

Preliminary Draft of
Proposed Amendments to the Federal
Rules of Practice and Procedure

SUBMITTED FOR PUBLIC COMMENT

Comments Due by February 16, 2010

Administrative Office of the U.S. Courts
James C. Duff, Director

A SUMMARY FOR BENCH AND BAR
(AUGUST 2009)

REQUEST FOR COMMENT ON PROPOSED
AMENDMENTS TO THE FEDERAL RULES
OF PRACTICE AND PROCEDURE

The Judicial Conference's Advisory Committees on Bankruptcy Rules, Criminal Rules, and Evidence Rules have proposed amendments to various rules and forms and are seeking public comment on the proposed changes. The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) **has not approved** these proposals, but presently submits them for public comment. The proposals have not been presented to the Judicial Conference or the Supreme Court.

The full text of the proposed rules and forms amendments and explanatory Committee Notes are set out in the *Request for Comment* pamphlets, which are posted at www.uscourts.gov/rules and are available on request from the Secretary to the Standing Committee. The synopses on the following pages highlight the major aspects of the proposed Bankruptcy, Criminal, and Evidence Rules amendments.

All comments from the public on these proposals will be considered carefully by the respective rules committees, which consist of experienced trial and appellate lawyers, scholars, and judges. The rules committees welcome all comments, whether favorable, adverse, or otherwise.

Written or electronic comments must be received by the Secretary to the Standing Committee **no later than February 16, 2010**. Comments may be sent electronically to rules_comments@ao.uscourts.gov.

The public is also provided an opportunity to appear at scheduled public hearings to testify regarding these proposals. Requests to appear at a public hearing must be received by the Secretary to the Standing Committee no later than 30 days before the scheduled date for the public hearing. The Secretary's mailing address, as well as the dates and locations of the scheduled public hearings, is set out at the end of this brochure.

Under the proposed schedule, the rules amendments would become effective on December 1, 2011, if they are in turn approved, with or without revision, by the relevant advisory committee, the Standing Committee, the Judicial Conference, and the Supreme Court, and if they are not altered by Congress. The revisions to the Official Bankruptcy Forms would become effective on December 1, 2010, if they are approved by the Rules Committees and the Judicial Conference.

**I. PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF BANKRUPTCY PROCEDURE**

Proposed new **Rule 1004.2** (Petition in Chapter 15 Cases) requires chapter 15 petitions for recognition of a foreign proceeding to state the country in which the debtor has its center of main interests. Petitions must also identify each country in which proceedings involving the debtor are pending. Parties may

file a motion challenging the center of main interests designation stated in the petition. Unless otherwise ordered by the court, such motions must be made seven days before the hearing on the petition. The purpose of this new rule is to assist parties and the court in determining whether the proceeding is main or nonmain.

Under the amendment to **Rule 2003** (Meeting of Creditors or Equity Security Holders), the presiding official at a creditors' or equity security holders' meeting is required to file a statement after the meeting adjourns indicating when the next meeting will be held.

Rule 2019 (Disclosure Regarding Creditors and Equity Security Holders in Chapter 9 and Chapter 11 Cases) is substantially amended and restructured. A broad definition of "disclosable economic interest" is added. The definition encompasses any economic interest that could affect the legal and strategic positions of a stakeholder in a chapter 9 or 11 case. Committees or groups consisting of more than one creditor or equity security holder are added to the mandatory disclosure group. The court may also require disclosures from individual parties who seek or oppose relief. Finally, sanctions may be imposed for failure to comply with the rule's provisions or any applicable law.

Under the proposed amendment, **Rule 3001** (Proof of Claim) is expanded to require that additional supporting information be filed with proofs of claim in individual debtor cases. The amendment authorizes a court to impose sanctions against a creditor that fails to provide the required information.

Proposed new **Rule 3002.1** (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence) implements § 1322(b)(5) of the Code, which allows a chapter 13 debtor to cure defaults and maintain home mortgage payments over the course of the debtor's plan. The new rule requires notice of any changes to post-petition mortgage payments for the debtor's principal residence and of the assessment of any post-petition fees, expenses, or charges. Under the proposed rule, a court may impose sanctions for failure to provide the required notice. The new rule also provides a procedure for determining at the end of the case whether the prepetition default has been fully cured and whether the debtor is current on all payments in accordance with § 1322(b)(5) of the Code.

Under the amendment to **Rule 4004** (Grant or Denial of Discharge), a party is authorized to seek an extension of time, in limited circumstances, to object to the debtor's discharge after the time in subdivision (a) of the rule has expired. New subdivision (b)(2) of this rule allows a party to file a motion to extend the time to object based on certain recently discovered facts, so long as the party did not have knowledge of the facts before the expiration of the objection deadline and the motion is filed promptly on their discovery.

Several amendments to Official Forms 22A (Chapter 7 Statement of Current Monthly Income and Means-Test Calculation), 22B (Chapter 11 Statement of Current Monthly Income), and 22C (Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income) are proposed. First, **Forms 22A** (line 8), **22B** (line 7),

and 22C (line 7) are amended to include an instruction that only one joint filer should report regular payments by another person for household expenses. This amendment seeks to prevent both spouses from reporting the amount, resulting in erroneous double-counting. Form 22A (lines 19A, 19B, 20A, and 20B) and 22C (lines 24A, 24B, 25A, and 25B) are amended to delete references to “household” and “household size” and replace those references with “number of persons” or “family size.” These changes more accurately reflect the relevant IRS nomenclature. Finally, as amended, Part I of the introductory instruction to Form 22A, directs debtors in joint cases to file separate forms if only one of the debtors is entitled to a Part I exemption and the debtors believe that they are required to file separate forms under § 707(b)(2)(C) of the Code.

II. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Following a comprehensive review of the Federal Rules of Criminal Procedure, the Advisory Committee on Criminal Rules recommended to the Standing Committee a package of amendments designed to integrate technological advances into the Rules. That package – along with proposed amendments to Rule 6(e), which were previously authorized by the Standing Committee but held for publication with this larger set of technology-related amendments – is now presented for comment.

Proposed new Rule 4.1 (Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means) brings together in a single rule the procedures for using phones or reliable electronic means to apply for, approve, or issue warrants, summonses, and complaints. The procedures governing requests for search warrants “by telephonic or other reliable electronic means” under Rule 41(d)(3) and (e)(3) have been relocated to this rule, reordered for easier application, and extended to arrest warrants, complaints, and summonses. New Rule 4.1 requires that the judge have a live, contemporaneous conversation with the person submitting the material who must be placed under oath. New Rule 4.1 authorizes the judge to summarize the testimony if it is limited to attesting to the contents of an affidavit submitted electronically rather than transcribing, as formerly required, a verbatim record of the entire conversation.

Rule 1 (Scope; Definitions) is amended to expand the definition of “telephone” to include technologies that enable live, contemporaneous voice conversations, such as calls placed by cell phone or from a computer over the internet. Amended Rules 3 (The Complaint), 4 (Arrest Warrant or Summons on a Complaint), and 9 (Arrest Warrant or Summons on an Indictment or Information) authorize judges to consider complaints and issue arrest warrants and summonses based on information submitted by reliable electronic means, as outlined in new Rule 4.1. The proposed amendment to Rule 4 specifically focuses on improving the efficiency of the search, arrest, and tracking-device warrant process through technology that allows law enforcement officers to retain, use, and return a duplicate original warrant.

Rules 6(e), 32.1, 40, and 43 are amended to incorporate video teleconferencing technology. Amended **Rule 6** (The Grand Jury) subdivision (e) provides that a grand jury return may be taken by video teleconference. As amended, **Rule 32.1** (Revoking or Modifying Probation or Supervised Release) allows defendants, on request, to participate in proceedings revoking or modifying probation or supervised release by video teleconference. Under the proposed amendment to **Rule 40** (Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District), a defendant who consents to do so may appear by video teleconference at a proceeding following an arrest for failure to appear in another district or for violating conditions of release set in another district. The proposed amendment to **Rule 43** (Defendant's Presence) authorizes arraignment, trial, and sentencing in misdemeanor cases by video teleconference on the defendant's written consent.

Rule 41 (Search and Seizure) is amended to delete provisions now included in new Rule 4.1. **Rule 49** (Serving and Filing Papers), as amended, authorizes a court by local rule to permit the filing, signing, or verification of papers by electronic means. The means chosen must be consistent with Judicial Conference standards and must allow for reasonable exceptions.

III. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

The restyling of the Federal Rules of Evidence follows the same drafting guidelines that were used in the restylings of the Rules of Appellate Procedure in 1998, Rules of Criminal Procedure in 2002, and Rules of Civil Procedure in 2007. The twin aims of the restyling effort are: (1) to make the rules easier to read and understand; and (2) to make style and terminology consistent throughout the rules.

The proposed changes are intended to be stylistic only. The amendments are not intended to change the result in any ruling on the admissibility of evidence. In fact, the Committee made special efforts to reject any proposed style amendment that might result in a substantive change to the rule. The Committee considered a change substantive if: (1) it could lead to a new result as to admissibility; (2) it could lead to a change in the procedure that guides determinations of admissibility; (3) the structure of a rule is amended in such a way that the approach courts and litigants have traditionally used to think and argue about admissibility is altered; or (4) it changes a "sacred phrase" – a phrase that has become so familiar in practice that its alteration would be disruptive.

These stylistic changes take several forms. First, formatting changes present the rules more clearly. Formatting changes include: (1) progressively indenting subparagraphs and adding headings; (2) using "hanging indents;" (3) substituting vertical lists for horizontal lists; and (4) breaking rules into constituent parts. Without changing any words, this kind of formatting results in a body of rules that is graphically structured and easier to read and understand.

Second, the wording of many rules has been changed. (1) The restyled rules reduce confusion resulting from the use of inconsistent terms by using the same words to express the same meaning. (2) The restyled rules minimize the use of words that are inherently ambiguous. For example, the word “shall” is removed from the rules because it is not generally used in contemporary written English. It is also subject to widely varying definitions. The restyled rules replace “shall” with “must,” “may,” or “should,” depending on the context and the established interpretation of each rule. (3) The restyled rules minimize the use of unnecessary emphasis-adding “intensifiers” because these expressions are often redundant and may create negative implications for other rules. Their removal does not affect the substantive meaning of the rules. (4) Outdated words and concepts are removed.

Finally, to achieve greater clarity and simplicity, the subdivisions within certain rules have been rearranged. Each rule, however, retains its original number to reduce the impact these changes may have on research.

Amended **Rule 804(b)(3)** (Hearsay Exceptions; Declarant Unavailable) includes “substantive” changes that are scheduled to take effect (unless Congress acts otherwise) on December 1, 2009. The substantive amendments provide that the corroborating-circumstances requirement applies to statements against penal interest offered by the government in a criminal case, as well as to those offered by the defendant.

Public hearings are scheduled to be held on the amendments to:

- Bankruptcy Rules in Phoenix, Arizona, on January 6, 2010, and in New York City, New York, on February 5, 2010;
- Criminal Rules in Phoenix, Arizona, on January 8, 2010, and in Atlanta, Georgia, on January 11, 2010;
- Evidence Rules in Phoenix, Arizona, on January 5, 2010, in San Francisco, California, on January 29, 2010, and in New York City, New York, on February 4, 2010.

Those wishing to testify should contact the Secretary at the address below, in writing, at least 30 days before the hearing. All written comments on the proposed rule amendments should be mailed to:

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Comments on the proposed rule amendments may be sent electronically to <rules_comments@ao.uscourts.gov>.

In accordance with established procedures, all comments submitted on the proposed amendments are available for public inspection.

The text of the proposed rule amendments and the accompanying Committee Notes can be found at <www.uscourts.gov/rules>. For further information, copies of this brochure, the *Request for Comment* pamphlets, and other materials, contact:

John K. Rabiej, Chief
Rules Committee Support Office
Administrative Office of U. S. Courts
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544
(202) 502-1820

★ ★ ★

ADMINISTRATIVE OFFICE OF THE U.S. COURTS
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544