and excluding the accompanying documents required by Rule 5(b)(1)(E):

(1) a paper produced using a computer must not exceed 5,200 words; and

(2) a handwritten or typewritten paper must not exceed 20 pages.

* * * * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes the accompanying documents required by Rule 5(b)(1)(E) and any items listed in Rule 32(f).

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

* * * * *

(d) Form of Papers; Number of Copies; Length Limits. All papers must conform to Rule 32(c)(2). ~~Except by the court's permission, a paper must not exceed 30 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C).~~ An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. Except by the court's permission, and excluding the accompanying documents required by Rule 21(a)(2)(C):

(1) a paper produced using a computer must not exceed 7,800 words; and

(2) a handwritten or typewritten paper must not exceed 30 pages.

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes the accompanying documents required by Rule 21(a)(2)(C) and any items listed in Rule 32(f).

Rule 27. Motions

* * * * *

(d) Form of Papers; Length Limits; ~~Page Limits; and~~ Number of Copies.

* * * * *

(2) **~~Page~~ Length Limits.** ~~A motion or a response to a motion must not exceed 20 pages, exclusive of the corporate disclosure statement and accompanying documents authorized by Rule 27(a)(2)(B), unless the court permits or directs otherwise. A reply to a response must not exceed 10 pages.~~Except by the court's permission, and excluding the accompanying documents authorized by Rule 27(a)(2)(B):

(A) a motion or response to a motion produced using a computer must not exceed 5,200 words;

(B) a handwritten or typewritten motion or response to a motion must not exceed 20 pages;

(C) a reply produced using a computer must not exceed 2,600 words; and

(D) a handwritten or typewritten reply to a response must not exceed 10 pages.

* * * * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes the accompanying documents required by Rule 27(a)(2)(B) and any items listed in Rule 32(f).

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

* * * * *

(10) the certificate of compliance, if required by Rule ~~32(a)(7)~~32(g)(1).

* * * * *

Committee Note

Rule 28(a)(10) is revised to refer to Rule 32(g)(1) instead of Rule 32(a)(7), to reflect the relocation of the certificate-of-compliance requirement.

Rule 28.1. Cross-Appeals

* * * * *

(e) Length.

(1) **Page Limitation.** Unless it complies with Rule 28.1(e)(2) ~~and (3)~~, the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) **Type-Volume Limitation.**

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if it:

(i) ~~it~~ contains no more than ~~14,000~~13,000 words; or

(ii) ~~it~~ uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if it:

(i) ~~it~~ contains no more than ~~16,500~~15,300 words; or

(ii) ~~it~~ uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

~~(3) **Certificate of Compliance.** A brief submitted under Rule 28.1(e)(2) must comply with Rule 32(a)(7)(C).~~

* * * * *

Committee Note

When Rule 28.1 was adopted in 2005, it modeled its type-volume limits on those set forth in Rule 32(a)(7) for briefs in cases that did not involve a cross-appeal. At that time, Rule 32(a)(7)(B) set word limits based on an estimate of 280 words per page.

In the course of adopting word limits for the length limits in Rules 5, 21, 27, 35, and 40, and responding to concern about the length of briefs, the Committee has reevaluated the conversion ratio (from pages to words) and decided to apply a conversion ratio of 260 words per page. Rules 28.1 and 32(a)(7)(B) are amended to reduce the word limits accordingly.

In a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in these rules, such as to include unusually voluminous information explaining relevant background or legal provisions or to respond to multiple briefs by opposing parties or amici. The Committee expects that courts will accommodate those situations by granting leave to exceed the type-volume limitations as appropriate.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

* * * * *

(7) **Length.**

(A) **Page Limitation.** A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B) ~~and (C)~~.

(B) **Type-Volume Limitation.**

(i) A principal brief is acceptable if it:

- ~~it~~ contains no more than ~~14,000~~13,000 words; or
- ~~it~~ uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type

volume specified in Rule 32(a)(7)(B)(i).

~~(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.~~

~~(C) Certificate of compliance.~~

~~(i) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief~~

~~complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:~~

- ~~the number of words in the brief;~~

~~or~~

- ~~the number of lines of monospaced type in the brief.~~

~~(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rules 28.1(e)(3) and 32(a)(7)(C)(i).~~

* * * * *

(e) Local Variation. Every court of appeals must accept documents that comply with the form requirements of this rule and the length limits set by these rules. By local rule or order in a particular case, a court of appeals may accept documents that do not meet all ~~of~~ the form requirements of this rule or the length limits set by these rules.

(f) Items Excluded from Length. In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- the cover page;
- a corporate disclosure statement;
- a table of contents;
- a table of citations;
- a statement regarding oral argument;
- an addendum containing statutes, rules, or regulations;

- certificates of counsel;
- the signature block;
- the proof of service; and
- any item specifically excluded by these rules or by local rule.

(g) Certificate of Compliance.

(1) **Briefs and Papers That Require a Certificate.** A brief submitted under Rules 28.1(e)(2), 29(b)(4), or 32(a)(7)(B)—and a paper submitted under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A), 27(d)(2)(C), 35(b)(2)(A), or 40(b)(1)—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the document. The certificate must state

the number of words—or the number of lines of monospaced type—in the document.

(2) **Acceptable Form.** Form 6 in the Appendix of Forms meets the requirements for a certificate of compliance.

Committee Note

When Rule 32(a)(7)(B)'s type-volume limits for briefs were adopted in 1998, the word limits were based on an estimate of 280 words per page. In the course of adopting word limits for the length limits in Rules 5, 21, 27, 35, and 40, and responding to concern about the length of briefs, the Committee has reevaluated the conversion ratio (from pages to words) and decided to apply a conversion ratio of 260 words per page. Rules 28.1 and 32(a)(7)(B) are amended to reduce the word limits accordingly.

In a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in these rules, such as to include unusually voluminous information explaining relevant background or legal provisions or to respond to multiple briefs by opposing parties or amici. The Committee expects that courts will accommodate those situations by granting leave to exceed the type-volume limitations as appropriate.

Subdivision (e) is amended to make clear a court's ability (by local rule or order in a case) to increase the

length limits for briefs and other documents. Subdivision (e) already established this authority as to the length limits in Rule 32(a)(7); the amendment makes clear that this authority extends to all length limits in the Appellate Rules.

A new subdivision (f) is added to set out a global list of items excluded from length computations, and the list of exclusions in former subdivision (a)(7)(B)(iii) is deleted. The certificate-of-compliance provision formerly in Rule 32(a)(7)(C) is relocated to a new Rule 32(g) and now applies to filings under all type-volume limits (other than Rule 28(j)'s word limit)—including the new word limits in Rules 5, 21, 27, 29, 35, and 40. Conforming amendments are made to Form 6.

Rule 35. En Banc Determination

* * * * *

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc.

* * * * *

(2) Except by the court's permission~~, a petition for an en banc hearing or rehearing must not exceed 15 pages, excluding material not counted under Rule 32.~~:

(A) a petition for an en banc hearing or rehearing produced using a computer must not exceed 3,900 words; and

(B) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages.

(3) For purposes of the ~~page~~ limits in Rule 35(b)(2), if a party files both a petition for panel rehearing

and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

* * * * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes any items listed in Rule 32(f).

Rule 40. Petition for Panel Rehearing

* * * * *

(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. ~~Unless the court permits or a local rule provides otherwise, a petition for panel rehearing must not exceed 15 pages.~~Except by the court's permission:

(1) a petition for panel rehearing produced using a computer must not exceed 3,900 words; and

(2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the

certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes any items listed in Rule 32(f).

Form 6. Certificate of Compliance With ~~Rule 32(a)~~ Type-Volume Limit

Certificate of Compliance With Type-Volume Limit~~ation~~, Typeface Requirements, and Type-Style Requirements

1. This ~~brief~~document complies with [the type-volume limit~~ation~~ of Fed. R. App. P. ~~32(a)(7)(B)~~[*insert Rule citation; e.g., 32(a)(7)(B)*]] [the word limit of Fed. R. App. P. [*insert Rule citation; e.g., 5(c)(1)*]] because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) [and [*insert applicable Rule citation, if any*]]:

☐ this ~~brief~~document contains [*state the number of*] words, ~~excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii),~~ **or**

☐ this brief uses a monospaced typeface and contains [*state the number of*] lines of text~~,~~ ~~excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)~~.

2. This ~~brief~~document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

☐ this ~~brief~~document has been prepared in a proportionally spaced typeface using [*state name and version of word-processing program*] in [*state font size and name of type style*], **or**

☐ this ~~brief~~document has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

(s)_____

Attorney for _____

Dated: _____

Appendix:
Length Limits Stated in the
Federal Rules of Appellate Procedure

This chart summarizes the length limits stated in the Federal Rules of Appellate Procedure. Please refer to the rules for precise requirements, and bear in mind the following:

- In computing these limits, you can exclude the items listed in Rule 32(f).
- If you use a word limit or a line limit (other than the word limit in Rule 28(j)), you must file the certificate required by Rule 32(g).
- For the limits in Rules 5, 21, 27, 35, and 40:
  - You must use the word limit if you produce your document on a computer; and
  - You must use the page limit if you handwrite your document or type it on a typewriter.
- For the limits in Rules 28.1, 29(a)(5), and 32:
  - You may use the word limit or page limit, regardless of how you produce the document; or
  - You may use the line limit if you type or print your document with a monospaced typeface. A typeface is monospaced when each character occupies the same amount of horizontal space.

	Rule	Document type	Word limit	Page limit	Line limit
Permission to appeal	5(c)	• Petition for permission to appeal • Answer in opposition • Cross-petition	5,200	20	Not applicable

	Rule	Document type	Word limit	Page limit	Line limit
Extraordinary writs	21(d)	• Petition for writ of mandamus or prohibition or other extraordinary writ • Answer	7,800	30	Not applicable
Motions	27(d)(2)	• Motion • Response to a motion	5,200	20	Not applicable
	27(d)(2)	• Reply to a response to a motion	2,600	10	Not applicable
Parties' briefs (where no cross-appeal)	32(a)(7)	• Principal brief	13,000	30	1,300
	32(a)(7)	• Reply brief	6,500	15	650
Parties' briefs (where cross-appeal)	28.1(e)	• Appellant's principal brief • Appellant's response and reply brief	13,000	30	1,300
	28.1(e)	• Appellee's principal and response brief	15,300	35	1,500
	28.1(e)	• Appellee's reply brief	6,500	15	650
Party's supplemental letter	28(j)	• Letter citing supplemental authorities	350	Not applicable	Not applicable

	Rule	Document type	Word limit	Page limit	Line limit
Amicus briefs	29(a)(5)	• Amicus brief during initial consideration of case on merits	One-half the length set by the Appellate Rules for a party's principal brief	One-half the length set by the Appellate Rules for a party's principal brief	One-half the length set by the Appellate Rules for a party's principal brief
	29(b)(4)	• Amicus brief during consideration of whether to grant rehearing	2,600	Not applicable	Not applicable
Rehearing and en banc filings	35(b)(2) & 40(b)	• Petition for hearing en banc • Petition for panel rehearing; petition for rehearing en banc	3,900	15	Not applicable

Rule 29. Brief of an Amicus Curiae

(a) During Initial Consideration of a Case on the Merits.

(1) **Applicability.** This Rule 29(a) governs amicus filings during a court's initial consideration of a case on the merits.

(2) **When Permitted.** The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

~~(b)~~ (3) **Motion for Leave to File.** The motion must be accompanied by the proposed brief and state:

~~(1)~~ (A) the movant's interest; and

~~(2)~~ (B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

~~(c)~~ (4) **Contents and Form.** An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following:

~~(1)~~ (A) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

~~(2)~~ (B) a table of contents, with page references;

~~(3)~~ (C) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—

with references to the pages of the brief where they are cited;

~~(4)~~ (D) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

~~(5)~~ (E) unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), a statement that indicates whether:

~~(A)~~ (i) a party's counsel authored the brief in whole or in part;

~~(B)~~ (ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

~~(C)~~ (iii) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended

to fund preparing or submitting the brief and, if so, identifies each such person;

~~(6)~~ (F) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

~~(7)~~ (G) a certificate of compliance under Rule 32(g)(1), if ~~required by Rule 32(a)(7)~~ length is computed using a word or line limit.

~~(d)~~ (5) **Length.** Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

~~(e)~~ (6) **Time for Filing.** An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

~~(f)~~ (7) **Reply Brief.** Except by the court's permission, an amicus curiae may not file a reply brief.

~~(g)~~ (8) **Oral Argument.** An amicus curiae may participate in oral argument only with the court's permission.

(b) During Consideration of Whether to Grant Rehearing.

(1) **Applicability.** This Rule 29(b) governs amicus filings during a court's consideration of whether to grant panel rehearing or rehearing en banc, unless a local rule or order in a case provides otherwise.

(2) **When Permitted.** The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court.

(3) **Motion for Leave to File.** Rule 29(a)(3) applies to a motion for leave.

(4) **Contents, Form, and Length**. Rule 29(a)(4) applies to the amicus brief. The brief must not exceed 2,600 words.

(5) **Time for Filing.** An amicus curiae supporting the petition for rehearing or supporting neither

party must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the petition is filed. An amicus curiae opposing the petition must file its brief, accompanied by a motion for filing when necessary, no later than the date set by the court for the response.

Committee Note

Rule 29 is amended to address amicus filings in connection with requests for panel rehearing and rehearing en banc.

Existing Rule 29 is renumbered Rule 29(a), and language is added to that subdivision (a) to state that its provisions apply to amicus filings during the court's initial consideration of a case on the merits. Rule 29(c)(7) becomes Rule 29(a)(4)(G) and is revised to accord with the relocation and revision of the certificate-of-compliance requirement. New Rule 32(g)(1) states that "[a] brief submitted under Rules 28.1(e)(2), 29(b)(4), or 32(a)(7)(B) . . . must include" a certificate of compliance. An amicus brief submitted during initial consideration of a case on the merits counts as a "brief submitted under Rule[] . . . 32(a)(7)(B)" if the amicus computes Rule 29(a)(5)'s length limit by taking half of a type-volume limit in

Rule 32(a)(7)(B). Rule 29(a)(4)(G) restates Rule 32(g)(1)'s requirement functionally, by providing that a certificate of compliance is required if an amicus brief's length is computed using a word or line limit.

New subdivision (b) is added to address amicus filings in connection with a petition for panel rehearing or rehearing en banc. Subdivision (b) sets default rules that apply when a court does not provide otherwise by local rule or by order in a case. A court remains free to adopt different rules governing whether amicus filings are permitted in connection with petitions for rehearing, and governing the procedures when such filings are permitted.

Rule 26. Computing and Extending Time

* * * * *

(c) Additional Time after Certain Kinds of Service. When a party may or must act within a specified time after ~~service~~being served, 3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is ~~not~~ treated as delivered on the date of service stated in the proof of service.

Committee Note

Rule 26(c) is amended to remove service by electronic means under Rule 25(c)(1)(D) from the modes of service that allow 3 added days to act after being served.

Rule 25(c) was amended in 2002 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were

concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28- day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

Rule 26(c) has also been amended to refer to instances when a party "may or must act . . . after being served" rather than to instances when a party "may or must act . . . after service." If, in future, an Appellate Rule sets a

deadline for a party to act after *that party itself effects service* on another person, this change in language will clarify that Rule 26(c)'s three added days are not accorded to the party who effected service.

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

* * * * *

(4) **''Last Day'' Defined.** Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing in the district court, at midnight in the court's time zone;

(B) for electronic filing in the court of appeals, at midnight in the time zone of the circuit clerk's principal office;

(C) for filing under Rules 4(c)(1), 25(a)(2)(B), and 25(a)(2)(C)—and filing by mail under Rule ~~13(b)~~13(a)(2)—at the latest time for

the method chosen for delivery to the post office, third-party commercial carrier, or prison mailing system; and

(D) for filing by other means, when the clerk's office is scheduled to close.

* * * * *

Committee Note

Subdivision (a)(4)(C). The reference to Rule 13(b) is revised to refer to Rule 13(a)(2) in light of a 2013 amendment to Rule 13. The amendment to subdivision (a)(4)(C) is technical and no substantive change is intended.

EXCERPT FROM THE SEPTEMBER 2015
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

* * * * *

FEDERAL RULES OF APPELLATE PROCEDURE

Rules and Forms Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6, and a proposed new Form 7, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and public for comment in August 2014, and were offered for approval as published except as noted below.

Inmate-Filing Rules

Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7. Proposed amendments to Rules 4(c)(1) and 25(a)(2)(C), and Forms 1 and 5, and proposed new Form 7, are designed to clarify and improve the inmate-filing rules. Proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions. The amendments further clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid. New Form 7 is a suggested form of declaration. Forms 1 and 5, which are suggested forms of notices of appeal, are revised to include a reference alerting inmate filers to the existence of new Form 7. The amendments also clarify that if sufficient evidence

does not accompany the initial filing, then the court of appeals may permit the later filing of a declaration or notarized statement to establish timely deposit.

The Advisory Committee received seven comments on this proposal. Commentators were divided on the published proposal to delete the requirement in Rules 4(c)(1) and 25(a)(2)(C) that an inmate use the institution's legal mail system (if one is available) in order to receive the benefit of the inmate-filing rules. After considering the comments and conducting further research, the Advisory Committee decided to abandon its proposal to delete the legal-mail-system requirement from Rules 4(c)(1) and 25(a)(2)(C). The Advisory Committee also made several post-publication technical improvements to the Forms.

Appeal Time After Post-judgment Motions

Rule 4(a)(4). A circuit split exists regarding whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as timely filed under Appellate Rule 4(a)(4). Rule 4(a)(4) provides that certain "timely" post-judgment motions restart the time to take a civil appeal. The proposed amendment addresses the split by adopting the majority view. Under the proposed rule, a motion restarts the time for taking an appeal only if it is filed within the time allowed by the Rules of Civil Procedure.

Rule 4(a)(4) provides that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Five circuits have held that a motion is "timely" only if it is filed within the deadline set by the rules. One circuit, however, ruled that if a district court mistakenly extends the time for filing a post-judgment motion (contrary to the prohibition in Civil Rule 6(b)), then the motion is "timely" for purposes of Rule 4(a)(4).

Given the conflict in authority, the Advisory Committee determined to clarify the meaning of Rule 4(a)(4). The proposed amendment adopts the majority view that post-judgment motions made outside the deadlines set by the Civil Rules do not restart the appeal time under Rule 4(a)(4). This rule ensures a uniform deadline for post-judgment motions and sets a definite point in time when litigation will end. The Advisory Committee also was concerned that the minority approach taken by one circuit was "uncomfortably close" to the "unique circumstances" doctrine that the Supreme Court disapproved in *Bowles v. Russell*, 551 U.S. 205, 214 (2007). *See Blue v. Int'l Bhd. of Elec. Workers Local Union 159*, 676 F.3d 579, 583 (7th Cir. 2012).

Five of six comments received on this proposal were supportive. The Advisory Committee discussed the concerns raised by the one objector, but ultimately adhered to its initial determination to amend the rule to adopt the majority view. No changes were made following publication.

Length Limits

Rules 5, 21, 27, 28, 28.1, 32, 35, and 40, and Form 6. The proposed amendments affect length limits set by the Appellate Rules for briefs and other documents. The Advisory Committee first addressed length limits that are expressed in page limits. The committee believed that these limits have been overtaken by technology and are vulnerable to manipulation. While considering how to convert page limits to word limits, the committee also examined the present length limit for briefs. The length limit for principal briefs was converted from 50 pages to 14,000 words in 1998. Members of the judiciary have expressed concern that briefs filed under the current limit are too long. Others have questioned whether the 14,000-word limit (which reflects a conversion ratio of 280 words per page) is an accurate translation of the traditional fifty-page limit.

The proposal amends Rules 5, 21, 27, 35, and 40 to convert the existing page limits to word limits for documents, other than briefs, that are prepared using a computer. The amendment uses a conversion ratio of 260 words per page in order to approximate traditional volume and to avoid increasing the length of documents such as motions, petitions for rehearing, and petitions for permission to appeal. For documents prepared without a computer, the proposed amendments retain the current page limits.

The proposed amendment to Rule 32 amends the word limits for briefs to reflect the pre-1998 page limits multiplied by 260 words per page. As a result, the current 14,000-word limit for a party's principal brief would become a 13,000-word limit; the word limit for a reply brief would change from 7,000 to 6,500 words. The proposal correspondingly reduces the word limits set by Rule 28.1 for cross-appeals.

New Rule 32(f) sets out a uniform list of the items that can be excluded when computing a document's length. A new appendix collects in one chart all length limits stated in the Appellate Rules. Form 6 concerning certificates of compliance is amended to account for the proposed amendments to length limits.

Under the proposal, a court of appeals that wants to retain the existing word limits for briefs may do so by local rule or by order in a case. The local variation provision of existing Rule 32(e) is amended to highlight a court's authority to do so. Unlike the present rule, however, the proposal does not require a court of appeals that prefers the amended limits to accept longer briefs that judges believe are burdensome and unnecessary.

The Advisory Committee received a large number of public comments in response to the proposed amendments. The committee also received testimony from four appellate lawyers during a public hearing. As published, the proposal would have employed a conversion ratio of

250 words per page and reduced the limit for principal briefs to 12,500 words. In an effort to accommodate views expressed by appellate lawyers who opposed the change, while still recognizing the validity of concerns voiced by judges and others with the length of briefs under the current rules, the Advisory Committee made changes to the amendments as published for comment. The proposal as forwarded employs a conversion ratio of 260 words per page, rather than 250 words per page as published. Accordingly, the length limit for a principal brief is set at 13,000 words, rather than 12,500. The committee note also acknowledges that in a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in the rules.[1]

Amicus Filings in Connection with Rehearing

Rule 29. Proposed new Rule 29(b) establishes default rules for the treatment of amicus filings in connection with petitions for rehearing. There is no national rule that establishes a filing deadline or a length limit for amicus briefs in connection with petitions for rehearing. Most circuits have no local rule on point. Attorneys reported confusion caused by the lack of guidance. The proposal developed by the Advisory Committee does not require acceptance of amicus briefs, but establishes guidelines for the filing of briefs when permitted. Most of the features of current Rule 29 are incorporated for the rehearing stage, including the authorization for certain governmental entities to file amicus briefs without party consent or court permission. Under the proposal, a circuit may alter the default federal rules on timing, length, and other matters by local rule or by order in a case.

[1]The proposed amendments to Rule 32, as revised for style after the public comment period, required a corresponding change to Rule 28(a)(10) to reflect the relocation of the certificate-of-compliance requirement from Rule 32(a)(7) to Rule 32(g)(1).

Overall, commentators expressed support for amending Rule 29 to address amicus filings in connection with rehearing petitions and offered varying suggestions as to length and timing. Based on the comments, the Advisory Committee changed the length limit under Rule 29(b) from 2,000 words to 2,600 words, and revised the deadline for amicus filings in support of a rehearing petition from three to seven days after the filing of the petition.

3-Day Rule

Rule 26(c). A proposed amendment to Rule 26(c) eliminates the so-called "3-day rule" in cases of electronic service. The 3-day rule adds three days to a given period if that period is measured after service and service is accomplished by certain methods. A subcommittee charged with overseeing an integrated approach to issues arising from electronic filing recommended that the "3-day rule" be amended to exclude electronic service. The proposed amendment to Appellate Rule 26(c) parallels proposed amendments to Civil Rule 6(d), Criminal Rule 45(c), and Bankruptcy Rule 9006(f) as part of a "3-day rule package."

Under current Appellate Rule 26(c), applicability of the 3-day rule depends on whether the paper in question is delivered on the date of service stated in the proof of service; if so, then the 3-day rule is inapplicable. The proposed amendment to Rule 26(c) excludes electronic service from the 3-day rule by deeming a paper served electronically as delivered on the date of service stated in the proof of service.

The Advisory Committee voted to approve the amendment as published. But in response to concerns expressed by commentators about whether the 14 days allowed by Appellate Rule 31(a)(1) is sufficient time for the preparation of a reply brief, the Advisory Committee agreed to study whether that deadline should be adjusted.

The Department of Justice proposed adding language to the Committee Note accompanying each rule in the 3-day rule package to recognize that extensions of time may be warranted to prevent prejudice in certain circumstances. In the interest of uniformity, each Advisory Committee approved adding such language to the published Committee Notes. The Standing Committee concurred, with a minor modification.

Technical Amendment

Rule 26(a)(4)(C). In 2013, then-existing Rule 13 governing appeals as of right from the Tax Court became Rule 13(a). A new Rule 13(b)—providing that Rule 5 governs permissive appeals from the Tax Court—was added. Rule 26(a)(4)(C)'s reference to "filing by mail under Rule 13(b)" should have been amended to refer to "filing by mail under Rule 13(a)(2)." The proposed amendment to Rule 26(a)(4)(C) updates the cross-reference. Because the proposed amendment is technical in nature, publication for public comment is not required.

The Standing Committee concurred with the Advisory Committee's recommendation as follows:

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6, and proposed new Form 7, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,

Jeffrey S. Sutton, Chair

Dean C. Colson	Patrick J. Schiltz
Brent E. Dickson	Amy J. St. Eve
Roy T. Englert, Jr.	Larry D. Thompson
Gregory G. Garre	Richard C. Wesley
Neil M. Gorsuch	Sally Yates
Susan P. Graber	Jack Zouhary
David F. Levi	

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

DATE: May 4, 2015

TO: Judge Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Steven M. Colloton, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 23 and 24 in Philadelphia, Pennsylvania. The Committee gave final approval to six sets of proposed amendments, relating to (1) the inmate-filing provisions under Rules 4(c) and 25(a); (2) tolling motions under Rule 4(a)(4); (3) length limits for appellate filings; (4) amicus briefs in connection with rehearing; (5) Rule 26(c)'s "three-day rule"; and (6) a technical amendment to Rule 26(a)(4)(C). The Committee discussed a number of other items and added one issue to its study agenda.

Part II of this report discusses the proposals for which the Committee seeks final approval.

* * * * *

II. Action Items—for Final Approval

The Committee seeks final approval of six sets of proposed amendments.

A. Inmate filings: Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7

Under the Federal Rules of Appellate Procedure, documents are timely filed if they are received by the court on or before the due date. Rules 4(c)(1) and 25(a)(2)(C) offer an alternative way for inmates to establish timely filing of documents. If the requirements of the relevant rule are met, then the filing date is deemed to be the date the inmate deposited the document in the institution's mail system rather than the date the court received the document. *See generally Houston v. Lack*, 487 U.S. 266 (1988).

The Committee has studied the workings of the inmate-filing rules since 2007, in light of concerns expressed about conflicts in the case law, unintended consequences of the current language, and ambiguity in the current text. Must an inmate prepay postage to benefit from the rule? There are decisions saying that an inmate need not prepay postage if he uses a prison's system designed for legal mail, but must prepay postage if he does not use that system. Must an inmate file a declaration or notarized statement averring the date of filing to benefit from the rule? One court held, over a dissent from denial of rehearing en banc, that a document is untimely if there is no declaration or notarized statement, even when other evidence such as a postmark shows that the document was timely deposited in the prison mail system. When must an inmate submit a declaration designed to demonstrate timeliness? One circuit has published inconsistent decisions, holding in one case that the declaration must accompany the notice and in another that the declaration may be filed at a later date.

The Committee seeks final approval of proposed amendments that are designed to clarify and improve the inmate-filing rules. The amendments to Rules 4(c)(1) and 25(a)(2)(C) would make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions. The amendments clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid. New Form 7 is a suggested form of declaration that would satisfy the Rule. Forms 1 and 5 (which are suggested forms of notices of appeal) are revised to include a reference alerting inmate filers to the existence of Form 7. The amendments also clarify that if sufficient evidence does not accompany the initial filing, then the court of appeals has discretion to permit the later filing of a declaration or notarized statement to establish timely deposit.

1. Text of proposed amendments and Committee Note

The Committee recommends final approval of the proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) and Forms 1 and 5, and proposed new Form 7, as revised after publication and set out in the enclosure to this report.

2. Changes made after publication and comment

After publication, the Committee decided to abandon its proposal to delete the legal-mail-system requirement from Rules 4(c)(1) and 25(c)(2)(C). The Committee also made several improvements to the Forms.

Rules 4(c)(1) and 25(a)(2)(C), as published, would have deleted the requirement that an inmate use a system designed for legal mail (if one is available) in order to receive the benefit of

the inmate-filing rules. The Committee proposed deleting that requirement because it perceived no purpose for it. The Committee had learned from the Deputy General Counsel of the U.S. Bureau of Prisons that the distinction between legal and non-legal mail systems, in BOP facilities, had more to do with privacy concerns than other reasons. And an inquiry to the Chief Deputy Clerk of the U.S. Supreme Court had likewise disclosed no reason to retain the legal-mail-system requirement.

Commentators were divided on the question of the legal-mail-system requirement. One commentator specifically expressed support for the published amendments' deletion of the requirement. Another commentator, however, pointed out that correctional institutions in the State of Florida log the date of deposit of inmates' legal mail but do not log the date of deposit of inmates' non-legal mail, and argued that the legal-mail-system requirement provided the State with an important way to provide evidence of the date of inmates' legal mail. The Committee's Reporter, with the assistance of the Director and Chief Counsel of the National Association of Attorneys General Center for Supreme Court Advocacy, investigated whether correctional institutions in jurisdictions other than Florida make a similar distinction (date-logging legal but not non-legal mail). The responses—from 21 states and the District of Columbia—disclosed that an appreciable number of the states do make such a distinction.[1] Further inquiry also determined that the federal Bureau of Prisons date-stamps legal mail, but does not log non-legal mail.

This new information, in the view of the Committee, provides reason to retain the legal-mail-system requirement. Requiring an inmate to use a legal mail system where available continues to serve a useful purpose by ensuring that mail is logged or date-stamped and avoiding unnecessary litigation over the timing of deposits. Accordingly, the Committee decided to restore that requirement to proposed Rules 4(c)(1) and 25(a)(2)(C). The Committee also revised proposed new Form 7, and the proposed amendments to Forms 1 and 5, to make all three forms more user-friendly and to make the new form more accurate. In particular, the Committee revised Form 7 to use the present tense ("Today ... I am depositing") rather than the past tense ("I deposited ..."), to reflect that the inmate will fill out the declaration before depositing both the declaration and the underlying filing in the institution's mail system.

The Committee decided not to implement other proposed changes to the amendments. The Committee did not adopt a suggestion that the Rules should *authorize* the later filing of the declaration (as opposed to giving the court the discretion to permit its later filing). Members considered it important to encourage the inmate to provide the declaration contemporaneously, while recollections are fresh. The Committee gave careful consideration to style comments advocating deletion of the Rules' reference to a court's ability to "exercise[] its discretion to permit the later filing" of the declaration (the style suggestion was to say simply "permit[]"). But Committee members were swayed by substantive concerns about the desire to ensure that inmates understand that later filing will not necessarily be permitted. The Committee also did

[1] Four states—Colorado, North Carolina, Tennessee, and Washington State—have systems that (like Florida's) log the date of legal mail but not non-legal mail. Two additional states—Alaska and Delaware—have such systems in at least some of their facilities. And though Pennsylvania does not currently date-log any outgoing mail, the Deputy Chief Counsel for Litigation at the Pennsylvania Department of Corrections reports that Pennsylvania is considering date-logging outgoing legal mail in order to provide evidence of the date of filing.

not adopt suggestions that the Rules should authorize courts to excuse an inmate's failure to prepay postage, as courts already have adequate authority to act if an institution refuses to provide postage when it is constitutionally required. The Committee considered whether to delete the Rules' reference to a notarized statement (as an alternative to a declaration), and decided to retain that reference because notaries are available in a number of correctional institutions, and similar language appears in the inmate-filing provisions in the Supreme Court Rules and the rules for habeas and Section 2255 proceedings. There was no opposition to the notarized statement option during the comment period.

B. Tolling motions: Rule 4(a)(4)

The proposed amendment to Appellate Rule 4(a)(4) addresses a circuit split concerning whether a motion filed outside a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Rule 4(a)(4) if a court has mistakenly ordered an "extension" of the deadline for filing the motion.

Caselaw in the wake of *Bowles v. Russell*, 551 U.S. 205 (2007), holds that statutory appeal deadlines are jurisdictional but that nonstatutory appeal deadlines are nonjurisdictional claim-processing rules. The statutory appeal deadline for civil appeals is set by 28 U.S.C. § 2107. The statute does not mention so-called "tolling motions" filed in the district court that have the effect of extending the appeal deadline, but "§ 2107 was enacted against a doctrinal backdrop in which the role of tolling motions had long been clear." 16A Wright et al., Federal Practice & Procedure § 3950.4. At the time of enactment, "caselaw stated that certain postjudgment motions tolled the time for taking a civil appeal." *Id.* Commentators have presumed, therefore, that Congress incorporated the preexisting caselaw into § 2107, and that appeals filed within a recognized tolling period may be considered timely consistent with *Bowles*.

The federal rule on tolling motions, Appellate Rule 4(a)(4), provides that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." A number of circuits have ruled that the Civil Rules' deadlines for post-judgment motions are nonjurisdictional claim-processing rules. On this view, where a district court mistakenly "extends" the time for making such a motion, and no party objects to that extension, the district court has authority to decide the motion on its merits. But does the motion count as a "timely" one that, under Rule 4(a)(4), tolls the time to appeal? The Third, Seventh, Ninth, and Eleventh Circuits have issued post-*Bowles* rulings stating that such a motion does not toll the appeal time. *E.g.*, *Blue v. Int'l Bhd. of Elec. Workers Local Union 159*, 676 F.3d 579, 582-84 (7th Cir. 2012); *Lizardo v. United States*, 619 F.3d 273, 278-80 (3d Cir. 2010). Pre-*Bowles* caselaw from the Second Circuit accords with this position. The Sixth Circuit, however, has held to the contrary. *Nat'l Ecological Found. v. Alexander*, 496 F.3d 466, 476 (6th Cir. 2007).

The Committee feels it is important to clarify the meaning of "timely" in Rule 4(a)(4), because the conflict in authority arises from arguable ambiguity in the current Rule, and timely filing of a notice of appeal is a jurisdictional requirement. The proposed amendment would adopt the majority view—i.e., that postjudgment motions made outside the deadlines set by the Civil Rules are not "timely" under Rule 4(a)(4). Such an amendment would work the least change in current law. And, as the court noted in *Blue*, 676 F.3d at 583, the majority approach

tracks the spirit of the Court's decision in *Bowles*, which held that the Court has "no authority to create equitable exceptions to jurisdictional requirements." 551 U.S. at 214.

1. Text of proposed amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 4(a)(4) as set out in the enclosure to this report.

2. Changes made after publication and comment

No changes were made after publication and comment.

All but one of the commentators who addressed this proposal voiced support for it. The sole opponent argued that both the current Rule and the proposed amended Rule set a trap for unwary litigants. That commentator also argued that it is incongruous that a district court has power to rule on the merits of an untimely postjudgment motion if the opposing party fails to object to the untimeliness but that same motion lacks tolling effect under Rule 4(a)(4).

The commentator's objections tracked concerns that had already been discussed by the Committee in its prior deliberations. After noting the comment, the Committee adhered to its substantive judgment that the Rule should be amended to adopt the majority view. Committee members discussed whether the amendment, as published, could be revised to make its meaning clearer. Specifically, the Committee discussed the possibility of adding rule text specifying that a motion made outside the time permitted by the relevant Civil Rule "is not rendered timely by, for instance: (i) a court order setting a due date that is later than allowed by the Federal Rules of Civil Procedure; (ii) another party's consent or failure to object; or (iii) the court's disposition of the motion." Committee members, however, expressed concern that this addition would distend an already long and complex Rule and that a list of this nature could be read to exclude other possible scenarios. Committee members observed, moreover, that these examples are stated in the Committee Note, so lawyers and litigants should have adequate notice to avoid a "trap."

C. Length limits: Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6

The proposed amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6—approved unanimously by the Advisory Committee after post-publication changes—would affect length limits set by the Appellate Rules for briefs and other documents. The proposal would amend Rules 5, 21, 27, 35, and 40 to convert the existing page limits to word limits for documents prepared using a computer. For documents prepared without the aid of a computer, the proposed amendments would retain the page limits currently set out in those rules. The proposed amendments employ a conversion ratio of 260 words per page for Rules 5, 21, 27, 35, and 40.

The amendments would also reduce Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 260 words per page. The 14,000-word limit for a party's principal brief would become a 13,000-word limit; the limit for a reply brief would change from 7,000 to 6,500 words. The proposals correspondingly reduce the word limits set by Rule 28.1 for cross-appeals. New Rule 32(f) sets out a uniform list of the items that can be excluded when

computing a document's length. A new appendix collects in one chart all the length limits stated in the Appellate Rules.

Any court of appeals that wishes to retain the existing limits, including 14,000 words for a principal brief, may do so under the proposed amendments. The local variation provision of existing Rule 32(e) would be amended to highlight a court's ability (by order or local rule) to set length limits that exceed those in the Appellate Rules.

* * *

The genesis of this project was the suggestion that length limits set in terms of pages have been overtaken by advances in technology, and that use of page limits rather than word limits invites gamesmanship by attorneys. As noted, the proposal would amend Rules 5, 21, 27, 35, and 40 to address that concern.

Drafting those amendments required the Committee to select a conversion ratio from pages to words. The 1998 amendments transmuted the prior 50-page limit for briefs into a 14,000-word limit—that is, the 1998 amendments used a conversion ratio of 280 words per page. In formulating the published proposal, the Committee relied upon two studies indicating that a traditional 50-page brief filed in the courts of appeals under the pre-1998 rules contained fewer than 280 words per page. A study in 1993 by the D.C. Circuit Advisory Committee recommended a conversion ratio of 250 words per page; based on this study, the D.C. Circuit applied a length limit of 12,500 words for principal briefs from 1993 to 1998. A 2013 study by the Committee's clerk representative found an average of 259 words per page (or 12,950 per fifty pages) in 210 randomly-selected appellate briefs filed by counsel in the Eighth Circuit from 1995 through 1998. The 1998 Advisory Committee Note to Rule 32 did not explain the reason for the selection of the 280 words per page conversion ratio, and the published proposal said that the basis for the estimate was unknown.

As published for comment, the proposed amendments employed a conversion ratio of 250 words per page for Rules 5, 21, 27, 35, and 40. The published proposal also reduced Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 250 words per page—that is, 12,500 words for a principal brief. The proposals correspondingly reduced the word limits set by Rule 28.1 for cross-appeals. The published proposed amendments were subject to the local variation provision of Rule 32(e), which permits a court to increase the length limit by order or local rule.

During consideration of the proposed shift to type-volume limits, the Committee also observed that the rules do not provide a uniform list of the items that can be excluded when computing a document's length. The published proposals would add a new Rule 32(f) setting forth such a list.

1. Text of proposed amendment and Committee Note

The Committee recommends final approval of the proposed amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, as revised after publication and set out in the enclosure to this report.

2. Changes made after publication and comment

The Committee received a large number of public comments on these proposed amendments. The Committee also received testimony from four appellate lawyers at a public hearing.

For documents other than briefs, a number of commentators voiced support for converting page limits to word limits. Two professional associations expressed support for the proposed amendments to Rules 5, 21, 27, 35, and 40 as published, but several commentators disagreed with the choice of word limits in some or all of those rules. Several of those commentators argued that the page-to-word conversion ratio should be 280 words per page or more, rather than the 250 words per page employed in formulating the published proposals. Commentators advocating a conversion ratio greater than 250 words per page noted that the issues addressed by these documents can be complex and important.

The Committee was not convinced to use a conversion ratio of 280 words per page. The principal basis for that ratio is the 1998 conversion of the limit for principal briefs from 50 pages to 14,000 words. The Committee was advised during the comment period that the 1998 conversion ratio was based on a word count in commercially printed briefs filed at the Supreme Court of the United States. The Committee was not persuaded that it should use the number of words in a commercially printed Supreme Court brief as the measure of equivalence for motions, petitions for rehearing, and other documents filed in the courts of appeals.

Other data informed the Committee's deliberations. Before publication, the Committee received the studies described above, which showed average length of 251 and 259 words per page, respectively, in appellate briefs filed before the conversion from page limits to word counts in 1998. One commentator submitted anecdotal reports that briefs filed under the current Appellate Rules (with 14-point font) average 240 words per page. The clerk's representative sampled twenty-eight rehearing petitions filed in late 2014 in the Eighth Circuit and found that selected pages in those filings averaged 255 words per page, with most pages containing between 245 and 260 words. In sum, the available data suggest that a conversion ratio of 280 words per page would not accurately reflect the number of words that naturally fit on a page. The Committee ultimately determined to employ a conversion ratio of 260 words per page.

On the length of briefs, many appellate lawyers opposed a reduction in the length limit, arguing principally that some complex appeals require 14,000 words. On the other hand, judges of two courts of appeals formally favored the proposal. Judges submitted public comments stating that unnecessarily long briefs interfere with the efficient and expeditious administration of justice. Appellate judges on the Committee shared those concerns and reported informal input from judicial colleagues who expressed similar views. In considering the suggestion of commentators to withdraw the proposal, therefore, the Committee was required to ask whether the federal rule should continue to require some courts of appeals to accept lengthy briefs that the courts say they do not need and do not want.

During committee deliberations and in public comments, there were two principal reasons advanced for amending the length limit for appellate briefs: (1) concern that the conversion from pages to words in 1998 effectively increased the length limit above the length of traditional briefs filed in the courts of appeals, and (2) concern that regardless of the history,

briefs filed under the current rules are too long, and that courts of appeals that wish to apply a shorter limit should be permitted to do so. The Committee received comment and gathered additional data on both points.

Judge Frank Easterbrook submitted a comment explaining that he, as a member of the Standing Committee, drafted the 1998 amendments to Rule 32. According to Judge Easterbrook, the 14,000 word limit came from a Seventh Circuit rule, which in turn was based on a word count of printed briefs filed in the Supreme Court. Judge Easterbrook reported that a similar study of briefs filed by law firms without printing showed an average of about 13,000 words for fifty pages. He wrote that the Advisory Committee selected a limit of 14,000 words, "thinking it best to err on the side of generosity if only because that would curtail the number of motions that counsel would file seeking permission to go longer." Judge Easterbrook reported that "[m]embers of the Advisory Committee (and in turn the Standing Committee) thought it more important to adopt a simple rule that would prevent cheating (by using tracking controls, smaller type, moving text to footnotes, and so on) than to clamp down on the maximum size of a brief."

The Committee also studied the official records of the Advisory Committee and the Standing Committee regarding the 1998 amendments. The 1998 Advisory Committee Note to Rule 32 states that the 14,000 word limit "approximate[s] the current 50-page limit." After hearing testimony that a 50-page brief prepared with an office typewriter would have contained approximately 12,500 words, the Committee in 1994 published a proposal to convert the 50-page limit to 12,500 words. Commentators objected on the ground that the 12,500 limit "reduces the length below the traditional 50 page limit." The Committee then published a new proposal setting a limit of 14,000 words. There was discussion in April 1997 "about reducing the word count from 14,000 to 13,000 because 14,000 is not a good equivalent to the old 50-page brief," and that 14,000 words "is closer to the length of a professionally printed brief." But the minutes of the Advisory Committee reflect that "[i]n order to avoid reopening the controversy" over the length of briefs, "several members spoke in favor of retaining the 14,000 word limit," and "[a] majority favored staying with 14,000." When the chair of the Advisory Committee presented the proposal to the Standing Committee, "[h]e pointed out that a 50-page brief would include about 14,000 words." When the Standing Committee forwarded the 1998 amendment to the Judicial Conference, the Standing Committee's report said that the rule "establishes length limitations of 14,000 words . . . (which equates roughly to the traditional fifty pages)."

Among the commentators supporting the proposed reduction in brief length limits were the judges of the D.C. Circuit; all non-recused active judges of the Tenth Circuit and a majority of the senior judges of the Tenth Circuit; two professional associations; and three individual lawyers. The Department of Justice supported the proposed reduction, while urging the Committee to include language in rule text or a committee note concerning the need for extra length in certain cases. The Solicitor General "agree[d] that in most appeals the parties can and should submit briefs substantially shorter than the current word limits permit," but noted that "in some cases parties will justifiably need to file longer briefs."

Commentators supporting a word-limit reduction asserted that the current word limits allow more length than is needed to brief most appeals. In cases where the full length is unneeded, the 14,000-word limit allows lawyers to avoid pruning away extraneous facts and tenuous arguments. A tighter word limit will drive lawyers to focus on the key facts and dispositive law. Overlong, loosely written briefs divert scarce judicial time. These

commentators noted that courts retain authority to grant leave to file overlength briefs in rare cases where 12,500 words are truly inadequate. A circuit that prefers longer limits also may enlarge the limits by local rule.

Among the commentators opposing the reduction in length limits for briefs were one judge; 22 law firms (or practice groups within law firms) or public interest groups; 10 professional associations; 19 non-government lawyers; and two government lawyers. Commentators opposing the reduction in word limits asserted that the current word limit has been unproblematic since its adoption in 1998. They asserted that in simple appeals where even 12,500 words is longer than necessary, the proposed reduction will not address prolixity. These commentators expressed concern that the full 14,000-word length is necessary to brief a complex, important appeal. They noted that inadequately-briefed issues are waived, and stated that it can be difficult to predict which arguments will persuade the court. They warned that motions for extra length will not be an adequate safety valve because a number of circuits strongly discourage such motions. A number of circuits require or instruct that motions for extra length be made a stated time in advance of the brief's due date, and the Fifth Circuit adds the requirement that a draft brief be included with the motion. A summary of all comments is included with this report, and the comments are available for review at Regulations.gov.

One commentator submitted two studies showing that lawyers could fit 300 words (or more) on a page under the pre-1998 Appellate Rules or a similar state-court framework. This information was not surprising, however, given the Standing Committee's conclusion in 1997 that "computer software programs make it possible . . . to create briefs that comply with a limitation stated in a number of pages, but that contain up to 40% more material than a normal brief."

Professor Gregory Sisk submitted a study in which he and his coauthor examined briefs filed in the Ninth Circuit. The Sisk and Heise study reports a correlation between appellant brief length and reversal. But correlation does not show causation, and the authors caution that it would be "absurd to suggest that greater brief length in itself could have a direct causal link to success on appeal."

In collecting more recent data, the Committee's clerk representative found that only two circuits had readily available data on length of briefs. In the Eighth Circuit, approximately 19 percent of briefs in argued cases contained between 12,500 and 14,000 words; another 4 percent contained more than 14,000. In the D.C. Circuit, 23 percent of all briefs contained between 12,500 and 14,000 words, and 4 percent included more than 14,000; data for argued cases only were unavailable in that circuit.

The Committee members carefully discussed the concerns raised during the public comment period, and decided to revise the published length limits to reflect a conversion ratio of 260 words per page, rather than 250 words per page as published. The length limit for a principal brief (14,000 words under the current rule) is adjusted to 13,000 words from 12,500 in the published proposal. This change addresses to some extent the points raised by commentators while still meaningfully recognizing the validity of the concerns expressed by judges and others about the current rule. For those moved by the historical data, the ratio selected also best approximates the average length of fifty-page briefs filed in courts of appeals governed by a page limit in the years immediately preceding the 1998 amendment. The Committee voted to amend

Rule 32(e) to highlight a circuit court's ability to increase any or all of the Appellate Rules' length limits by local rule. The Committee added language to the Committee Notes to Rules 28.1 and 32 to recognize the need for extra length in appropriate cases. The Committee adopted style changes proposed by Professor Kimble. As an aid to users of the Appellate Rules, the Committee endorsed an appendix collecting the length limits stated in the Appellate Rules.

The Committee deleted as unnecessary the alternative line limits from the length limits for documents other than briefs. The Committee retained line limits for briefs, because the length limits for briefs work differently than the proposed length limits for other documents. The 1998 amendments put in place page limits that were significantly more stringent than the new type-volume limits for briefs: For litigants who do not use Rule 32(a)(7)(B)'s type-volume limits, the 1998 amendments reduced the page limits by 40 percent. By including line limits in the type-volume limits for briefs, the 1998 amendments assured that the more generous type-volume limits would be available to litigants who prepared their briefs without the aid of a computer.

A majority of Committee members voiced support for some version of the proposal to reduce the length limit for briefs, while two attorney members spoke in opposition. As noted, the Committee made several changes in an effort to address concerns, and the ultimate vote was unanimous in favor of the proposal as shown in the attachment to this report.

D. Amicus filings in connection with rehearing: Rule 29

The proposed amendments to Rule 29 would re-number the existing Rule as Rule 29(a) and would add a new Rule 29(b) to set default rules for the treatment of amicus filings in connection with petitions for rehearing. The proposed amendment would not require any circuit to accept amicus briefs, but would establish guidelines for the filing of briefs when they are permitted.

Attorneys who file amicus briefs in connection with petitions for rehearing understandably seek clear guidance about the filing deadlines for, and permitted length of, such briefs. There is no federal rule on the topic. *See Fry v. Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723, 725 (7th Cir. 2009) (Easterbrook, C.J., in chambers). Most circuits have no local rule on point, and attorneys have reported frustration with their inability to obtain accurate guidance.

The proposed amendments would establish default rules concerning timing and length of amicus briefs in connection with petitions for rehearing. They also would incorporate (for the rehearing stage) most of the features of current Rule 29. A circuit could alter the default federal rules on timing, length, and other matters by local rule or by order in a case, but the new federal rule would ensure that some rule governs the filings in every circuit.

1. Text of proposed amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 29, as revised after publication and set out in the enclosure to this report.

2. Changes made after publication and comment

A number of commentators expressed general support for the idea of amending Rule 29 to address amicus filings in connection with rehearing petitions. Objections and suggestions focused mainly on the issues of length and timing; a third suggestion concerned amicus filings in connection with merits briefing at times other than the initial briefing of an appeal. In response to the public comments, the Committee decided to change the length limit under Rule 29(b) from 2,000 words to 2,600 words and to change the deadline for amicus filings in support of a rehearing petition (or in support of neither party) from three days after the petition's filing to seven days after the petition's filing. The Committee also deleted the alternative line limit from the length limit as unnecessary.

The published proposal's 2,000-word limit had been derived by taking half of the 15-page limit for the party's petition, rounding up (to eight pages), and multiplying by 250 words per page. The published proposal drew from current Rule 29(d), which provides that amicus filings in connection with the merits briefing of an appeal are limited to half the length of "a party's principal brief."

The ten commentators who specifically addressed this feature of the proposal advocated setting a longer limit. Not all of these commentators stated a preferred alternative, but proposals ranged from 2,240 words to 4,200 words. The arguments in favor of a longer limit related to the nature of the cases, the nature of the issues, the quality of the party's petition, and the required contents of the amicus's brief. Rehearing petitions tend to be filed in difficult cases. Issues may include late-breaking developments in the law. The party's petition may be poorly drafted. The party may neglect the larger implications of a ruling and might not focus on ways that a ruling might usefully be narrowed while preserving the result in the case at hand. Amicus filings must include the statement of the amicus's identity, interest, and authority to file and (usually) the authorship and funding disclosure.

The Committee considered this input and examined the local rules in the four circuits that address the question of length: Two give amici essentially the same length limit as parties, and two give amici more than one-half the length limit for parties but less than the full amount. The Committee then opted to increase the proposed length limit for the federal rule from one-half of the length allowed for a party's petition to two-thirds of that length. Applying the 260-words-per-page conversion ratio noted in Part II.C.2 of this report, the Committee arrived at a revised length limit of 2,600 words.

The published proposal would set a time lag of three days between the filing of the petition and the due date of any amicus filings in support of the petition (or in support of neither party). It would give an amicus curiae opposing the petition the same due date as that set by the court for the response. Two commentators expressed support for the proposed timing rules; eight commentators believed that one or both of the periods would be too short.

Seven of those commentators proposed lengthening the period for amicus filings in support of a rehearing petition and four proposed lengthening the deadline for amicus filings in opposition. Commentators argued that the published proposal's deadlines would generate motions for extensions of time and decrease the quality of amicus filings. They noted that it may not be practicable for an amicus to coordinate with the party whose position it supports. One

commentator observed that government lawyers may need time to seek relevant approvals before filing an amicus brief. One commentator advocated adoption of a two-step process, under which the rule would set a three-day deadline by which the amicus must file a notice of intent to file a brief and a further seven- or ten-day deadline for the actual brief.

The Committee noted that in four circuits that have local provisions addressing the timing of amicus filings in support of rehearing petitions, the time allowed ranges from seven to 14 days after the filing of the party's petition. The Committee also recognized that any circuit could shorten the time period by local rule if it were concerned, for example, about inefficiencies resulting from an amicus brief arriving after a responding party has drafted a response to a petition. The Committee thus decided to adopt a deadline of seven days after the petition's filing for amicus filings in support of the petition (or in support of neither party). The Committee did not alter the deadline for amicus filings in opposition. It is rare for a court to request a response to a rehearing petition, and when the court does so, the order requesting a response can readily alter the due date for amicus filings if such an alteration is desirable.

One commentator suggested adopting a rule to govern amicus filings after the grant of rehearing en banc or after a remand from the Supreme Court. The proposed rule that was published for comment did not address those topics. In deciding not to address them, the Committee took into account three considerations. First, any new provision addressing those contexts would need to be published for comment, and it would not be worthwhile to hold up the already-published proposal for that purpose. Second, amicus filings in those contexts occur only rarely, giving reason to doubt the need for a national rule on the subject. Third, it seems likely that the courts of appeals take flexible approaches to the procedure in those contexts, suggesting that the wiser course might be to leave those topics for treatment in local provisions and orders in particular cases.

E. Amending the "three-day rule": Rule 26(c)

The proposed amendment to Rule 26(c) implements a recommendation by the Standing Committee's CM/ECF Subcommittee that the "three-day rule" in each set of national Rules be amended to exclude electronic service. The three-day rule adds three days to a given period if that period is measured after service and service is accomplished by certain methods. Now that electronic service is well-established, it no longer makes sense to include that method of service among the types of service that trigger application of the three-day rule.

The proposed amendment to Rule 26(c) accomplishes the same result as the proposed amendments to Civil Rule 6, Criminal Rule 45, and Bankruptcy Rule 9006, but does so using different wording in light of Appellate Rule 26(c)'s current structure. Under that structure, the applicability of the three-day rule depends on whether the paper in question is delivered on the date of service stated in the proof of service; if so, then the three-day rule is inapplicable. The change is thus accomplished by amending the rule to state that a paper served electronically is deemed (for this purpose) to have been delivered on the date of service stated in the proof of service.

1. Text of proposed amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 26(c), as revised after publication and set out in the enclosure to this report.

2. Changes made after publication and comment

The Committee voted to approve the amendment as published. But recognizing that the Criminal Rules Committee had voted to add certain language to the Committee Note accompanying the proposed amendment to Rule 45, the Committee gave the chair discretion to accede to the addition of the same language to Rule 26(c)'s Committee Note depending on discussions with the Standing Committee. It now appears that the Bankruptcy and Civil Rules Committees are prepared to accommodate the strongly-held preference of the Criminal Rules Committee. Under those circumstances, the Appellate Rules Committee would not object to including the same language in the Committee Note.

A number of commentators supported the proposal to exclude electronic service from the three-day rule. Others conceded its appeal, but proposed changes to offset its anticipated consequences. Still others opposed the proposal altogether.

Commentators' concerns fall into four basic categories: unfair behavior by opponents, hardship for the party being served, the need for time to draft reply briefs and/or motion papers, and inefficiency that would result from motions for extensions of time. Electronic service, unlike personal service, can occur outside of business hours. For example, it may be made late at night on a Friday before a holiday weekend in a different time zone. Some commentators worried that electronically served papers are more likely to be overlooked. Hardships might fall more heavily on lawyers who operate in small offices or as solo practitioners, and on lawyers who must draft complex response papers. Commentators stated that the three extra days are especially important to provide extra time to draft reply briefs, responses to motions, and replies to such responses. They state that, with the prevalence of electronic filing and service, the extra three days have become a "de facto" part of the time periods for such documents. The Department of Justice notes that government lawyers need time to confer with relevant personnel. Other commentators say that lawyers need time to deal with the competing demands of other cases and to communicate with clients who are incarcerated. Acknowledging that an extension of time could address the problems noted above, commentators argued that such motions do not provide a good solution, because making and adjudicating those motions consume lawyer and court time.

A number of commentators suggested modifications to the proposal or additional amendments that would offset some effects of the proposal. Some of the suggested revisions applied equally to the three-day rules in the Civil, Criminal, and Bankruptcy Rules. Others were specific to the Appellate Rules.

The Department of Justice proposed the addition, to each Committee Note, of language encouraging the grant of extensions when appropriate. After some discussion, the Department circulated a revised proposal that read: "The ease of making electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice." The

Criminal Rules Committee voted to add the proposed language to the Committee Note to Criminal Rule 45, and noted the importance of taking a flexible approach and resolving issues on their merits in criminal cases. The other Advisory Committees now are prepared to acquiesce in that language.

Other commentators made a variety of suggestions. Two commentators proposed that although electronic service should not give rise to an automatic three-day extension, a more limited automatic extension (of one or two days) would be appropriate. One commentator proposed the adoption of a provision that would address the computation of response time when a document "is submitted with a motion for leave to file or is not accepted for filing." Two sets of comments suggested lengthening the deadline for reply briefs.

The Committee did not adopt the proposals for a one-or-two-day extension or for a provision addressing documents that are not immediately accepted for filing. Some committee members, however, were sympathetic to the concerns about the timing for reply briefs. As the commentators pointed out, the "de facto" deadline for reply briefs is now 17 days (14 day under Rule 31(a)(1), plus three days under Rule 26(c)). Before the advent of electronic service, the three-day rule existed to offset transit time in the mail; if the mail took three days, then the de facto response time would be the same as the nominal deadline, namely, 14 days. But in 2002, Rule 25 was amended to permit electronic service, and as electronic service has become more widespread, lawyers have become accustomed to a period of 17 days for filing a reply brief. A number of Committee members expressed concern that a 14-day deadline is very short and that it can be difficult to seek extensions of time.

Committee members concluded that the amendment to Rule 26(c) should proceed together with the amendments to the three-day rules in the other sets of rules. But the Committee added to its study agenda a new item concerning the deadline for reply briefs. The Committee also discussed that before the amendment to the three-day rule takes effect on December 1, 2016, the chair could alert the chief judges of the courts of appeals about the Committee's work relating to the filing deadline for reply briefs. Such notice would permit local courts to consider whether to extend the deadline for reply briefs by local rule, especially if the Committee is considering a national rule amendment on that topic.

F. Updating a cross-reference in Rule 26(a)(4)(C)

In 2013, Rule 13—governing appeals as of right from the Tax Court—was revised and became Rule 13(a). A new Rule 13(b)—providing that Rule 5 governs permissive appeals from the Tax Court—was added. At that time, Rule 26(a)(4)(C)'s reference to "filing by mail under Rule 13(b)" should have been updated to refer to "filing by mail under Rule 13(a)(2)."

The Committee voted to give final approval to an amendment to Rule 26(a)(4)(C) to update this cross-reference. The Committee noted that the change is a technical amendment that can proceed without publication.

* * * * *

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

October 9, 2015

MEMORANDUM

To: The Chief Justice of the United States and
Associate Justices of the Supreme Court

From: James C. Duff

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 1010, 1011, 2002, 3002.1, and 9006, and new Rule 1012 of the Federal Rules of Bankruptcy Procedure, which were approved by the Judicial Conference at its September 2015 session. The Judicial Conference recommends that the amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) "clean" copies of the affected rules incorporating the proposed amendments and accompanying Committee Notes; (ii) a redline version of the same; (iii) an excerpt from the September 2015 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the May 2015 Report of the Advisory Committee on the Federal Rules of Bankruptcy Procedure.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 1010. Service of Involuntary Petition and Summons

(a) SERVICE OF INVOLUNTARY PETITION AND SUMMONS. On the filing of an involuntary petition, the clerk shall forthwith issue a summons for service. When an involuntary petition is filed, service shall be made on the debtor. The summons shall be served with a copy of the petition in the manner provided for service of a summons and complaint by Rule 7004(a) or (b). If service cannot be so made, the court may order that the summons and petition be served by mailing copies to the party's last known address, and by at least one publication in a manner and form directed by the court. The summons and petition may be served on the party anywhere. Rule 7004(e) and Rule 4(*l*) F.R.Civ.P. apply when service is made or attempted under this rule.

* * * * *

Committee Note

Subdivision (a) of this rule is amended to remove provisions regarding the issuance of a summons for service in certain chapter 15 proceedings. The requirements for notice and service in chapter 15 proceedings are found in Rule 2002(q).

Rule 1011. Responsive Pleading or Motion in Involuntary Cases

(a) WHO MAY CONTEST PETITION. The debtor named in an involuntary petition may contest the petition. In the case of a petition against a partnership under Rule 1004, a nonpetitioning general partner, or a person who is alleged to be a general partner but denies the allegation, may contest the petition.

* * * * *

(f) CORPORATE OWNERSHIP STATEMENT. If the entity responding to the involuntary petition is a corporation, the entity shall file with its first appearance, pleading, motion, response, or other request addressed to the court a corporate ownership statement containing the information described in Rule 7007.1.

Committee Note

This rule is amended to remove provisions regarding chapter 15 proceedings. The requirements for responses to a petition for recognition of a foreign proceeding are found in Rule 1012.

Rule 1012. Responsive Pleading in Cross-Border Cases

(a) WHO MAY CONTEST PETITION. The debtor or any party in interest may contest a petition for recognition of a foreign proceeding.

(b) OBJECTIONS AND RESPONSES; WHEN PRESENTED. Objections and other responses to the petition shall be presented no later than seven days before the date set for the hearing on the petition, unless the court prescribes some other time or manner for responses.

(c) CORPORATE OWNERSHIP STATEMENT. If the entity responding to the petition is a corporation, then the entity shall file a corporate ownership statement containing the information described in Rule 7007.1 with its first appearance, pleading, motion, response, or other request addressed to the court.

Committee Note

This rule is added to govern responses to petitions for recognition in cross-border cases. It incorporates provisions formerly found in Rule 1011. Subdivision (a) provides that the debtor or a party in interest may contest the petition. Subdivision (b) provides for presentation of responses no later than 7 days before the hearing on the petition, unless the court directs otherwise. Subdivision (c) governs the filing of corporate ownership statements by entities responding to the petition.

Rule 2002. Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee

* * * * *

(q) NOTICE OF PETITION FOR RECOGNITION OF FOREIGN PROCEEDING AND OF COURT'S INTENTION TO COMMUNICATE WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES.

(1) *Notice of Petition for Recognition*. After the filing of a petition for recognition of a foreign proceeding, the court shall promptly schedule and hold a hearing on the petition. The clerk, or some other person as the court may direct, shall forthwith give the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under §1519 of the Code, all parties to

litigation pending in the United States in which the debtor is a party at the time of the filing of the petition, and such other entities as the court may direct, at least 21 days' notice by mail of the hearing. The notice shall state whether the petition seeks recognition as a foreign main proceeding or foreign nonmain proceeding and shall include the petition and any other document the court may require. If the court consolidates the hearing on the petition with the hearing on a request for provisional relief, the court may set a shorter notice period, with notice to the entities listed in this subdivision.

* * * * *

Committee Note

Subdivision (q) is amended to clarify the procedures for giving notice in cross-border proceedings. The amended rule provides, in keeping with Code § 1517(c), for the court to schedule a hearing to be held promptly on the petition for recognition of a foreign proceeding. The amended rule contemplates that a hearing on a request for

provisional relief may sometimes overlap substantially with the merits of the petition for recognition. In that case, the court may choose to consolidate the hearing on the request for provisional relief with the hearing on the petition for recognition, see Rules 1018 and 7065, and accordingly shorten the usual 21-day notice period.

Rule 3002.1. Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

(a) IN GENERAL. This rule applies in a chapter 13 case to claims (1) that are secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments. Unless the court orders otherwise, the notice requirements of this rule cease to apply when an order terminating or annulling the automatic stay becomes effective with respect to the residence that secures the claim.

* * * * *

Committee Note

Subdivision (a) is amended to clarify the applicability of the rule. Its provisions apply whenever a chapter 13 plan provides that contractual payments on the debtor's home mortgage will be maintained, whether they will be paid by the trustee or directly by the debtor. The reference to § 1322(b)(5) of the Code is deleted to make clear that the rule applies even if there is no prepetition arrearage to be cured. So long as a creditor has a claim that

is secured by a security interest in the debtor's principal residence and the plan provides that contractual payments on the claim will be maintained, the rule applies.

Subdivision (a) is further amended to provide that, unless the court orders otherwise, the notice obligations imposed by this rule cease on the effective date of an order granting relief from the automatic stay with regard to the debtor's principal residence. Debtors and trustees typically do not make payments on mortgages after the stay relief is granted, so there is generally no need for the holder of the claim to continue providing the notices required by this rule. Sometimes, however, there may be reasons for the debtor to continue receiving mortgage information after stay relief. For example, the debtor may intend to seek a mortgage modification or to cure the default. When the court determines that the debtor has a need for the information required by this rule, the court is authorized to order that the notice obligations remain in effect or be reinstated after the relief from the stay is granted.

Rule 9006. Computing and Extending Time; Time for Motion Papers

* * * * *

(f) ADDITIONAL TIME AFTER SERVICE BY MAIL OR UNDER RULE 5(b)(2)(D) OR (F) F.R.CIV.P. When there is a right or requirement to act or undertake some proceedings within a prescribed period after being served and that service is by mail or under Rule 5(b)(2)(D) (leaving with the clerk) or (F) (other means consented to) F.R.Civ.P., three days are added after the prescribed period would otherwise expire under Rule 9006(a).

* * * * *

Committee Note

Subdivision (f) is amended to remove service by electronic means under Civil Rule 5(b)(2)(E) from the modes of service that allow three added days to act after being served.

Rule 9006(f) and Civil Rule 6(d) contain similar provisions providing additional time for actions after being

served by mail or by certain modes of service that are identified by reference to Civil Rule 5(b)(2). Rule 9006(f)—like Civil Rule 6(d)—is amended to remove the reference to service by electronic means under Rule 5(b)(2)(E). The amendment also adds clarifying parentheticals identifying the forms of service under Rule 5(b)(2) for which three days will still be added.

Civil Rule 5(b)—made applicable in bankruptcy proceedings by Rules 7005 and 9014(b)—was amended in 2001 to allow service by electronic means with the consent of the person served. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow three added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the three added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the three added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the three added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day

periods that allow "day-of-the-week" counting. Adding three days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow three added days means that the three added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means" of delivery under subparagraph (F).

Subdivision (f) is also amended to conform to a corresponding amendment of Civil Rule 6(d). The amendment clarifies that only the party that is served by mail or under the specified provisions of Civil Rule 5—and not the party making service—is permitted to add three days to any prescribed period for taking action after service is made.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 1010. Service of Involuntary Petition and Summons~~; Petition for Recognition of a Foreign Nonmain Proceeding~~

(a) SERVICE OF INVOLUNTARY PETITION AND SUMMONS~~; SERVICE OF PETITION FOR RECOGNITION OF FOREIGN NONMAIN PROCEEDING~~. On the filing of an involuntary petition ~~or a petition for recognition of a foreign nonmain proceeding~~, the clerk shall forthwith issue a summons for service. When an involuntary petition is filed, service shall be made on the debtor. ~~When a petition for recognition of a foreign nonmain proceeding is filed, service shall be made on the debtor, any entity against whom provisional relief is sought under § 1519 of the Code, and on any other party as the court may direct.~~ The summons shall be served with a copy of the petition in the manner provided for service of a

* New material is underlined; matter to be omitted is lined through.

summons and complaint by Rule 7004(a) or (b). If service cannot be so made, the court may order that the summons and petition be served by mailing copies to the party's last known address, and by at least one publication in a manner and form directed by the court. The summons and petition may be served on the party anywhere. Rule 7004(e) and Rule 4(*l*) F.R.Civ.P. apply when service is made or attempted under this rule.

* * * * *

Committee Note

Subdivision (a) of this rule is amended to remove provisions regarding the issuance of a summons for service in certain chapter 15 proceedings. The requirements for notice and service in chapter 15 proceedings are found in Rule 2002(q).

Rule 1011. Responsive Pleading or Motion in Involuntary ~~and Cross-Border~~ Cases

(a) WHO MAY CONTEST PETITION. The debtor named in an involuntary petition~~, or a party in interest to a petition for recognition of a foreign proceeding,~~ may contest the petition. In the case of a petition against a partnership under Rule 1004, a nonpetitioning general partner, or a person who is alleged to be a general partner but denies the allegation, may contest the petition.

* * * * *

(f) CORPORATE OWNERSHIP STATEMENT. If the entity responding to the involuntary petition ~~or the petition for recognition of a foreign proceeding~~ is a corporation, the entity shall file with its first appearance, pleading, motion, response, or other request addressed to the court a corporate ownership statement containing the information described in Rule 7007.1.

Committee Note

This rule is amended to remove provisions regarding chapter 15 proceedings. The requirements for responses to a petition for recognition of a foreign proceeding are found in Rule 1012.

Rule 1012. Responsive Pleading in Cross-Border Cases

(a) WHO MAY CONTEST PETITION. The debtor or any party in interest may contest a petition for recognition of a foreign proceeding.

(b) OBJECTIONS AND RESPONSES; WHEN PRESENTED. Objections and other responses to the petition shall be presented no later than seven days before the date set for the hearing on the petition, unless the court prescribes some other time or manner for responses.

(c) CORPORATE OWNERSHIP STATEMENT. If the entity responding to the petition is a corporation, then the entity shall file a corporate ownership statement containing the information described in Rule 7007.1 with its first appearance, pleading, motion, response, or other request addressed to the court.

Committee Note

This rule is added to govern responses to petitions for recognition in cross-border cases. It incorporates provisions formerly found in Rule 1011. Subdivision (a) provides that the debtor or a party in interest may contest the petition. Subdivision (b) provides for presentation of responses no later than 7 days before the hearing on the petition, unless the court directs otherwise. Subdivision (c) governs the filing of corporate ownership statements by entities responding to the petition.

Rule 2002. Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee

* * * * *

(q) NOTICE OF PETITION FOR RECOGNITION OF FOREIGN PROCEEDING AND OF COURT'S INTENTION TO COMMUNICATE WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES.

(1) *Notice of Petition for Recognition*. After the filing of a petition for recognition of a foreign proceeding, the court shall promptly schedule and hold a hearing on the petition. The clerk, or some other person as the court may direct, shall forthwith give the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under §1519 of the Code, all parties to

litigation pending in the United States in which the debtor is a party at the time of the filing of the petition, and such other entities as the court may direct, at least 21 days' notice by mail of the hearing ~~on the petition for recognition of a foreign proceeding~~. The notice shall state whether the petition seeks recognition as a foreign main proceeding or foreign nonmain proceeding and shall include the petition and any other document the court may require. If the court consolidates the hearing on the petition with the hearing on a request for provisional relief, the court may set a shorter notice period, with notice to the entities listed in this subdivision.

* * * * *

Committee Note

Subdivision (q) is amended to clarify the procedures for giving notice in cross-border proceedings. The amended rule provides, in keeping with Code § 1517(c), for the court to schedule a hearing to be held promptly on the

petition for recognition of a foreign proceeding. The amended rule contemplates that a hearing on a request for provisional relief may sometimes overlap substantially with the merits of the petition for recognition. In that case, the court may choose to consolidate the hearing on the request for provisional relief with the hearing on the petition for recognition, see Rules 1018 and 7065, and accordingly shorten the usual 21-day notice period.

Rule 3002.1. Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

(a) IN GENERAL. This rule applies in a chapter 13 case to claims (1) that are ~~(1)~~secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments~~provided for under § 1322(b)(5) of the Code in the debtor's plan~~. Unless the court orders otherwise, the notice requirements of this rule cease to apply when an order terminating or annulling the automatic stay becomes effective with respect to the residence that secures the claim.

* * * * *

Committee Note

Subdivision (a) is amended to clarify the applicability of the rule. Its provisions apply whenever a chapter 13 plan provides that contractual payments on the debtor's home mortgage will be maintained, whether they will be paid by the trustee or directly by the debtor. The reference to § 1322(b)(5) of the Code is deleted to make

clear that the rule applies even if there is no prepetition arrearage to be cured. So long as a creditor has a claim that is secured by a security interest in the debtor's principal residence and the plan provides that contractual payments on the claim will be maintained, the rule applies.

Subdivision (a) is further amended to provide that, unless the court orders otherwise, the notice obligations imposed by this rule cease on the effective date of an order granting relief from the automatic stay with regard to the debtor's principal residence. Debtors and trustees typically do not make payments on mortgages after the stay relief is granted, so there is generally no need for the holder of the claim to continue providing the notices required by this rule. Sometimes, however, there may be reasons for the debtor to continue receiving mortgage information after stay relief. For example, the debtor may intend to seek a mortgage modification or to cure the default. When the court determines that the debtor has a need for the information required by this rule, the court is authorized to order that the notice obligations remain in effect or be reinstated after the relief from the stay is granted.

Rule 9006. Computing and Extending Time; Time for Motion Papers

* * * * *

(f) ADDITIONAL TIME AFTER SERVICE BY MAIL OR UNDER RULE 5(b)(2)(D)~~, (E),~~ OR (F) F.R.CIV.P. When there is a right or requirement to act or undertake some proceedings within a prescribed period after ~~service~~being served and that service is by mail or under Rule 5(b)(2)(D) (leaving with the clerk)~~, (E),~~ or (F) (other means consented to) F.R.Civ.P., three days are added after the prescribed period would otherwise expire under Rule 9006(a).

* * * * *

Committee Note

Subdivision (f) is amended to remove service by electronic means under Civil Rule 5(b)(2)(E) from the modes of service that allow three added days to act after being served.

Rule 9006(f) and Civil Rule 6(d) contain similar provisions providing additional time for actions after being

served by mail or by certain modes of service that are identified by reference to Civil Rule 5(b)(2). Rule 9006(f)—like Civil Rule 6(d)—is amended to remove the reference to service by electronic means under Rule 5(b)(2)(E). The amendment also adds clarifying parentheticals identifying the forms of service under Rule 5(b)(2) for which three days will still be added.

Civil Rule 5(b)—made applicable in bankruptcy proceedings by Rules 7005 and 9014(b)—was amended in 2001 to allow service by electronic means with the consent of the person served. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow three added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the three added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the three added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the three added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day

periods that allow "day-of-the-week" counting. Adding three days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow three added days means that the three added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means" of delivery under subparagraph (F).

Subdivision (f) is also amended to conform to a corresponding amendment of Civil Rule 6(d). The amendment clarifies that only the party that is served by mail or under the specified provisions of Civil Rule 5—and not the party making service—is permitted to add three days to any prescribed period for taking action after service is made.

EXCERPT FROM THE SEPTEMBER 2015
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

* * * * *

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules * * * * * Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed new Rule 1012, proposed amendments to Rules 1010, 1011, 2002, 3002.1, and 9006(f) * * * * * with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and public for comment in August 2013 * * * * *, and were offered for approval as published except as noted below.

Rules 1010, 1011, and 2002, and New Rule 1012

The proposed amendments to Rules 1010, 1011, and 2002, and proposed new Rule 1012 are intended to improve procedures for international bankruptcy cases. Shortly after chapter 15 (Ancillary and Other Cross-Border Cases) was added to the Bankruptcy Code in 2005, the Bankruptcy Rules were amended to insert new provisions governing cross-border cases. Among the new provisions were changes to Rules 1010 and 1011, which previously governed only involuntary bankruptcy cases, and Rule 2002, which governs notice. The proposed new rule and amendments would: (1) remove the chapter 15-related provisions from Rules 1010 and 1011; (2) create a new Rule 1012 (Responsive Pleading in Cross-Border Cases) to govern responses to a chapter 15 petition; and (3) augment Rule 2002 to clarify the procedures for giving notice in cross-border proceedings. One comment received will be treated as a suggestion for later

consideration. The Advisory Committee determined to recommend approval of the amended rules as published.

Rule 3002.1

Rule 3002.1 applies only in chapter 13 cases and requires creditors whose claims are secured by a security interest in the debtor's principal residence to provide the debtor and the trustee notice of any changes in the periodic payment amount or the assessment of any fees or charges during the bankruptcy case. This rule intended to ensure that debtors who attempt to maintain their home mortgage payments while they are in chapter 13 will have the information they need to do so.

The proposed amendments seek to clarify three matters on which courts have disagreed: (1) the rule applies whenever a debtor will make ongoing mortgage payments during the chapter 13 case, whether or not a prepetition default is being cured; (2) the rule applies regardless of whether it is the debtor or the trustee who is making the payments to the mortgagee; and (3) the rule generally ceases to apply when an order granting relief from the stay becomes effective with respect to the debtor's residence.

Four comments were submitted on the proposed amendments. Two of them addressed the difficulty of applying the rule to home equity lines of credit, for which changes in payment amount are frequent and often de minimis. The other comments were supportive of the amendments. The Advisory Committee determined to recommend approval of the amended rule as published.

Rule 9006(f)

The amendment to Rule 9006(f) would eliminate the 3-day extension to time periods when service is made electronically. The amendment was initially proposed by the CM/ECF

Subcommittee and was published simultaneously with similar amendments to Civil Rule 6(d), Appellate Rule 26(c), and Criminal Rule 45(c) as part of the 3-day rule package. Five comments were submitted on the proposed bankruptcy rule amendment, including one by the Department of Justice similar to its comments on the other Advisory Committees' parallel amendments. To maintain uniformity with the Committee Notes of the other rules in the 3-day rule package, the Advisory Committee agreed to the addition of language to the Committee Note to address the concerns raised by the Department of Justice. The Standing Committee concurred with the minor modification.

* * * * *

The Standing Committee concurred with the Advisory Committee's recommendations above.

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 1010, 1011, 2002, 3002.1, 9006(f), and new Rule 1012, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law;

* * * * *

Respectfully submitted,

Jeffrey S. Sutton, Chair

Dean C. Colson	Patrick J. Schiltz
Brent E. Dickson	Amy J. St. Eve
Roy T. Englert, Jr.	Larry D. Thompson
Gregory G. Garre	Richard C. Wesley
Neil M. Gorsuch	Sally Yates
Susan P. Graber	Jack Zouhary
David F. Levi	

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

JEFFREY S. SUTTON
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Sandra Segal Ikuta, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 6, 2015

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on April 20, 2015, in Pasadena, California.

* * * * *

The Committee now seeks the Standing Committee's final approval of one proposed new rule and five rule amendments that were published in August 2014.

* * * * *

II. Action Items

A. Items for Final Approval

* * * * *

Action Item 1. Rules 1010, 1011, and 2002, and proposed new Rule 1012 (governing responses to, and notices of hearings on, chapter 15 petitions for recognition). These amendments and addition to the Bankruptcy Rules are intended to improve procedures for international bankruptcy cases. Shortly after chapter 15 (Ancillary and Other Cross-Border Cases) was added to the Bankruptcy Code in 2005, the Bankruptcy Rules were amended to insert new provisions governing cross-border cases. Among the new provisions were changes to Rules 1010 and 1011, which previously governed only involuntary bankruptcy cases, and Rule 2002, which governs notice. The currently proposed amendments to the Bankruptcy Rules would make three changes: (i) remove the chapter 15-related provisions from Rules 1010 and 1011; (ii) create a new Rule 1012 (Responsive Pleading in Cross-Border Cases) to govern responses to a chapter 15 petition; and (iii) augment Rule 2002 to clarify the procedures for giving notice in cross-border proceedings.

Only one comment was submitted regarding the proposed rule changes. The Pennsylvania Bar Association expressed general approval of the proposed amendments, but suggested that Rule 1012 (Responsive Pleading in Cross-Border Cases) contain a cross-reference to Rule 1004.2 (Petition in Chapter 15 Cases). The latter rule prescribes a procedure for challenging the designation in a chapter 15 petition of the debtor's center of main interests. The Bar Association explained that "Rule 1004.2(b) sets forth those parties that should be served in connection with challenges to a debtor's designation in a petition." It suggested that objections and responses to a petition under proposed Rule 1012(b) should be served in the same manner.

The Committee voted unanimously to approve the proposed rules as published. It concluded that the Bar Association's comment should be treated as a new suggestion that the notice provisions of Rule 1004.2(b) should be made applicable to all objections and responses to a chapter 15 petition rather than just to challenges to the designation of the debtor's center of main interests. The Committee has added this suggestion to its list of matters for future consideration.

Action Item 2. Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence). This rule, which applies only in chapter 13 cases, requires creditors whose claims are secured by a security interest in the debtor's principal residence to provide the debtor and the trustee notice of any changes in the periodic payment amount or the assessment of any fees or charges while the bankruptcy case is pending. The rule was promulgated in 2011 in order to ensure that debtors who attempt to maintain their home mortgage payments while they are in chapter 13 will have the information they need to do so.

The proposed amendments that were published last summer seek to clarify three matters on which courts have disagreed:

1) The rule applies whenever a debtor will make ongoing mortgage payments during the chapter 13 case, whether or not a prepetition default is being cured.
2) The rule applies regardless of whether it is the debtor or the trustee who is making the payments to the mortgagee.
3) The rule generally ceases to apply when an order granting relief from the stay becomes effective with respect to the debtor's residence.

Four comments were submitted on the proposed amendments. Two of them addressed the difficulty of applying the rule to home equity lines of credit, for which payment amount changes are frequent and often de minimis. The other comments were supportive of the amendments.

The Committee voted unanimously to approve the amendments to Rule 3002.1 as published. The issue of the rule's applicability to home equity lines of credit was considered by the Committee at the fall 2014 meeting, and publication of a proposed amendment to address that issue will be sought later as part of a larger package of related amendments.

Action Item 3. Rule 9006(f) (Computing and Extending Time). Among the proposed amendments published last summer was an amendment to Rule 9006(f) that would eliminate the 3-day extension to time periods when service is made electronically. The amendment was initially proposed by the Standing Committee's CM/ECF Subcommittee. It was published simultaneously with similar amendments to Civil Rule 6(d), Appellate Rule 26(c), and Criminal Rule 45(c).

Five comments were submitted on the proposed bankruptcy rule amendment. One expressed support for the amendment, and two raised questions about how this time computation change would apply to pending cases or would interact with other rules. A fourth comment, submitted by a bankruptcy clerk, expressed concern about having different deadlines for parties in response to service of a single document. The final comment was submitted by the Department of Justice and was similar to the comments it submitted on the other advisory committees' parallel amendments. The comment raised concerns about possible prejudice caused by end-of-day or beginning-of-weekend electronic service and suggested an addition to the Committee Note that would note the court's authority to grant extensions of time to prevent unfairness in such situations.

The Committee voted unanimously to approve the amendment as published. While the Committee preferred not to revise the Committee Note in response to the DOJ's comment, it agreed to the addition of the following language if needed to maintain uniformity with the Committee Notes of the other advisory committees: "The ease of making electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice."

* * * * *

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

October 9, 2015

MEMORANDUM

To: The Chief Justice of the United States and
Associate Justices of the Supreme Court

From: James C. Duff

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 4, 6, and 82 of the Federal Rules of Civil Procedure, which were approved by the Judicial Conference at its September 2015 session. The Judicial Conference recommends that the amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) "clean" copies of the affected rules incorporating the proposed amendments and accompanying Committee Notes; (ii) a redline version of the same; (iii) an excerpt from the September 2015 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the May 2015 Report of the Advisory Committee on the Federal Rules of Civil Procedure.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 4. Summons

* * * * *

(m) Time Limit for Service. If a defendant is not served within 90[1] days after the complaint is filed, the court¾on motion or on its own after notice to the plaintiff¾must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

* * * * *

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[1] This time period reflects the amendment adopted by the Court and transmitted to Congress on April 29, 2015. Absent contrary action by Congress, the amendment will become effective December 1, 2015.

Committee Note

Rule 4(m) is amended to correct a possible ambiguity that appears to have generated some confusion in practice. Service in a foreign country often is accomplished by means that require more than the time set by Rule 4(m). This problem is recognized by the two clear exceptions for service on an individual in a foreign country under Rule 4(f) and for service on a foreign state under Rule 4(j)(1). The potential ambiguity arises from the lack of any explicit reference to service on a corporation, partnership, or other unincorporated association. Rule 4(h)(2) provides for service on such defendants at a place outside any judicial district of the United States "in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i)." Invoking service "in the manner prescribed by Rule 4(f)" could easily be read to mean that service under Rule 4(h)(2) is also service "under" Rule 4(f). That interpretation is in keeping with the purpose to recognize the delays that often occur in effecting service in a foreign country. But it also is possible to read the words for what they seem to say—service is under Rule 4(h)(2), albeit in a manner borrowed from almost all, but not quite all, of Rule 4(f).

The amendment resolves this possible ambiguity.

Rule 6. Computing and Extending Time; Time for Motion Papers

* * * * *

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after being served and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

Committee Note

Rule 6(d) is amended to remove service by electronic means under Rule 5(b)(2)(E) from the modes of service that allow 3 added days to act after being served.

Rule 5(b)(2) was amended in 2001 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by

advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3 added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means" of delivery under subparagraph (F).

What is now Rule 6(d) was amended in 2005 "to remove any doubt as to the method for calculating the time to respond after service by mail, leaving with the clerk of court, electronic means, or by other means consented to by the party served." A potential ambiguity was created by substituting "after service" for the earlier references to acting after service "upon the party" if a paper or notice "is served upon the party" by the specified means. "[A]fter service" could be read to refer not only to a party that has been served but also to a party that has made service. That reading would mean that a party who is allowed a specified time to act after making service can extend the time by choosing one of the means of service specified in the rule, something that was never intended by the original rule or the amendment. Rules setting a time to act after making service include Rules 14(a)(1), 15(a)(1)(A), and 38(b)(1). "[A]fter being served" is substituted for "after service" to dispel any possible misreading.

Rule 82. Jurisdiction and Venue Unaffected

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. ' 1390.

Committee Note

Rule 82 is amended to reflect the enactment of 28 U.S.C. ' 1390 and the repeal of ' 1392.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 4. Summons

* * * * *

(m) Time Limit for Service. If a defendant is not served within 90[1] days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

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* New material is underlined; matter to be omitted is lined through.

[1] This time period reflects the amendment adopted by the Court and transmitted to Congress on April 29, 2015. Absent contrary action by Congress, the amendment will become effective December 1, 2015.

13 * * * * *

Committee Note

Rule 4(m) is amended to correct a possible ambiguity that appears to have generated some confusion in practice. Service in a foreign country often is accomplished by means that require more than the time set by Rule 4(m). This problem is recognized by the two clear exceptions for service on an individual in a foreign country under Rule 4(f) and for service on a foreign state under Rule 4(j)(1). The potential ambiguity arises from the lack of any explicit reference to service on a corporation, partnership, or other unincorporated association. Rule 4(h)(2) provides for service on such defendants at a place outside any judicial district of the United States "in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i)." Invoking service "in the manner prescribed by Rule 4(f)" could easily be read to mean that service under Rule 4(h)(2) is also service "under" Rule 4(f). That interpretation is in keeping with the purpose to recognize the delays that often occur in effecting service in a foreign country. But it also is possible to read the words for what they seem to say—service is under Rule 4(h)(2), albeit in a manner borrowed from almost all, but not quite all, of Rule 4(f).

The amendment resolves this possible ambiguity.

Rule 6. Computing and Extending Time; Time for Motion Papers

* * * * *

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after ~~service~~being served and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), ~~(E),~~ or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

Committee Note

Rule 6(d) is amended to remove service by electronic means under Rule 5(b)(2)(E) from the modes of service that allow 3 added days to act after being served.

Rule 5(b)(2) was amended in 2001 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems

might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3 added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not

count as consent to service "by any other means" of delivery under subparagraph (F).

What is now Rule 6(d) was amended in 2005 "to remove any doubt as to the method for calculating the time to respond after service by mail, leaving with the clerk of court, electronic means, or by other means consented to by the party served." A potential ambiguity was created by substituting "after service" for the earlier references to acting after service "upon the party" if a paper or notice "is served upon the party" by the specified means. "[A]fter service" could be read to refer not only to a party that has been served but also to a party that has made service. That reading would mean that a party who is allowed a specified time to act after making service can extend the time by choosing one of the means of service specified in the rule, something that was never intended by the original rule or the amendment. Rules setting a time to act after making service include Rules 14(a)(1), 15(a)(1)(A), and 38(b)(1). "[A]fter being served" is substituted for "after service" to dispel any possible misreading.

Rule 82. Jurisdiction and Venue Unaffected

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. ' 1390 ~~not a civil action for purposes of 28 U.S.C. ' ' 1391-1392~~.

Committee Note

Rule 82 is amended to reflect the enactment of 28 U.S.C. ' 1390 and the repeal of ' 1392.

EXCERPT FROM THE SEPTEMBER 2015
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

* * * * *

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rules 4, 6, and 82, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and public for comment in August 2014, and are proposed for approval as published with the minor exceptions noted below.

Rule 4(m)

The proposed amendment to Rule 4(m), the rule addressing time limits for service, corrects an ambiguity regarding service abroad on a corporation. Comments received on the amendment to Rule 4(m) that was published in 2013 as part of the Duke Conference Package[1] revealed that many practitioners believe the time for service set forth in Rule 4(m) applies to foreign corporations. This ambiguity arises because two exceptions for service on an individual in a foreign country under Rule 4(f) and for service on a foreign state under Rule 4(j)(1) are clearly referenced, while no such explicit reference is made to service on a corporation. Rule 4(h)(2) provides for service on a corporation at a place not within any judicial district of the United States in a "manner prescribed by Rule 4(f)." It is not clear whether this is service

[1]That amendment, which was approved by the Supreme Court and transmitted to Congress on April 29, 2015, shortens the time for service from 120 days to 90 days.

"under" Rule 4(f). The proposed amendment makes clear that the time limit set forth in Rule 4(m) does not include service under Rule 4(h)(2). Four comments were submitted, all of which supported the proposed amendment.

3-Day Rule

Rule 6(d). The proposed amendment to Rule 6(d) parallels the proposed amendments to Appellate Rule 26(c), Bankruptcy Rule 9006(f), and Criminal Rule 45(c), which are part of the 3-day rule package discussed *supra*. The proposed amendment eliminates the three additional days to respond when service is effected by electronic means, and adds parenthetical descriptions of the modes of service that continue to allow the three additional days.

Some commentators expressed concern that the time periods in the Civil Rules are too short and, therefore, any provision that provides some relief should be retained. The Advisory Committee carefully considered this concern as well as others, but approved the text of the rule as published. The Advisory Committee approved adding language to the Committee Note as a result of the concerns expressed by the Department of Justice (*see supra*, pp. 7-8); the Standing Committee concurred with minor modifications.

Another proposed amendment to Rule 6(d) is to substitute "after being served" for "after service." The purpose of the amendment is to correct a potential ambiguity that was created when the "after service" language was included in the rule when it was amended in 2005. "[A]fter service" could be read to refer not only to a party that has been served but also to a party that has made service. The purpose of the proposed amendment is to dispel any misreading. The proposed amendment was published in August 2013, and approved by the Committee in May 2014. It was held in abeyance for one year in order for it to be submitted to the Judicial Conference simultaneously with the proposed amendment to the 3-day rule.

Rule 82

Civil Rule 82 addresses venue for admiralty and maritime claims. The proposed amendment to Rule 82 arises from legislation that added a new § 1390 to the venue statutes in Title 28 and repealed former § 1392 (local actions). The proposed amendment deletes the reference to § 1391 and to repealed § 1392 and adds a reference to new § 1390 in order to carry forward the purpose of integrating Rule 9(h)[2] with the venue statutes through Rule 82.

The Standing Committee concurred with the Advisory Committee's recommendations above.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Civil Rules 4, 6, and 82, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,

Jeffrey S. Sutton, Chair

Dean C. Colson	Patrick J. Schiltz
Brent E. Dickson	Amy J. St. Eve
Roy T. Englert, Jr.	Larry D. Thompson
Gregory G. Garre	Richard C. Wesley
Neil M. Gorsuch	Sally Yates
Susan P. Graber	Jack Zouhary
David F. Levi	

[2]Rule 82 invokes Rule 9(h) to ensure that the Civil Rules do not seem to modify the venue rules for admiralty or maritime actions. Rule 9(h) provides that an action cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for purposes of Rule 82. It further provides that if a claim for relief is within the admiralty or maritime jurisdiction but also is within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

JEFFREY S. SUTTON
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable David G. Campbell, Chair
Advisory Committee on Civil Rules

DATE: May 2, 2015

RE: Report of the Advisory Committee on Civil Rules

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* * * * *

I. RECOMMENDATIONS TO APPROVE FOR ADOPTION

I.A. RULE 4(m) - RULE 4(h)(2)

The Standing Committee approved the August, 2014 publication of a proposed amendment of Rule 4(m). The amendment adds service on an entity in a foreign country to the list in the last sentence that exempts service in a foreign country from the presumptive time limit set by Rule 4(m) for serving the summons and complaint. It is recommended that the proposed amendment be recommended for adoption. The reasons are described in the Committee Note.

Rule 4. Summons

* * * * *

(m) Time Limit for Service. If a defendant is not served within 90[1] days after the complaint is filed, the court¾on motion or on its own after notice to the plaintiff¾must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

* * * * *

COMMITTEE NOTE

Rule 4(m) is amended to correct a possible ambiguity that appears to have generated some confusion in practice. Service in a foreign country often is accomplished by means that require more than the 120 days originally set by Rule 4(m)[, or than the 90 days set by amended Rule 4(m)]. This problem is recognized by the two clear exceptions for service on an individual in a foreign country under Rule 4(f) and for service on a foreign state under Rule 4(j)(1). The potential ambiguity arises from the lack of any explicit reference to service on a corporation, partnership, or other unincorporated association. Rule 4(h)(2) provides for service on such defendants at a place outside any judicial district of the United States "in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i)." Invoking service "in the manner prescribed by Rule 4(f)" could easily be read to mean that service under Rule 4(h)(2) is also service "under" Rule 4(f). That interpretation is in keeping with the purpose to recognize the delays that often occur in effecting service in a foreign country. But it also is possible to read the words for what they seem to say—service is under Rule 4(h)(2), albeit in a manner borrowed from almost all, but not quite all, of Rule 4(f).

The amendment resolves this possible ambiguity.

Gap Report

No changes were made in the published rule text or Committee Note.

I.B. RULE 6(d)

The Standing Committee approved the August, 2014 publication of a proposed amendment of Rule 6(d). Present Rule 6(d) provides 3 added days to respond after service "made under Rule 5(b)(2)(C), (D), (E), or (F)." The amendment deletes (E), service by electronic means consented to by the person served. It also adds parenthetical descriptions of the modes of service that continue to allow the 3 added days: "(C)(mail), (D)(leaving with the clerk), or (F)(other means consented to)." Parallel proposals to delete electronic service from the 3-added days

[1] This anticipates adoption of the proposed amendment transmitted to Congress on April 29, 2015.

provision were published for the other sets of rules that included it. It is recommended that the proposed amendment be recommended for adoption as published. It is further recommended that a new paragraph be added to the Committee Note to reflect concerns raised by the Department of Justice and several other public comments. This brief new paragraph is discussed below.

A variety of concerns were raised by the public comments. One theme is that the time periods allowed by the Civil Rules are too short as they are. Any provision that allows even some relief should be retained. A related theme focuses on strategic opportunities to manipulate the amount of time practically available to respond after electronic service. This concern is illustrated by electronic filings made just before midnight on a Friday or the eve of a holiday. "No one goes home until after midnight." Suggested remedies include either a rule barring electronic filing after 5:00 or 6:00 p.m., or treating any later filing as made the next day (or on the next day that is not a weekend or legal holiday).

The Federal Magistrate Judges Association expressed a different concern — that some hasty readers would conclude that because Rule 5(b)(2)(E) currently requires consent for electronic service, electronic service is an "other means consented to" under Rule 5(b)(2)(F), restoring the 3 added days after all. Magistrate Judges are all too familiar with the ways in which rule text can be misread. But the Committee decided not to revise the recommended rule text. Apart from the hope that few will fall into this patent misreading, it is unlikely that a court would visit any serious consequences for a filing made 3 days late. The occasion for misreading, moreover, will be reduced when the proposed amendment of Rule 5(b)(2)(E) described below is approved for publication, and if it survives the public comment process. Consent would no longer be required for service on a registered user through the court's transmission facilities. That is likely to govern an ever-growing swath of civil litigation.

The Department of Justice, after expressing concerns with failed electronic transmission, late-night filing in general, and strategic use of late-night filing in particular, recommended that language be added to the Committee Note to remind courts of the reasons to allow extensions of time when appropriate to respond to such problems. Adding anything to the Committee Note on this account could be resisted as unnecessary. Judges do not need to be told to make reasonable adjustments for these or any of the other myriad circumstances that may counsel that a time limit be extended. Brevity, moreover, is increasingly emphasized in framing Committee Notes. The Department's extensive experience with these and similar problems throughout the country, however, deserves some deference. The several advisory committees have agreed to add the new paragraph underlined in the Committee Note set out below. Considering the question independently, the Committees took different positions. The Civil, Appellate, and Bankruptcy Rules Committees preferred not to add any new language. But the Criminal Rules Committee strongly favored adding some language, moved in part by concern that many criminal defense lawyers are occupied in court or otherwise away from their small offices and may not actually view e-service for some time after it arrives. Each Committee authorized its chair to agree to a common solution. Given the strength of the Criminal Rules Committee's position, and the value of uniformity, the joint recommendation is to adopt a much-shortened version proposed by the Department of Justice in the Committee Notes to each set of rules.

Rule 6. Computing and Extending Time; Time for Motion Papers

* * * * *

(d) ADDITIONAL TIME AFTER CERTAIN KINDS OF SERVICE. When a party may or must act within a specified time after ~~service~~ being served[2] and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), ~~(E),~~ or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

COMMITTEE NOTE

Rule 6(d) is amended to remove service by electronic means under Rule 5(b)(2)(E) from the modes of service that allow 3 added days to act after being served.

Rule 5(b)(2) was amended in 2001 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

The ease of making electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3 added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means" of delivery under subparagraph (F).

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[2] This wording reflects the proposed amendment approved by the Standing Committee in May 2014, but held in abeyance.

Gap Report

No changes are made in the rule text as published. A new paragraph in the Committee Note is underlined.

I.C. RULE 82

The Standing Committee approved the August, 2014 publication of a proposed amendment of Rule 82. It is recommended that the proposed amendment be recommended for adoption.

Rule 82. Jurisdiction and Venue Unaffected

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. ' 1390 ~~not a civil action for purposes of 28 U.S.C. ' ' 1391-1392~~.

COMMITTEE NOTE

Rule 82 is amended to reflect the enactment of 28 U.S.C. ' 1390 and the repeal of ' 1392.

Gap Report

No changes are made in the rule text or Committee Note as published.

* * * * *

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

October 9, 2015

MEMORANDUM

To: The Chief Justice of the United States and
Associate Justices of the Supreme Court

From: James C. Duff

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 4, 41, and 45 of the Federal Rules of Criminal Procedure, which were approved by the Judicial Conference at its September 2015 session. The Judicial Conference recommends that the amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) "clean" copies of the affected rules incorporating the proposed amendments and accompanying Committee Notes; (ii) a redline version of the same; (iii) an excerpt from the September 2015 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the May 2015 Report of the Advisory Committee on the Federal Rules of Criminal Procedure.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 4. Arrest Warrant or Summons on a Complaint

(a) Issuance. If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it. At the request of an attorney for the government, the judge must issue a summons, instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If an individual defendant fails to appear in response to a summons, a judge may, and upon request of an attorney for the government must, issue a warrant. If an organizational defendant fails to appear in response to a summons, a judge may take any action authorized by United States law.

* * * * *

(c) Execution or Service, and Return.

(1) ***By Whom.*** Only a marshal or other authorized officer may execute a warrant. Any person authorized to serve a summons in a federal civil action may serve a summons.

(2) ***Location.*** A warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest. A summons to an organization under Rule 4(c)(3)(D) may also be served at a place not within a judicial district of the United States.

(3) ***Manner.***

(A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the original or a duplicate

original warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the original or a duplicate original warrant to the defendant as soon as possible.

(B) A summons is served on an individual defendant:

(i) by delivering a copy to the defendant personally; or

(ii) by leaving a copy at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location and by

mailing a copy to the defendant's last known address.

(C) A summons is served on an organization in a judicial district of the United States by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. If the agent is one authorized by statute and the statute so requires, a copy must also be mailed to the organization.

(D) A summons is served on an organization not within a judicial district of the United States:

(i) by delivering a copy, in a manner authorized by the foreign jurisdiction's law, to an officer, to a

managing or general agent, or to an agent appointed or legally authorized to receive service of process; or

(ii) by any other means that gives notice, including one that is:

(a) stipulated by the parties;

(b) undertaken by a foreign authority in response to a letter rogatory, a letter of request, or a request submitted under an applicable international agreement; or

(c) permitted by an applicable international agreement.

* * * * *

Committee Note

Subdivision (a). The amendment addresses a gap in the current rule, which makes no provision for organizational defendants who fail to appear in response to a criminal summons. The amendment explicitly limits the

issuance of a warrant to individual defendants who fail to appear, and provides that the judge may take whatever action is authorized by law when an organizational defendant fails to appear. The rule does not attempt to specify the remedial actions a court may take when an organizational defendant fails to appear.

Subdivision (c)(2). The amendment authorizes service of a criminal summons on an organization outside a judicial district of the United States.

Subdivision (c)(3)(C). The amendment makes two changes to subdivision (c)(3)(C) governing service of a summons on an organization. First, like Civil Rule 4(h), the amended provision does not require a separate mailing to the organization when delivery has been made in the United States to an officer or to a managing or general agent. Service of process on an officer or a managing or general agent is in effect service on the principal. Mailing is required when delivery has been made on an agent authorized by statute, if the statute itself requires mailing to the entity.

Second, also like Civil Rule 4(h), the amendment recognizes that service outside the United States requires separate consideration, and it restricts Rule 4(c)(3)(C) and its modified mailing requirement to service on organizations within the United States. Service upon organizations outside the United States is governed by new subdivision (c)(3)(D).

These two modifications of the mailing requirement remove an unnecessary impediment to the initiation of

criminal proceedings against organizations that commit domestic offenses but have no place of business or mailing address within the United States. Given the realities of today's global economy, electronic communication, and federal criminal practice, the mailing requirement should not shield a defendant organization when the Rule's core objective—notice of pending criminal proceedings—is accomplished.

Subdivision (c)(3)(D). This new subdivision states that a criminal summons may be served on an organizational defendant outside the United States and enumerates a non-exhaustive list of permissible means of service that provide notice to that defendant.

Although it is presumed that the enumerated means will provide notice, whether actual notice has been provided may be challenged in an individual case.

Subdivision (c)(3)(D)(i). Subdivision (i) notes that a foreign jurisdiction's law may authorize delivery of a copy of the criminal summons to an officer, or to a managing or general agent. This is a permissible means for serving an organization outside of the United States, just as it is for organizations within the United States. The subdivision also recognizes that a foreign jurisdiction's law may provide for service of a criminal summons by delivery to an appointed or legally authorized agent in a manner that provides notice to the entity, and states that this is an acceptable means of service.

Subdivision (c)(3)(D)(ii). Subdivision (ii) provides a non-exhaustive list illustrating other permissible means of

giving service on organizations outside the United States, all of which must be carried out in a manner that "gives notice."

Paragraph (a) recognizes that service may be made by a means stipulated by the parties.

Paragraph (b) recognizes that service may be made by the diplomatic methods of letters rogatory and letters of request, and the last clause of the paragraph provides for service under international agreements that obligate the parties to provide broad measures of assistance, including the service of judicial documents. These include crime-specific multilateral agreements (e.g., the United Nations Convention Against Corruption (UNCAC), S. Treaty Doc. No. 109-6 (2003)), regional agreements (e.g., the Inter-American Convention on Mutual Assistance in Criminal Matters (OAS MLAT), S. Treaty Doc. No. 105-25 (1995)), and bilateral agreements.

Paragraph (c) recognizes that other means of service that provide notice and are permitted by an applicable international agreement are also acceptable when serving organizations outside the United States.

As used in this rule, the phrase "applicable international agreement" refers to an agreement that has been ratified by the United States and the foreign jurisdiction and is in force.

Rule 41. Search and Seizure

* * * * *

(b) Venue for a Warrant Application. At the request of a federal law enforcement officer or an attorney for the government:

* * * * *

(6) a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district if:

(A) the district where the media or information is located has been concealed through technological means; or

(B) in an investigation of a violation of 18 U.S.C. § 1030(a)(5), the media are protected computers that have been damaged without authorization and are located in five or more districts.

* * * * *

(f) Executing and Returning the Warrant.

(1) ***Warrant to Search for and Seize a Person or Property.***

* * * * *

(C) *Receipt.* The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property. For a warrant to

use remote access to search electronic storage media and seize or copy electronically stored information, the officer must make reasonable efforts to serve a copy of the warrant and receipt on the person whose property was searched or who possessed the information that was seized or copied. Service may be accomplished by any means, including electronic means, reasonably calculated to reach that person.

* * * * *

Committee Note

Subdivision (b). The revision to the caption is not substantive. Adding the word "venue" makes clear that Rule 41(b) identifies the courts that may consider an application for a warrant, not the constitutional requirements for the issuance of a warrant, which must still be met.

Subdivision (b)(6). The amendment provides that in two specific circumstances a magistrate judge in a district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when that media or information is or may be located outside of the district.

First, subparagraph (b)(6)(A) provides authority to issue a warrant to use remote access within or outside that district when the district in which the media or information is located is not known because of the use of technology such as anonymizing software.

Second, (b)(6)(B) allows a warrant to use remote access within or outside the district in an investigation of a violation of 18 U.S.C. § 1030(a)(5) if the media to be searched are protected computers that have been damaged without authorization, and they are located in many districts. Criminal activity under 18 U.S.C. § 1030(a)(5) (such as the creation and control of "botnets") may target multiple computers in several districts. In investigations of this nature, the amendment would eliminate the burden of attempting to secure multiple warrants in numerous districts, and allow a single judge to oversee the investigation.

As used in this rule, the terms "protected computer" and "damage" have the meaning provided in 18 U.S.C. § 1030(e)(2) & (8).

The amendment does not address constitutional questions, such as the specificity of description that the

Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing or copying electronically stored information, leaving the application of this and other constitutional standards to ongoing case law development.

Subdivision (f)(1)(C). The amendment is intended to ensure that reasonable efforts are made to provide notice of the search, seizure, or copying, as well as a receipt for any information that was seized or copied, to the person whose property was searched or who possessed the information that was seized or copied. Rule 41(f)(3) allows delayed notice only "if the delay is authorized by statute." See 18 U.S.C. § 3103a (authorizing delayed notice in limited circumstances).

Rule 45. Computing and Extending Time

* * * * *

(c) Additional Time After Certain Kinds of Service. Whenever a party must or may act within a specified time after being served and service is made under Federal Rule of Civil Procedure 5(b)(2)(C) (mailing), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under subdivision (a).

Committee Note

Subdivision (c). Rule 45(c) and Rule 6(d) of the Federal Rules of Civil Procedure contain parallel provisions providing additional time for actions after certain modes of service, identifying those modes by reference to Civil Rule 5(b)(2). Rule 45(c)—like Civil Rule 6(d)—is amended to remove service by electronic means under Rule 5(b)(2)(E) from the forms of service that allow 3 added days to act after being served. The amendment also adds clarifying parentheticals identifying the forms of service for which 3 days will still be added.

Civil Rule 5 was amended in 2001 to allow service by electronic means with the consent of the person served, and a parallel amendment to Rule 45(c) was adopted in 2002. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3

added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means of delivery" under subparagraph (F).

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 4. Arrest Warrant or Summons on a Complaint

(a) Issuance. If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it. At the request of an attorney for the government, the judge must issue a summons, instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If an individual defendant fails to appear in response to a summons, a judge may, and upon request of an attorney for the government must, issue a warrant. If an organizational defendant fails to appear in response

* New material is underlined; matter to be omitted is lined through.

to a summons, a judge may take any action authorized by United States law.

* * * * *

(c) Execution or Service, and Return.

(1) ***By Whom.*** Only a marshal or other authorized officer may execute a warrant. Any person authorized to serve a summons in a federal civil action may serve a summons.

(2) ***Location.*** A warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest. A summons to an organization under Rule 4(c)(3)(D) may also be served at a place not within a judicial district of the United States.

(3) ***Manner*****.**

(A) A warrant is executed by arresting the

defendant. Upon arrest, an officer possessing the original or a duplicate original warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the original or a duplicate original warrant to the defendant as soon as possible.

(B) A summons is served on an individual defendant:

(i) by delivering a copy to the defendant personally; or

(ii) by leaving a copy at the defendant's residence or usual place of abode with a person of suitable age and discretion

residing at that location and by mailing a copy to the defendant's last known address.

(C) A summons is served on an organization in a judicial district of the United States by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. ~~A copy~~If the agent is one authorized by statute and the statute so requires, a copy must also be mailed to the organization~~organization's last known address within the district or to its principal place of business elsewhere in the United States~~.

(D) A summons is served on an organization not within a judicial district of the United States:

(i) by delivering a copy, in a manner authorized by the foreign jurisdiction's law, to an officer, to a managing or general agent, or to an agent appointed or legally authorized to receive service of process; or

(ii) by any other means that gives notice, including one that is:

(a) stipulated by the parties;

(b) undertaken by a foreign authority in response to a letter rogatory, a letter of request, or a request submitted under an applicable international agreement; or

(c) permitted by an applicable international agreement.

* * * * *

Committee Note

Subdivision (a). The amendment addresses a gap in the current rule, which makes no provision for organizational defendants who fail to appear in response to a criminal summons. The amendment explicitly limits the issuance of a warrant to individual defendants who fail to appear, and provides that the judge may take whatever action is authorized by law when an organizational defendant fails to appear. The rule does not attempt to specify the remedial actions a court may take when an organizational defendant fails to appear.

Subdivision (c)(2). The amendment authorizes service of a criminal summons on an organization outside a judicial district of the United States.

Subdivision (c)(3)(C). The amendment makes two changes to subdivision (c)(3)(C) governing service of a summons on an organization. First, like Civil Rule 4(h), the amended provision does not require a separate mailing to the organization when delivery has been made in the United States to an officer or to a managing or general agent. Service of process on an officer or a managing or general agent is in effect service on the principal. Mailing is required when delivery has been made on an agent authorized by statute, if the statute itself requires mailing to the entity.

Second, also like Civil Rule 4(h), the amendment recognizes that service outside the United States requires separate consideration, and it restricts Rule 4(c)(3)(C) and its modified mailing requirement to service on organizations within the United States. Service upon organizations outside the United States is governed by new subdivision (c)(3)(D).

These two modifications of the mailing requirement remove an unnecessary impediment to the initiation of criminal proceedings against organizations that commit domestic offenses but have no place of business or mailing address within the United States. Given the realities of today's global economy, electronic communication, and federal criminal practice, the mailing requirement should not shield a defendant organization when the Rule's core objective—notice of pending criminal proceedings—is accomplished.

Subdivision (c)(3)(D). This new subdivision states that a criminal summons may be served on an organizational defendant outside the United States and enumerates a non-exhaustive list of permissible means of service that provide notice to that defendant.

Although it is presumed that the enumerated means will provide notice, whether actual notice has been provided may be challenged in an individual case.

Subdivision (c)(3)(D)(i). Subdivision (i) notes that a foreign jurisdiction's law may authorize delivery of a copy of the criminal summons to an officer, or to a

managing or general agent. This is a permissible means for serving an organization outside of the United States, just as it is for organizations within the United States. The subdivision also recognizes that a foreign jurisdiction's law may provide for service of a criminal summons by delivery to an appointed or legally authorized agent in a manner that provides notice to the entity, and states that this is an acceptable means of service.

Subdivision (c)(3)(D)(ii). Subdivision (ii) provides a non-exhaustive list illustrating other permissible means of giving service on organizations outside the United States, all of which must be carried out in a manner that "gives notice."

Paragraph (a) recognizes that service may be made by a means stipulated by the parties.

Paragraph (b) recognizes that service may be made by the diplomatic methods of letters rogatory and letters of request, and the last clause of the paragraph provides for service under international agreements that obligate the parties to provide broad measures of assistance, including the service of judicial documents. These include crime-specific multilateral agreements (e.g., the United Nations Convention Against Corruption (UNCAC), S. Treaty Doc. No. 109-6 (2003)), regional agreements (e.g., the Inter-American Convention on Mutual Assistance in Criminal Matters (OAS MLAT), S. Treaty Doc. No. 105-25 (1995)), and bilateral agreements.

Paragraph (c) recognizes that other means of service that provide notice and are permitted by an applicable

international agreement are also acceptable when serving organizations outside the United States.

As used in this rule, the phrase "applicable international agreement" refers to an agreement that has been ratified by the United States and the foreign jurisdiction and is in force.

Rule 41. Search and Seizure

* * * * *

(b) ~~Authority to Issue a Warrant~~Venue for a Warrant Application. At the request of a federal law enforcement officer or an attorney for the government:

* * * * *

(6) a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district if:

(A) the district where the media or information is located has been concealed through technological means; or

(B) in an investigation of a violation of 18 U.S.C. § 1030(a)(5), the media are protected computers that have been damaged without authorization and are located in five or more districts.

* * * * *

(f) Executing and Returning the Warrant.

(1) ***Warrant to Search for and Seize a Person or Property.***

* * * * *

(C) *Receipt.* The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property. For a warrant to

use remote access to search electronic storage media and seize or copy electronically stored information, the officer must make reasonable efforts to serve a copy of the warrant and receipt on the person whose property was searched or who possessed the information that was seized or copied. Service may be accomplished by any means, including electronic means, reasonably calculated to reach that person.

* * * * *

Committee Note

Subdivision (b). The revision to the caption is not substantive. Adding the word "venue" makes clear that Rule 41(b) identifies the courts that may consider an application for a warrant, not the constitutional requirements for the issuance of a warrant, which must still be met.

Subdivision (b)(6). The amendment provides that in two specific circumstances a magistrate judge in a district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when that media or information is or may be located outside of the district.

First, subparagraph (b)(6)(A) provides authority to issue a warrant to use remote access within or outside that district when the district in which the media or information is located is not known because of the use of technology such as anonymizing software.

Second, (b)(6)(B) allows a warrant to use remote access within or outside the district in an investigation of a violation of 18 U.S.C. § 1030(a)(5) if the media to be searched are protected computers that have been damaged without authorization, and they are located in many districts. Criminal activity under 18 U.S.C. § 1030(a)(5) (such as the creation and control of "botnets") may target multiple computers in several districts. In investigations of this nature, the amendment would eliminate the burden of attempting to secure multiple warrants in numerous districts, and allow a single judge to oversee the investigation.

As used in this rule, the terms "protected computer" and "damage" have the meaning provided in 18 U.S.C. §1030(e)(2) & (8).

The amendment does not address constitutional questions, such as the specificity of description that the

Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing or copying electronically stored information, leaving the application of this and other constitutional standards to ongoing case law development.

Subdivision (f)(1)(C). The amendment is intended to ensure that reasonable efforts are made to provide notice of the search, seizure, or copying, as well as a receipt for any information that was seized or copied, to the person whose property was searched or who possessed the information that was seized or copied. Rule 41(f)(3) allows delayed notice only "if the delay is authorized by statute." See 18 U.S.C. § 3103a (authorizing delayed notice in limited circumstances).

Rule 45. Computing and Extending Time

* * * * *

(c) Additional Time After Certain Kinds of Service. Whenever a party must or may act within a specified ~~period~~ time after ~~service~~ being served and service is made ~~in the manner provided~~ under Federal Rule of Civil Procedure 5(b)(2)(C) (mailing), (D) (leaving with the clerk), ~~(E),~~ or (F) (other means consented to), 3 days are added after the period would otherwise expire under subdivision (a).

Committee Note

Subdivision (c). Rule 45(c) and Rule 6(d) of the Federal Rules of Civil Procedure contain parallel provisions providing additional time for actions after certain modes of service, identifying those modes by reference to Civil Rule 5(b)(2). Rule 45(c)—like Civil Rule 6(d)—is amended to remove service by electronic means under Rule 5(b)(2)(E) from the forms of service that allow 3 added days to act after being served. The amendment also adds clarifying parentheticals identifying the forms of service for which 3 days will still be added.

Civil Rule 5 was amended in 2001 to allow service by electronic means with the consent of the person served, and a parallel amendment to Rule 45(c) was adopted in 2002. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3

added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means of delivery" under subparagraph (F).

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

EXCERPT FROM THE SEPTEMBER 2015
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

* * * * *

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Rules 4, 41, and 45, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and published for public comment in August 2014, and are recommended for approval as published, with the revisions noted below.

Rule 4

The proposed amendment to Rule 4 addresses service of summons on organizational defendants that have no agent or principal place of business within the United States. The current rule provides for service of an arrest warrant or summons within a judicial district of the United States. The Department of Justice advised that current Rule 4 poses an obstacle to the prosecution of foreign corporations that have committed offenses punishable in the United States. Often, such corporations cannot be served because they have no last known address or principal place of business in the United States. Given the increasing number of criminal prosecutions involving foreign entities, the Advisory Committee agreed that the Criminal Rules should provide a mechanism for foreign service on an organization.

The proposed amendment makes several changes to Rule 4. First, it fills a gap in the current rule (without expanding judicial authority) by specifying that the court may take any action authorized by law if an organizational defendant fails to appear in response to a summons. Second, the amendment changes the mailing requirement for service of a summons on an organization within the United States by eliminating the requirement of a separate mailing to an organizational defendant when delivery has been made to an officer or to a managing or general agent, but requires mailing when delivery has been made to an agent authorized by statute, if the statute itself requires mailing to the organization. Third, the amendment authorizes service on an organizational defendant outside of the United States by prescribing a non-exclusive list of methods for service, including service in a manner authorized by the applicable foreign jurisdiction's law, stipulated by the parties, undertaken by foreign authority in response to a letter rogatory or similar request, or pursuant to an international agreement. In addition to these specifically enumerated means of service, the proposal contains an open-ended provision that allows service "by any other means that gives notice." This provision provides flexibility for cases in which the Department of Justice concludes that service cannot be made (or made without undue difficulty) by the other means enumerated in the rule.

The Advisory Committee considered at length whether to require prior judicial approval before service of a criminal summons could be made in a foreign country by other unspecified means. The Advisory Committee concluded that the Criminal Rules should not adopt such a requirement. In its view, requiring prior judicial approval might raise difficult questions regarding the appropriate institutional roles of the courts and the executive branch, as well as unripe questions of international law.

Six comments were received and one witness testified about the proposed amendment at a public hearing in Washington, D.C. In addition, the Department of Justice provided written responses to the issues raised by the comments. The commentators generally agreed the proposal: addresses a gap in the current rules that poses an obstacle to the prosecution of foreign corporations that have committed crimes in the United States; provides methods of service that are reasonably calculated to provide notice and comply with applicable laws; and gives courts appropriate discretion to fashion remedies. The Advisory Committee carefully considered the comments and suggested revisions received, and unanimously approved the proposed amendment as published.

Rule 41

The proposed amendment to Rule 41 addresses venue for obtaining warrants for certain remote electronic searches. At present, the rule generally limits searches to locations within a district, with a few specified exceptions. The proposal to amend Rule 41 is narrowly tailored to address two increasingly common situations in which the existing territorial or venue requirements may hamper the investigation of serious federal crimes: (1) where the warrant sufficiently describes the computer to be searched but the district within which that computer is located is unknown, and (2) where the investigation requires law enforcement to coordinate searches of numerous computers in numerous districts.

The proposal would address this issue by amending Rule 41(b) to include two additional exceptions to the list of out-of-district searches permitted under that subsection.[1] Language in a

[1]At present, Rule 41(b) authorizes search warrants for property located outside the judge's district in only four situations: (1) for property in the district that might be removed before execution of the warrant; (2) for tracking devices installed in the district, which may be monitored outside the district; (3) for investigations of domestic or international terrorism; and (4) for property located in a U.S. territory or a U.S. diplomatic or consular mission.

new subsection 41(b)(6) would authorize a court to issue a warrant to use remote access to search electronic storage media and seize electronically stored information inside or outside of the district: (1) when a suspect has used technology to conceal the location of the media to be searched; or (2) in an investigation into a violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(5), when the media to be searched include damaged computers located in five or more districts. The proposal also amends Rule 41(f)(1)(C) to specify the process for providing notice of a remote access search.

As expected, the proposed amendment generated significant response; the Advisory Committee received 44 written comments, and 8 witnesses testified at a public hearing in Washington, D.C. In addition, the Department of Justice submitted written responses to the issues raised by the comments and testimony. Many commentators raised concerns regarding the substantive limits on government searches, which are not affected by the proposal. In fact, much of the opposition reflected a misunderstanding of the scope of the proposal. The proposal addresses venue; it does not itself create authority for electronic searches or alter applicable constitutional requirements.

The Advisory Committee approved revisions to the published proposal aimed at clarifying the procedural nature of the proposed amendment. It changed the published caption from "Authority to Issue a Warrant" to "Venue for a Warrant Application" and revised the Committee Note to state that the constitutional requirements for the issuance of a warrant are not altered by the amendment. The Advisory Committee also approved revisions to the notice provision and accompanying Committee Note that directly respond to points raised by commentators.

3-Day Rule

Rule 45(c). The proposed amendment to Rule 45(c) parallels the proposed amendments to Appellate Rule 26(c), Bankruptcy Rule 9006(f), and Civil Rule 6(d). It eliminates the 3-day extension of time periods when service is effected electronically.

As discussed *supra*, pp. 7-8, the Department of Justice expressed concerns about potential hardship from elimination of electronic service from the 3-day rule. The Advisory Committee on Criminal Rules was sympathetic to these concerns, recognizing that the three additional days are particularly important for criminal practitioners who often must speak directly with their clients and, therefore, frequently need additional time. The Advisory Committee approved the addition of language to the published Committee Note to address the concerns raised by the Department of Justice; the Standing Committee concurred with minor modifications.

Recommendation: That the Judicial Conference approve the proposed amendments to Criminal Rules 4, 41, and 45, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,

Jeffrey S. Sutton, Chair

Dean C. Colson
Brent E. Dickson
Roy T. Englert, Jr.
Gregory G. Garre
Neil M. Gorsuch
Susan P. Graber
David F. Levi
Patrick J. Schiltz
Amy J. St. Eve
Larry D. Thompson
Richard C. Wesley
Sally Yates
Jack Zouhary

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

TO: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Reena Raggi, Chair
Advisory Committee on Criminal Rules

DATE: May 6, 2015

RE: Report of the Advisory Committee on Criminal Rules

I. INTRODUCTION

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Advisory Committee") met on March 16-17, 2015, in Orlando, Florida, and took action on a number of proposals.

* * * * *

This report presents three action items for Standing Committee consideration. The Advisory Committee recommends that:

(1) a proposed amendment to Rule 4 (service of summons on organizational defendants), previously published for public comment, be approved as published and transmitted to the Judicial Conference; and

(2) a proposed amendment to Rule 41 (venue for approval of warrant for certain remote electronic searches), previously published for public comment, be approved as amended and transmitted to the Judicial Conference; and

(3) a proposed amendment to Rule 45 (additional time after certain kinds of service), previously published for public comment, be approved as amended and transmitted to the Judicial Conference.

* * * * *

II. ACTION ITEMS

A. ACTION ITEM—Rule 4 (service of summons on organizational defendants)

After review of the public comments, the Advisory Committee voted unanimously to recommend that the Standing Committee approve the proposed amendment as published and transmit it to the Judicial Conference. The amendment is at Tab C.

1. Reasons for the proposal

The proposed amendment originated in an October 2012 letter from Assistant Attorney General Lanny Breuer, who advised the Committee that Rule 4 now poses an obstacle to the prosecution of foreign corporations that have committed offenses that may be punished in the United States. In some cases, such corporations cannot be served because they have no last known address or principal place of business in the United States. General Breuer emphasized the "new reality": a truly global economy reliant on electronic communications, in which organizations without an office or agent in the United States can readily conduct both real and virtual activities here. He argued that this new reality has created a "growing class of organizations, particularly foreign corporations" that have gained "'an undue advantage' over the government relating to the initiation of criminal proceedings."

At present, the Federal Rules of Criminal Procedure provide for service of an arrest warrant or summons only within a judicial district of the United States. Fed. R. Crim. P. 4(c)(2), which governs the location of service, states that an arrest warrant or summons may be served "within the jurisdiction of the United States."[1] In contrast, Fed. R. Civ. P. 4(f) authorizes service on individual defendants in a foreign country, and Fed. R. Civ. P. 4(h)(2) allows service on organizational defendants as provided by Rule 4(f).

2. The proposed amendment

Given the increasing number of criminal prosecutions involving foreign entities, the Advisory Committee agreed that it would be appropriate for the Federal Rules of Criminal Procedure to provide a mechanism for foreign service on an organization. The Advisory Committee recognized that the government may not be able to prosecute foreign entities that fail to respond to service. Nevertheless, it is expected that entities subject to collateral consequences (forfeiture, debarment, etc.) will appear. The proposed amendment makes the following changes in Rule 4:

[1] Fed. R. Crim. P. 4(c)(2) does provide, however, that service may also be made "anywhere else a federal statute authorizes an arrest."

(1) It specifies that the court may take any action authorized by law if an organizational defendant fails to appear in response to a summons. This fills a gap in the current rule, without any expansion of judicial authority.

(2) For service of a summons on an organization within the United States, it:

- eliminates the requirement of a separate mailing to an organizational defendant when delivery has been made to an officer or to a managing or general agent, but

- requires mailing when delivery has been made on an agent authorized by statute, if the statute itself requires mailing to the organization.

(3) It also authorizes service on an organization at a place not within a judicial district of the United States, prescribing a non-exclusive list of methods for service.

In addition to the enumerated means of service, the proposal contains an open-ended provision in (c)(3)(D)(ii) that allows service "by any other means that gives notice." This provision provides flexibility for cases in which the Department of Justice concludes that service cannot be made (or made without undue difficulty) by the enumerated means. One of the principal issues considered by the Advisory Committee was whether to require prior judicial approval of other means of service. Civil Rule 4(f)(3) provides for foreign service on an organization "by other means not prohibited by international agreement, as the court orders."(emphasis added). The Committee concluded the Criminal Rules should not require prior judicial approval before service of a criminal summons could be made in a foreign country by other unspecified means. In its view, a requirement of prior judicial approval might raise difficult questions of international law and the institutional roles of the courts and the executive branch.[2]

The Committee considered the possibility that in rare cases the Department of Justice might seek to make service under (c)(3)(D)(ii) in a foreign nation without its cooperation or consent. Representatives of the Department stated that such service would be made only as a last resort, and only after the Criminal Division's Office of International Affairs and representatives of the Department of State had considered the foreign policy and reciprocity implications of such an action. The Department also stressed the Executive Branch's primacy in foreign relations and its obligation to ensure that the laws are faithfully executed. Finally, the Department noted that the federal courts are not deprived of jurisdiction to try a defendant whose presence before the court was procured by illegal means. This principle was reaffirmed in United States v. Alvarez-

[2] These issues would be raised most starkly by a request for judicial approval of service of criminal process in a foreign country without its consent or cooperation, and in violation of its laws, or even in violation of international agreement. Fed. R. Civ. P. 4(f)(3) may permit such a request. Where there is no internationally agreed means of service prescribed, Fed. R. Civ. P. 4(f)(2) then authorizes service by various means, and Fed. R. Civ. P. 4(f)(3) provides for service by "any other means not prohibited by international agreement, as the court orders." Although Fed. R. Civ. P. 4(f)(2)(C) precludes service "prohibited by the foreign country's law," that restriction is absent from Fed. R. Civ. P. 4(f)(3). The proposed amendment to Criminal Rule 4 authorizes service "permitted by an applicable international agreement," but does not prohibit service that is not so permitted, as long as service "gives notice."

Machain, 504 U.S. 655 (1992) (holding that abduction of defendant in Mexico in violation of extradition treaty did not deprive court of jurisdiction). Similarly, if service were made on an organizational defendant in a foreign nation without its consent, or in violation of international agreement, the court would not be deprived of jurisdiction. Under the Committee's proposal–which does not require prior judicial approval of the means of service–a court would never be asked to give advance approval of service contrary to the law of another state or in violation of international law. Rather, a court would consider any legal challenges to such service only when raised in a proceeding before it.

3. Public Comments and Subcommittee Review

a. Public comments

Six written comments on the proposed amendment were received, and one speaker (from the Federal Bar Council for the Second Circuit) testified about the proposed amendment. The Federal Bar Council, the Federal Magistrate Judges Association (FMJA), Mr. Kyle Druding, and the National Association of Criminal Defense Lawyers (NACDL) all supported the proposed amendment, though the FMJA and NACDL suggested revisions. Robert Feldman, Esq. of Quinn Emanuel Urquart & Sullivan opposed the amendment and urged that it be withdrawn. Additionally, the Department of Justice provided written responses. Each comment is summarized at Tab C.

With the exception of Quinn Emanuel, the commenters generally agreed that the amendment (1) addresses a gap in the current rules that may hinder the prosecution of foreign corporations that commit crimes in the United States but have no physical presence here, (2) provides methods of service that are reasonably calculated to provide notice and comply with applicable laws, and (3) gives courts appropriate discretion to fashion remedies.

b. The Subcommittee's review and recommendations

The Rule 4 Subcommittee, chaired by Judge David Lawson, received both summaries and the full text of the comments, and it held a teleconference to review the comments. The Subcommittee unanimously recommended that the Advisory Committee approve the proposed amendment as published and transmit it to the Standing Committee.

4. Recommended action

After a full discussion, the Advisory Committee concurred in the recommendation that the proposed amendment as published should be approved for transmission to the Standing Committee.

a. Opposition to the proposed amendment

Only one comment opposed the amendment and recommended that it be withdrawn. The law firm of Quinn Emanuel Urquart & Sullivan represents the Pangang Group Company and affiliated entities, a state-owned Chinese corporation. The Department of Justice has been

unable to serve process on Pangang under current Rule 4.[3] The proposal to amend the rule would provide a mechanism for effecting service on foreign corporations that commit serious crimes in the United States without having any physical presence here. The amendment is intended to allow reliable service with adequate notice on these organizations so that U.S. courts can adjudicate the merits of criminal allegations and ensure appropriate accountability.

The Committee carefully considered Quinn Emanuel's arguments, and found them unpersuasive. Quinn Emanuel argued that the proposed amendment would essentially foreclose judicial review of the adequacy of notice to foreign corporations, because "the very act of challenging service might be said to conclusively establish the notice that would make service complete." Corporate defendants who wish to contest service, they argued, would face "a Hobson's choice." The Committee agreed that if a lawyer for a corporation appears in a criminal case it may be difficult to convince the court that the corporation did not receive notice. But this is appropriate. A court should be able to take into account the appearance of counsel when evaluating a corporation's claim that it did not receive notice. Moreover, nothing in the proposed amendment addresses or limits any authority of the court to allow a special appearance to contest service on other grounds, nor does it address the ability of a corporate defendant to contest notice in a collateral proceeding. Quoting *Omni Capital Int'l v. Wolff & Co.*, 484 U.S. 97, 104 (1987), Quinn Emanuel also argued that in suggesting notice was the sole criterion for service, the Rule would "eliminate a historical function of service." The Committee concluded that the *Omni Capital* decision is fully consistent with the proposed amendment. In the sentence following the language quoted by Quinn Emanuel the Court made it clear that service in compliance with the Civil Rules provided the additional element of "amenability to service." The Court explained, "Absent consent, this means there must be authorization for service of summons on the defendant." Here, the purpose of the proposed amendment is to provide the necessary "authorization for service" (as well as notice to the defendant).

The lawyers from Quinn Emanuel raised another argument that the Committee had considered as it was formulating the proposal, namely, that "other governments may reciprocate by adopting a similar regime" to "ensnare U.S. corporations in criminal prosecutions around the globe." In a related objection, Quinn Emanuel noted that a court might interpret the amendment to permit "a manner of service prohibited by international agreement . . . , so long as it appears to

[3] On July 10, 2014, after a two month jury trial, Walter Liew, the owner and president of a California-based engineering consulting company, was sentenced to 15 years in prison for conspiring to steal trade secrets from E.I. du Pont de Nemours & Company ("DuPont") related to the manufacture of titanium dioxide and for the benefit of Pangang. *See, Walter Liew Sentenced to Fifteen Years in Prison for Economic Espionage,* justice.gov (Jul. 11, 2014), www.justice.(_2,ov/usao-ndca/pr/walter-liew-sentenced-fifteen-years-prison-economic-espiona2,e. Liew was aware that DuPont had developed industry-leading titanium dioxide technology over many years of research and development and assembled a team of former DuPont employees to assist him in his efforts to convey DuPont's titanium dioxide technology to entities in the People's Republic of China, including Pangang. At Liew's sentencing; the Honorable Jeffrey S. White, U.S. District Court Judge, stated that the 15-year sentence was intended, in part, to send a message that the theft and sale of trade secrets for the benefit of a foreign government is a serious crime that threatens our national economic security. *Id.* Despite the fact that Pangang was indicted years ago along with Liew, and has actual notice of the indictment, to date, the United States has been unable to effectively serve Pangang pursuant to the current Rule 4. *See, e.g., United States v. Pangang Group Co., Ltd,* 879 F. Supp. 2d 1052 (N.D. Cal. 2012).

have provided notice to the accused," an interpretation it found objectionable. Both of these concerns were anticipated by the Committee well before the proposal was approved for publication. In response to a specific request from a Committee member, the Department of Justice provided written assurance that it had consulted with appropriate authorities in the Executive Branch about the potential international relations ramifications of the proposed amendment. The Committee agreed that in light of this assurance, concerns about any impact on diplomatic relations were not a basis for rejecting the proposed amendment.

b. Suggested revisions

The FMJA, Quinn Emanuel, and NACDL suggested revisions that the Advisory Committee declined to adopt. The FMJA suggested that an addition to the Committee Note stating that the means of service must satisfy constitutional due process. Quinn Emanuel's attorneys also argued if a corporate defendant did not receive notice and failed to appear, the court might impose sanctions, or appoint counsel and conduct trial in absentia. Similarly, NACDL requested that the amendment be revised to include in the rule's text that actions by a judge upon a corporation's failure to appear must be "consistent with Rule 43(a)," or, in the alternative that this requirement be stated in the Note. The Advisory Committee considered and rejected these suggestions. It is always assumed that a rule will be interpreted against the backdrop of existing rules, statutes, and constitutional doctrine. Absent some compelling reason to believe this point will be misunderstood, adding such a command to a rule's text or Note is unnecessary. Indeed, doing so might have the undesirable effect of suggesting that in the absence of such a cross reference, other statutes and rules are not applicable.

The Advisory Committee also rejected proposed revisions that would add procedural hurdles and might invite extended litigation. NACDL suggested that the proposed amendment be modified to allow service by alternative means only if it was not possible to deliver a copy in a manner authorized by the foreign jurisdiction's law, to a officer, manager or other general agent, or an agent appointed to receive process. The Advisory Committee chose neither to add such a condition nor to prioritize the means of service, as that would invite unnecessary litigation over whether the triggering condition had been met. Similarly, the Committee rejected the further suggestion of NACDL that the new provisions be limited to cases in which "the organization does not have a place of business or mailing address within the United States at or through which actual notice to a principal of the organization can likely be given." As noted by the Department of Justice, litigation in a recent case on the question whether a subsidiary of a foreign corporation could be served took eight months. Finally, the Committee rejected Quinn Emanuel's argument that "any other means that gives notice" renders superfluous the other sections of the proposed amendment. Similarly, the Committee considered and rejected a suggestion that the government be required to show other options were not feasible or had been exhausted before resorting to certain options for service as unnecessarily burdensome and time consuming.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 4 be approved as published and transmitted to the Judicial Conference.

B. ACTION ITEM—Rule 41 (venue for approval of warrant for certain remote electronic searches)

After review of the public comments, the Advisory Committee voted with one dissent to recommend that Standing Committee approve the proposed amendment as revised after publication and transmit it to the Judicial Conference.

The proposed amendment (Tab D) provides that in two specific circumstances a magistrate judge in a district where the activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when that media or information is or may be located outside of the district.

The proposal has two parts. The first change is an amendment to Rule 41(b), which generally limits warrant authority to searches within a district,[4] but permits out-of-district searches in specified circumstances.[5] The amendment would add specified remote access searches for electronic information to the list of other extraterritorial searches permitted under Rule 41(b). Language in a new subsection 41(b)(6) would authorize a court to issue a warrant to use remote access to search electronic storage media and seize electronically stored information inside *or outside* of the district in two specific circumstances.

The second part of the proposal is a change to Rule 41(f)(1)(C), regulating notice that a search has been conducted. New language would be added at the end of that provision indicating the process for providing notice of a remote access search.

1. Reasons for the proposed amendment

Rule 41's territorial venue provisions–which generally limit searches to locations within a district–create special difficulties for the Government when it is investigating crimes involving electronic information. The proposal speaks to two increasingly common situations affected by the territorial restriction, each involving remote access searches, in which the government seeks to obtain access to electronic information or an electronic storage device by sending surveillance software over the Internet.

In the first situation, the warrant sufficiently describes the computer to be searched, but the district within which the computer is located is unknown. This situation is occurring with increasing frequency because persons who commit crimes using the Internet are using sophisticated anonymizing technologies. For example, persons sending fraudulent

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[4] Rule 41(b)(1) ("a magistrate judge with authority in the district – or if none is reasonably available, a judge of a state court of record in the district – has authority to issue a warrant to search for and seize a person or property located within the district").

[5] Currently, Rule 41(b) (2) – (5) authorize out-of-district or extra-territorial warrants for: (1) property in the district when the warrant is issued that might be moved outside the district before the warrant is executed; (2) tracking devices, which may be monitored outside the district if installed within the district; (3) investigations of domestic or international terrorism; and (4) property located in a United States territory or a United States diplomatic or consular mission.

communications to victims and child abusers sharing child pornography may use proxy services designed to hide their true IP addresses. Proxy services function as intermediaries for Internet communications: when one communicates through an anonymizing proxy service, the communication passes through the proxy, and the recipient of the communication receives the proxy's IP address, not the originator's true IP address. Accordingly, agents are unable to identify the physical location and judicial district of the originating computer.

A warrant for a remote access search when a computer's location is not known would enable investigators to send an email, remotely install software on the device receiving the email, and determine the true IP address or identifying information for that device. The Department of Justice provided the Committee with several examples of affidavits seeking a warrant to conduct such a search. Although some judges have reportedly approved such searches, one judge recently concluded that the territorial requirement in Rule 41(b) precluded a warrant for a remote search when the location of the computer was not known, and he suggested that the Committee consider updating the territorial limitation to accommodate advancements in technology. *In re Warrant to Search a Target Computer at Premises Unknown*, 958 F. Supp. 2d 753 (S.D. Tex. 2013) (noting that "there may well be a good reason to update the territorial limits of that rule in light of advancing computer search technology").

The second situation involves the use of multiple computers in many districts simultaneously as part of complex criminal schemes. An increasingly common form of online crime involves the surreptitious infection of multiple computers with malicious software that makes them part of a "botnet," which is a collection of compromised computers that operate under the remote command and control of an individual or group. Botnets may range in size from hundreds to millions of compromised computers, including computers in homes, businesses, and government systems. Botnets are used to steal personal and financial data, conduct large-scale denial of service attacks, and distribute malware designed to invade the privacy of users of the host computers.

Effective investigation of these crimes often requires law enforcement to act in many judicial districts simultaneously. Under the current Rule 41, however, except in cases of domestic or international terrorism, investigators may need to coordinate with agents, prosecutors, and magistrate judges in every judicial district in which the computers are known to be located to obtain warrants authorizing the remote access of those computers. Coordinating simultaneous warrant applications in many districts–or perhaps all 94 districts–requires a tremendous commitment of resources by investigators, and it also imposes substantial demands on many magistrate judges. Moreover, because these cases concern a common scheme to infect the victim computers with malware, the warrant applications in each district will be virtually identical.

2. <u>The proposed amendment</u>

The Committee's proposed amendment is narrowly tailored to address these two increasingly common situations in which the territorial or venue requirements now imposed by Rule 41(b) may hamper the investigation of serious federal crimes. The Committee considered, but declined to adopt, broader language relaxing these territorial restrictions. It is important to

note that the proposed amendment changes only the territorial limitation that is presently imposed by Rule 41(b). Using language drawn from Rule 41(b)(3) and (5), the proposed amendment states that a magistrate judge "with authority in any district where activities related to a crime may have occurred" (normally the district most concerned with the investigation) may issue a warrant that meets the criteria in new paragraph (b)(6). The proposed amendment does not address constitutional questions that may be raised by warrants for remote electronic searches, such as the specificity of description that the Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing or copying electronically stored information. The amendment leaves the application of this and other constitutional standards to ongoing case law development.

In a very limited class of investigations the Committee's proposed amendment would also eliminate the burden of attempting to secure multiple warrants in numerous districts. The proposed amendment is limited to investigations of violations of 18 U.S.C. § 1030(a)(5),[6] where the media to be searched are "protected computers" that have been "damaged without authorization." The definition of a protected computer includes any computer "which is used in or affecting interstate or foreign commerce or communication." 18 U.S.C. § 1030(e)(2). The statute defines "damage" as "any impairment to the integrity or availability of data, a program, a system, or information." 18 U.S.C. § 1030(e)(8). In cases involving an investigation of this nature, the amendment allows a single magistrate judge with authority in any district where activities related to a violation of 18 U.S.C. § 1030(a)(5) may have occurred to oversee the investigation and issue a warrant for a remote electronic search if the media to be searched are protected computers located in five or more districts. The proposed amendment would enable investigators to conduct a search and seize electronically stored information by remotely installing software on a large number of affected victim computers pursuant to one warrant issued by a single judge. The current rule, in contrast, requires obtaining multiple warrants to do so, in each of the many districts in which an affected computer may be located.

Finally, the proposed amendment includes a change to Rule 41(f)(1)(C), which requires notice that a search has been conducted. New language would be added at the end of that provision indicating the process for providing notice of a remote access search. The rule now requires that notice of a physical search be provided "to the person from whom, or from whose premises, the property was taken" or left "at the place where the officer took the property." The Committee recognized that when an electronic search is conducted remotely, it is not feasible to provide notice in precisely the same manner as when tangible property has been removed from physical premises. The proposal requires that when the search is by remote access, reasonable efforts be made to provide notice to the person whose information was seized or whose property was searched.

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[6] 18 U.S.C. § 1030(5) provides that criminal penalties shall be imposed on whoever:

(A) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;
(B) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or
(C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage and loss.

3. Public Comments and Subcommittee Review

a. The public comments

During the public comment period the Committee received 44 written comments from individuals and organizations, and eight witnesses testified at the Committee's hearing in November:

> The Federal Bar Council, the Federal Magistrate Judges' Association, the National Association of Assistant United States Attorneys, and former advocate for missing and exploited children Carolyn Atwell-Davis all supported the amendment without change.
>
> The amendment was opposed by the American Civil Liberties Union (ACLU), the National Association of Criminal Defense Attorneys (NACDL), the Pennsylvania Bar Association, the Reporters Committee on the Freedom of the Press, the Clandestine Reporters Working Group, and several foundations and centers that focus on privacy and/or technology. Twenty-eight unaffiliated individuals wrote to oppose the amendment.

The Department of Justice submitted several written responses to issues raised in the public comments.

A summary of the comments is provided at Tab D. The main themes in the comments opposing the amendment are summarized below.

(i) Fourth Amendment concerns

The most common theme in the comments opposing the amendment was a concern that it relaxed or undercut the protections for personal privacy guaranteed by the Fourth Amendment. These comments focused principally on proposed (b)(6)(A), which allows the court in a district in which activities related to a crime may have occurred to grant a warrant for remote access when anonymizing technology has been employed to conceal the location of the target device or information.

Multiple comments argued that remote searches could not meet the Fourth Amendment's particularity requirement, and others emphasized that they would constitute surreptitious entries and invasive or destructive searches requiring a heightened showing of reasonableness. Many of these comments also challenged the constitutional adequacy of the notice provisions. Finally, several comments urged that the serious constitutional issues raised by remote searches would be insulated from judicial review.

A particular concern raised in many comments was that the use of anonymizing technology, such as Virtual Private Networks (VPNs), would subject law abiding citizens to remote electronic searches.

(ii) Title III

Multiple comments urged that warrant applications for remote electronic searches should be subject to requirements like those under the Wiretap Act, 18 U.S.C. § 2518 (Title III), or a surveillance warrant containing equivalent protections.

(iii) Extraterritoriality and international law concerns

Some comments focused on the possibility that the devices to be searched–whose location was by definition unknown–might be located outside the United States. They urged that the courts should not authorize searches outside the United States that would violate international law and the sovereignty of other nations, as well as any applicable mutual legal assistance treaties.

(iv) The role of Congress

An additional theme running through many of these comments was that the proposed amendment raised policy issues that should be resolved by Congress, not through procedural rulemaking. Some comments argued that only Congress could balance the competing policies and adopt appropriate safeguards. Others urged that the proposed amendment exceeded the authority granted by the Rules Enabling Act.

(v) Notice concerns

Finally, multiple comments expressed concern that the notice provisions were insufficiently protective, because they required only that reasonable efforts be made to provide notice. This, commenters argued, might lead to no notice being given to parties who were subject to remote electronic searches, or to long delays in giving notice. Some commenters also argued that all parties whose rights were affected by a search must be given notice, not either the person whose property was searched or whose information was seized or copied.

b. The Subcommittee's review and recommendation

The Rule 41 Subcommittee, chaired by Judge Raymond Kethledge, received both summaries and the full text of all comments, and it held multiple teleconferences to review the comments. The Subcommittee unanimously recommended that, with several minor revisions, the Advisory Committee should approve the proposed amendment and transmit it to the Judicial Conference.

4. Recommended action

After extended discussion, the Advisory Committee concurred in the recommendation that the proposed amendment, with minor revisions proposed by the Subcommittee, should be approved for transmission to the Standing Committee.

a. Opposition to the proposed amendment

In general the Committee concluded that the concerns of those opposing the amendment were about the substantive limits on government searches, which are not affected by the proposed amendment. Opposition comments did not address the procedure for designating the district in which a court will initially decide whether substantive requirements have been satisfied in the two circumstances prompting the amendment. Thus they furnished no basis for withdrawing the proposed amendment. The Committee is confident that judges will address Fourth Amendment requirements on a case-by-case basis both in issuing warrants under these amendments and in reviewing them when challenges are made thereafter.

Much of the opposition to the amendment reflected a misunderstanding of current law, the scope of the amendment, and the serious problems that it addresses. First, many commenters who opposed the rule did not recognize that the government must demonstrate probable cause to obtain a warrant. As noted below, the Committee recommends a revision to the caption of the relevant section referring to "venue" in order to draw attention to the limited scope of the amendment. Second, many commenters incorrectly assumed that the amendment created the authority for remote electronic searches. To the contrary, remote electronic searches are currently taking place when the government can identify the district in which an application should be made and satisfy the probable cause requirements for a warrant. Third, the opposing comments do not take account of the real need for amendment to allow the government to respond effectively to the threats posed by technology. Technology now provides the means for identity theft, corporate espionage, terrorism, child pornography, and other serious offenses to jeopardize the economy, national security, and individual privacy. The government can itself use technology to identify the perpetrators of such crimes but needs a rule clarifying the venue where it should make the Fourth Amendment showing necessary for a warrant. At the hearings, those who opposed the amendment were candid in admitting that they could offer no alternative to the proposed amendment (other than the hope that Congress might study the general issues and respond).

The Committee concluded that it was important to provide venue, thus allowing the case law on potential constitutional issues to develop in an orderly process as courts review warrant applications. This is far preferable than after-the-fact rulings on the legality of warrantless searches for which the government claims exigent circumstances. If the New York Stock Exchange were to be hacked tomorrow using anonymizing software, under current Rule 41 there is no district in which the government could seek a warrant. It would be preferable, the Committee concluded, to allow the government to seek a warrant from the court where the investigation is taking place, rather than conducting a warrantless search. Judicial review of warrant applications better ensures Fourth Amendment rights and enhances privacy. Any concern that judges may be uninformed about the technology to be used in the searches could be addressed by judicial education. The Federal Judicial Center has recently prepared some information materials about topics such as cloud computing, and additional materials could be developed to help judges review applications for remote electronic searches.

In botnet investigations, the amendment provides venue in one district for the warrant applications, eliminating the burden of attempting to secure multiple warrants in numerous

districts and allowing a single judge to oversee the investigation. In prior botnet investigations, the burden of seeking warrants in multiple districts played a role in the government's strategy, providing a strong incentive to rely on civil processes. Again, the amendment addresses only a procedural issue, not the underlying substantive law regulating these searches. Allowing venue in a single district in no way alters the constitutional requirements that must be met before search warrants can be issued.

The Committee declined to make any major changes in the provisions governing notice. However, as noted below, it adopted several small changes recommended by the Subcommittee and also revised the Committee Note to address concerns made in the public comments.

Finally, the Committee concluded that arguments urging that the matter be left to Congress are not persuasive. Venue is not substance. Venue is process, and Rules Enabling Act tells the judiciary to promulgate rules of practice and procedure, not to wait for Congress to act. Instead, Congress responds to proposed rules. The Department came to the Committee with two procedural problems, created by the language of the existing Rule, not by the Constitution or other statute, that are impairing its ability to investigate ongoing, serious computer crimes. The Advisory Committee's role under the Rules Enabling Act is to propose amendments that address these problems and provide a forum for the government to determine the lawfulness of these searches.

One member dissented from the Committee's conclusions on these points and voted against forwarding the amendment to the Standing Committee. The dissenting member thought that the amendment is substantive, not procedural, because it has such important substantive effects, allowing judges to make ex parte determinations about core privacy concerns. The amendment, this member argued, would not permit adversarial testing of the underlying substantive law because defense counsel would not participate until too late in the process, in back-end litigation. For many people, computers are their lives, and the member concluded that these privacy concerns should be considered in the first instance by Congress. The remainder of the Committee was not persuaded; computers are no more sacrosanct than homes, and search warrants for homes have long been issued ex parte and reviewed in back-end litigation.

b. Proposed revisions

The Committee unanimously accepted the Subcommittee's recommendations for several revisions in the rule as published, none of which require republication.

(i) The caption

The Committee accepted the Subcommittee's recommendation for a change in the caption of the affected subdivision of Rule 41, substituting "Venue for a Warrant Application" for the current caption "Authority to Issue a Warrant." This change responds to the many comments that assumed the amendment would allow a remote search in any case falling within the proposed amendment (for example, any case in which an individual had used anonymizing technology such as a VPN). The current caption seems to state an unqualified "authority" to issue warrants meeting the criteria of any of the subsections. Many commenters mistakenly

interpreted the rule in this fashion, and strongly opposed it on this ground. The Committee considered and declined to adopt alternative language suggested by our style consultant, Professor Kimble, because it would less clearly indicate the limited purpose and effect of the amendment.

The Committee also adopted the Subcommittee's proposed addition to the Committee Note explaining the change in the caption. The new Note explicitly addresses the common misunderstanding in the public comments, stating what the amendment does (and does not) do: "the word 'venue' makes clear that Rule 41(b) identifies the courts that may consider an application for a warrant, not the constitutional requirements for the issuance of a warrant, which must still be met."

(ii) Notice

The Committee adopted the Subcommittee's two proposed revisions to the notice provisions for remote electronic searches and the accompanying Committee Note. The purpose of both revisions to the text is to parallel, as closely as possible, the requirements for physical searches. The addition to the Committee Note explains the changes to the text, and also responds to a common misunderstanding that underpinned multiple comments criticizing the proposed notice provisions.

The Committee added a requirement that the government provide a "receipt" for any property taken or copied (as well as a copy of the warrant authorizing the search). This parallels the current requirement that a receipt be provided for any property taken in a physical search. The Committee agreed that the omission of this requirement in the published rule was an oversight that should be remedied.

The Committee also rephrased the obligation to provide notice to "the person whose property was searched or <u>who possessed the information that was seized or copied</u>." Again, the purpose was to parallel the requirement for physical searches.

On the other hand, the Committee rejected the suggestion in some public comments that the government should be required to provide notice to both "the person whose property was searched" <u>and</u> whoever "possessed the information that was seized or copied, since that is not required in the case of physical searches. For example, if the Chicago Board of Trade is served with a warrant and files containing information regarding many customers are seized, the government may give notice of the search only to the Board of Trade, and not to each of the customers whose information may be included in one or more files. The same should be true in the case of remote electronic searches.

Finally, the Committee endorsed the Subcommittee's proposed addition to the Committee Note explaining the changes made in the notice provisions after publication, and also responding to the many comments that criticized the proposed notice provisions as insufficiently protective. The addition to the Note draws attention to the other provisions of Rule 41 that preclude delayed notice except when authorized by statute and provides a citation to the relevant statute. Professor Coquillette commented that because of the widespread confusion on this point in the public

comments, the proposed addition was an appropriate exception to the general rule that committee notes should not be used to help practitioner.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 41 be approved as amended and transmitted to the Judicial Conference.

C. ACTION ITEM—Rule 45 (additional time after certain kinds of service)

After review of the public comments, the Advisory Committee voted unanimously to recommend that the Standing Committee approve the proposed amendment to Rule 45(c), with three revisions from the published version and transmit it to the Judicial Conference. The proposed amendment is at Tab E.

1. Reasons for the proposal

The proposed amendment to Rule 45(c) is a product of the Standing Committee's CM/ECF Subcommittee; parallel amendments to the civil, criminal, bankruptcy and appellate rules were published for comment. The proposed amendment would abrogate the rule providing for an additional three days whenever service is made by electronic means. It reflects the CM/ECF Subcommittee's conclusion that the reasons for allowing extra time to respond in this situation no longer exist. Concerns about delayed transmission, inaccessible attachments, and consent to service have been alleviated by advances in technology and extensive experience with electronic transmission. In addition, eliminating the extra three days would also simplify time computation. The proposed amendment, as well as the parallel amendments to the other Rules, includes new parenthetical descriptions of the forms of service for which three days will still be added.

2. Public Comments

The public comments are summarized at Tab E.

The Pennsylvania Bar Association and the National Association of Criminal Defense Lawyers (NACDL) opposed the amendment. Each noted that the three added days are particularly valuable when a filing is electronically served at inconvenient times. NACDL emphasized that many criminal defense counsel are solo practitioners or in very small firms, where they have little clerical help, and often do not see their ECF notices the day they are received. The Department of Justice expressed a similar concern about situations in which service after business hours, from a location in a different time zone, or during a weekend or holiday may significantly reduce the time available to prepare a response. The Department did not oppose the amendment, however, and instead suggested language be added to the Committee Note to address this issue.

NACDL also questioned the addition of the phrase "Time for Motion Papers" to the caption to Rule 45(c), suggesting that it may lead to confusion.

Ms. Cheryl Siler suggested that as part of the revision the existing language of Rule 45(c) should be amended to parallel Fed. R. Civ. P. 6(d), FRAP 26(c) and Fed. R. Bank. P. 9006(f). In contrast to Rule 45(c), which requires action "within a specified time *after service*," the parallel Civil and Bankruptcy Rules require action "within a specified [or prescribed] time *after being served*." Siler expressed concern that practitioners may interpret the current rule to mean the party serving a document (as well as the party being served) is entitled to 3 extra days.

The Federal Magistrate Judges Association (FMJA) expressed concern that readers of the amended rule might think that three days are still added after electronic service because of the cross reference to Civil Rule 5(b)(2)(F) "(other means consented to)." It suggested either eliminating all of the parentheticals in the proposed rule or revising the rule to refer to "(F) (other means consented to except electronic service)."

The Advisory Committee's CM/ECF Subcommittee, chaired by Judge David Lawson, held a telephone conference to consider the comments. After discussing the FMJA's concerns it decided not to recommend a change in the published rule. The likelihood of confusion did not seem significant, and any confusion that might arise would be short lived because of the efforts underway to eliminate the requirement for consent to electronic service. The parentheticals will be helpful to practitioners, and any revision to the parenthetical reference would require further amendment in the near future. Language in the proposed Committee Note directly addresses this issue. The Subcommittee recommended to the Criminal Advisory Committee that no change be made in the published rule on this issue, and the Advisory Committee agreed with that recommendation at its March meeting.

The Advisory Committee did approve three other revisions to the proposal, each recommended by its Subcommittee.

3. Suggested Revisions

a. Addition to Committee Note.

The first change is a proposed addition to the Committee Note that addresses the potential need to grant an extension to the time allowed for responding after electronic service. At the Advisory Committee's March meeting, two members initially opposed forwarding the published amendment to the Standing Committee, finding that the concerns voiced by the Pennsylvania Bar Association, NACDL, and the Department of Justice counseled against an amendment that would eliminate the three added days after electronic service. These members noted that the three added days are important for criminal practitioners because it is often necessary to speak directly with clients before filing responses, but speaking with incarcerated clients takes more time, particularly when clients are incarcerated in distant locations. However, the Committee eventually achieved unanimity on a compromise approach: adding language to the Committee Note. The Committee approved an addition to the Note drafted by the Department of Justice and recommended by the Advisory Committee's CM/ECF Subcommittee. The Committee decided that adding language to the Committee Note that mentioned the potential need for extensions was important not only for the reasons voiced by defense attorneys and the Department of Justice, but also because district court discretion to adjust deadlines in criminal cases is essential in order to

address matters on the merits when appropriate. Such flexibility is particularly important when a person's liberty is at stake. Granting extensions in some circumstances may also be more efficient because of collateral challenges that frequently follow missed deadlines. This principal was among those that guided the Committee's recent work on Rule 12. The amendments to Rule 12 emphasized the district court's discretion to extend or modify motion deadlines so that issues can be most efficiently resolved on their merits before trial, avoiding litigation under Section 2255.

To facilitate uniformity in the Committee Note that would accompany the parallel rules making their way through the various Advisory Committees, the Criminal Advisory Committee approved the revised Note language with the understanding that modifications may be required. Indeed, subsequent to the March meeting, a much shorter version of the addition was approved by the Criminal Advisory Committee's Subcommittee on CM-ECF, and then by the Chairs of each Advisory Committee. That new language has been added to the published Committee Note in each Committees' parallel proposal. It reads: "Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice."

b. Change to the Caption

The Advisory Committee also agreed to amend the caption of the Rule published for comment to eliminate the additional words "Time for Motion Papers." These words do not appear in the caption of the existing Rule 45, and were included in the proposed amendment in order to parallel the current caption of Civil Rule 6, on which Rule 45 was patterned, as well as the caption to Bankruptcy Rule 9006. However, the added words do not describe the text of Rule 45. Instead, Rule 12 deals extensively with the time for motions.

c. Substituting "being served" for "service"

Finally, the Advisory Committee agreed to amend the proposed text of the amendment to Rule 45 as published so that it is parallel to the language of the other rules, referring to action "within a specified time after *being served*" instead of "time after *service*." The Committee is unaware of any substantive reason for the slightly different wording of Rule 45 as compared to the Civil and Bankruptcy Rules. The Committee believes it is prudent to revise the language of Rule 45(c) to eliminate the discrepancy while other changes are being made in Rule 45(c).

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 45 be approved as amended and transmitted to the Judicial Conference.

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