U.S. District Court, District of Colorado

Summary of Local and Federal Rule Changes
Effective December 1, 2017

The Advisory Committee on the Local Rules of Practice completed the following in this 2017 cycle of rule changes:

Amendments to the Local Rules of Practice were approved by the Court on November 8, 2017, after consideration of the following: 1) ten comments tabled during the 2016 cycle for further review and discussion in this year's cycle; and 2) thirteen comments timely submitted during the 2017 cycle. After opportunity for public review and comment through electronic notices and posting on the court's website, and consideration of four additional comments, the approved and finalized Local Rules of Practice were published on November 20, and became effective on December 1, 2017. This year's revisions include efforts to refine the initial review process for unrepresented parties and prisoners; the making of further adjustments to the limited representation procedure made available for all parties in 2016; an assortment of new administrative provisions that will contribute to more efficient case administration, and several amendments to attorney practice rules.

As a result, the Local Rule revisions do the following:

- Refine the civil rules. Motions practice - add a further exception to the duty by parties to confer, and eliminate summary judgment motions from the requirement that counsel or the filing party provide the basis and authority for the motion; for initial review of pro se parties, expand the process to include represented parties filing *in forma pauperis* motions, provide more specific filing instructions to such filers, and clarify that review of prisoner pleadings includes cases involving all types of confinement, not just prisons; amended pleadings - eliminate an exception created for prisoners from documenting amendments of pleadings by motion, and expand the rule to allow supplementation of pleadings; assignment of cases - add another exception to direct assignment of magistrate judges to include cases where an order of referral by a district judge has already been filed.
- Adjust the criminal rules. Regarding restricted documents, add judicial authorization to broaden levels of restriction or be more specific regarding access to certain documents; restrict information about parties posting any bond; broaden language about possible restricted CJA filings.
- Expand the court's attorney rules. For withdrawals of appearance, provide more details as to counsel's responsibilities regarding limited representation. With respect to attorney discipline, memorialize the selection criteria for Committee on Conduct membership. Civil pro bono representation - permit appointment of counsel for both limited and general representation; expand unrepresented parties' eligibility to include appointment of counsel during the initial review process; and authorize appointment of counsel for defendants/respondents.
- Undertake certain minor restyling and reformatting changes (stylistic changes are not listed below).
- In addition to the local rule amendments, the court has approved new complaint and habeas corpus petition/motion forms to incorporate features from standardized pleading forms developed by the Administrative Office of the U.S. Courts. The new forms are available on the court's Forms website page.

For the complete versions of the Local Rules of Practice, in both final and redline form, please visit the Local Rules page of the court's website: http://www.cod.uscourts.gov/CourtOperations/RulesProcedures/LocalRules.aspx.

The Advisory Committee urges court staff, members of the bar, and the general public to be aware that the Federal Rules of Procedure have undergone several changes. Those changes are for the most part addressed in the summary provided below, but for a comprehensive account of the federal rule changes, please visit the Current Rules of Practice & Procedure subpage of the Rules and Policies section of the U.S. Courts website.[1]

[1] For your convenience, a copy of a March 2017 Report by the Judicial Conference Standing Committee on Rules of Practice and Procedure to the Chief Justice and the entire Judicial Conference of the U.S. describing most, but not all, of the 2017 federal rule changes to become effective Dec. 1, 2017 is attached at the end of this document. See also Current Rules of Practice & Procedure (above).

The Advisory Committee on the Local Rules always welcomes comments from court users, members of the bar, and the public at large. Please send your comments or suggestions to: LocalRule_Comments@cod.uscourts.gov. **PLEASE NOTE: the next rule revision cycle will take place in 2019.**

Local Rule Number and Title, or Important Federal Rule Revision	Practice Under Previous Local Rule	New Practice Under Revised Local Rule	Related Federal Rule, Statute, or Other Consideration.
SECTION I - CIVIL RULES			
Fed. R. Civ. P. 4(m) – Summons – Time Limits for Service	Imposes the new 90 time limit for service of a complaint (in effect in 2016).	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)(l), or to service of a notice under Rule 7l.l(d)(3)(A). **This is a technical rule amendment that adds an exemption for notices in condemnation actions.**	No other related federal rule or statute.

D.C.COLO.LCivR 7.1 – MOTIONS	(b) Exceptions to Duty to Confer: (4) a motion under D.C.COLO.LAttyR 5(a). **Excuses counsel/unrepresented party from the need to confer prior to the filing of a motion before making an appearance in a case, including motions to appear for limited representation.** --- (d) Motion, Response and Reply; Time for Serving and Filing; Length. Excluding motions filed under Fed. R. Civ. P. 56 or 65, a motion involving a contested issue of law shall state under which rule or statute it is filed and be supported by a recitation of legal authority in the motion.	(b) Exceptions to Duty to Confer: (4) a motion under D.C.COLO.LAttyR 5(a) **and (b).** **Further expands the exception to include motions for withdrawals of appearance.** --- (d) Motion, Response and Reply; Time for Serving and Filing; Length. Excluding motions filed under Fed. R. Civ. P. ~~56 or~~ 65 … **Summary judgment motions are no longer an exception to the requirement that a filer must state under what rule and authority a motion is filed. Rule is revised to no longer conflict with D.C.COLO.LCivR 56.1 – Motion for Summary Judgment.**	**Fed. R. Civ. P. 7. Pleadings Allowed; Form of Motions and Other Papers** (b) Motions and Other Papers. (1) *In General.* A request for a court order must be made by motion. The motion must: (A) be in writing unless made during a hearing or trial; (B) state with particularity the grounds for seeking the order; and (C) state the relief sought. (2) *Form*. The rules governing captions and other matters of form in pleadings apply to motions and other papers.

D.C.COLO.LCivR 8.1 ~~UNREPRESENTED (PRO SE) PARTIES~~IN FORMA PAUPERIS PARTY AND PRISONER PLEADINGS	This local rule regarding "pro se"/unrepresented parties describes the court's program for initial review prescribed by 28 U.S.C. § 1915 - Proceedings in forma pauperis and 28 U.S.C. § 1915A – Screening.	**~~UNREPRESENTED (PRO SE) PARTIES~~IN FORMA PAUPERIS PARTY AND PRISONER PLEADINGS** **(a) Review of ~~Unrepresented Party~~ In Forma Pauperis Party Pleadings.** A judicial officer designated by the Chief Judge shall review the pleadings of a~~n~~ ~~unrepresented~~ party who is allowed to proceed without prepayment of filing fees to determine whether the pleadings should be dismissed summarily. A judicial officer may request additional facts or documentary evidence necessary to make this determination. A party who seeks leave to proceed without prepayment of filing fees shall use the procedures, forms, and instructions available on the court's website or from the office of the clerk. **(b) Review of Prisoner Pleadings.** A judicial officer designated by the Chief Judge shall review the pleadings of a prisoner (whether represented by counsel or not) to determine whether the pleadings should be dismissed summarily if the prisoner is (1) proceeding without prepayment of fees; (2) challenging ~~prison~~ conditions of confinement; (3) seeking redress from a governmental entity, officer, or employee; or (4) asserting claims pertinent to his or her conviction or sentence, except in death penalty cases. **These rule amendments authorize initial review by the Court's Pro Se division for all *In Forma Pauperis* filers, including those represented by counsel; provide more specific instructions to pro se parties regarding filing procedures; and expands the scope of cases for initial review beyond "prisons" – i.e., jails and other types of confinement.**	**Rule 8. General Rules of Pleading** No corresponding federal rule exists regarding unrepresented parties; but see *In Forma Pauperis* and Screening statutes of Title 28, U.S. Code.

D.C.COLO.LCivR 15.1 **Amended Pleading**	(b) Amendment by Motion. -- Amendment made by motion [Subdivision (b)] must follow specific textual markings to allow court to understand proposed changes.	**(b) Amendment or Supplementation ~~B~~by Motion**. A party ~~other than an unrepresented prisoner~~ who files an opposed motion for leave to amend or supplement a pleading shall attach as an exhibit a copy of the proposed amended or supplemental pleading which strikes through (e.g., ~~strikes through~~) the text to be deleted and underlines (e.g., underlines) the text to be added. Unless otherwise ordered, the proposed amended or supplemental pleading shall not incorporate by reference any part of the preceding pleading, including exhibits. Unless otherwise ordered, if a motion for leave to amend or supplement a pleading is granted, the moving party shall file and serve the amended or supplemental pleading on all parties under Fed. R. Civ. P. 5 no later than 14 days after the filing of the order granting leave to amend or supplement. **Textual markups for amendments of pleadings will now apply to unrepresented prisoners in Subdivision (b). They are still excused from documenting pleading amendments through text markups when amending as a matter of course or by consent [Subdivision (a)].** **Rule is enhanced to allow supplementation of pleadings, conforming this local rule to the federal rule equivalent (Fed. R. Civ. P. 15(d)).**	**Fed. R. Civ. P. 15. Amended and Supplemental Pleadings.**

D.C.COLO.LCivR 40.1 Assignment Of Cases	**(c) Direct Assignment to Magistrate Judges.** Permits direct assignment of civil cases to all full-time magistrate judges with built-in consent provisions and exceptions.	(2) The following civil actions shall not be assigned directly to a magistrate judge: (a) A civil action in which a motion for injunctive relief is filed; (b) (b) A civil action brought under 28 U.S.C. § 2255 if the sentencing judge is still in regular active service or is rendering substantial assistance as a senior judge; (c) A civil action or proceeding brought under or related to Title 11, United States Code; ~~and~~ (d) A civil action in which an order of referral has been filed; and (e) A~~a~~ny other civil action excluded from direct assignment by a majority of the district judges. **This amendment adds another exception to direct assignment, to now also include cases where an order of referral to a magistrate judge of an issue, case management process or motion has already been entered by a district court judge.**	**Fed. R. Civ. P. 73. Magistrate Judges: Trial by Consent; Appeal.** **28 U.S.C. § 636(c) - Jurisdiction, powers, and temporary assignment.** (1) *Upon the consent of the parties*, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, *when specially designated to exercise such jurisdiction by the district court or courts he serves*. **[See D.C.COLO.LCivR 72.2 – Consent Jurisdiction of a Magistrate Judge, (a) Designation.]** **28 U.S.C. § 137 - Division of business among district judges**. "The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court."

Local Rule Number and Title or Important Federal Rule Revision	Practice Under Previous Local Rule	New Practice Under Revised Local Rule	Related Federal Rule, Statute, or Other Consideration
SECTION II - CRIMINAL RULES			
D.C.COLO.LCrR 47.1 Public Access To Cases, Documents, And Proceedings	This local rule provides the policy declaration of the District of Colorado and procedural guidelines for the restriction of documents in criminal cases.	**(b) Levels of Restriction. Unless otherwise ordered,** ~~T~~there are four levels of restriction. Level 1 limits access to the parties and the court. Level 2 limits access to the filing party, the affected defendant(s), the government, and the court. Level 3 limits access to the filing party and the court. Level 4 limits access to the court. **This revision adds judicial authorization to 1) broaden levels of restriction or 2) be more specific regarding access to particular documents. For example, Level 3 permits access only to a filing party and the Court – counsel for the U.S. Government however may need to disclose a sealed document to an individual defendant's counsel to comply with discovery obligations, or vice versa. With court approval, a level of restriction can be modified to limit access to individuals or parties beyond the strict confines of the rule.** --- **(f) Documents Subject to Presumptive Restriction.** The following documents shall be filed subject to the specified presumptive restriction levels without the order of a judicial officer: **(1) Documents that shall be filed with Level 2**	**Fed. R. Crim. P. 47. Motions and Supporting Affidavits**. **Fed. R. Crim. P. 49.1. Privacy Protection for Filings Made with the Court. [See in particular Advisory Committee Notes – 2002 to Rule 49.1, for Judicial Conference of the Unite States guidance and policy decision re: privacy and public access restrictions.]**

		restriction (access limited to the filing party, the affected defendant(s), the government, and the court): * * * * * (D) Information provided by ~~an owner of cash bail~~ a person or entity posting bond. **Subparagraph (D) is further clarified to presumptively restrict personal information of the poster of any bond or bail document, not just cash bail – for example, an owner of real property pledged as collateral.** --- **(2) Documents that shall be filed with Level 3 restriction (access limited to the filing party and the court):** * * * * * **(B)** ~~Applications, motions,~~Documents and orders under the Criminal Justice Act. Unless otherwise ordered, this restriction shall expire on the entry of final judgment. **Subparagraph (B) broadens language about possible restricted CJA filings; since applications for claims for compensation are submitted through the federal judiciary's E-Voucher program, applications are no longer filed in a case, but the need for various motions and documents still arises; documents is substituted to encompass all potential circumstances.**	--- **18 U.S. Code § 3006A - Adequate representation of defendants.** **United States District Court for the District Of Colorado - Criminal Justice Act Panel Plan**

Local Rule Number and Title or Important Federal Rule Revision	Practice Under Previous Local Rule	New Practice Under Revised Local Rule	Related Federal Rule, Statute, or Other Consideration
SECTION III - LOCAL PATENT RULES (No Changes)			

Local Rule Number and Title or Important Federal Rule Revision	Practice Under Previous Local Rule	New Practice Under Revised Local Rule	Related Federal Rule, Statute, or Other Consideration
SECTION IV - AP RULES (No Changes)			

Local Rule Number and Title or Important Federal Rule Revision	Practice Under Previous Local Rule	New Practice Under Revised Local Rule	Related Federal Rule, Statute, or Other Consideration
SECTION V - ATTORNEY RULES			
D.C.COLO.LAttyR 5 <u>Entry And Withdrawal Of Appearance and Maintenance Of Contact Information</u>	Sets forth the procedural steps for counsel to enter a case on behalf of a client, in civil and criminal cases; and in civil cases, to represent a client for a limited or discrete task or purpose.	**D.C.COLO.LAttyR 5 <u>Entry And Withdrawal Of Appearance and Maintenance Of Contact Information</u>** ***** **(b) Withdrawal of Appearance.** An attorney who has filed an Entry of Appearance or an Entry of Appearance to Provide Limited Representation or has appeared otherwise in a case may seek to withdraw on motion showing good cause. Withdrawal shall be effective only on court order entered after service of the motion to withdraw on all counsel of record, any unrepresented party, and the client of the withdrawing attorney. A motion to withdraw must state the reasons for withdrawal, unless the statement would violate the rules of professional conduct. Motions to withdraw based on the completion of the limited representation shall include a certification by counsel that the service specified in the Entry of Appearance to Provide Limited Representation is complete. **The new text in Subdivision (b), requiring withdrawing counsel to provide a certification to the court of completion of the limited, discrete task or service – in instances where withdrawal is sought for that reason, rather than attorney-client relationship differences – provides readily verifiable documentation to the court that the limited representation task is completed.**	For attorney admission and case filing procedures, see also the U.S. District Court's Attorney Services Portal on the U.S.D.C. website and the Electronic Case Filing Procedures (Civil Version 6.1) and Electronic Case Filing Procedures (Criminal Version 6.1), **incorporated in the Court's Local Rules**.

D.C.COLO.LAttyR 6 Disciplinary Panel and Committee on Conduct	Attorney discipline in matters before the Court is governed by the local rules of practice of the court, specifically D.C.COLO.LAttyR 7, Complaints and Grounds for Discipline. To investigate and preside over disciplinary proceedings, the Court in D.C.COLO.LAttyR 6 has established a Disciplinary Panel comprised of three district judges that has jurisdiction over all judicial proceedings involving disbarment, suspension, censure, or other lawyer discipline. The U.S. District Court has also established a standing Committee on Conduct comprised of 12 members of this court's bar.	**(b) Committee on Conduct.** The court has established a standing Committee on Conduct (the Committee) consisting of 12 members of the bar of this court. Each member shall be appointed for three years and until a successor is appointed. No member of the Committee shall serve more than two consecutive terms. Additional members may be appointed by the court. Any member appointed to fill a vacancy shall serve the unexpired term of his or her predecessor. If a member serves beyond expiration of the appointed term, the additional time served shall be chargeable to the successor member. The court shall designate a chairperson and vice-chairperson of the Committee. The vice-chairperson shall act during the absence or disability of the chairperson. Members of the Committee shall serve without compensation, but when practicable their necessary expenses shall be paid by the clerk from the fund in which admission and annual registration fees paid by members of the bar are deposited. To be eligible for appointment to the Committee, an attorney shall certify that the attorney satisfies the following: (1) has been practicing law for at least 10 years, with no discipline imposed; (2) is licensed to practice by the Colorado Supreme Court; (3) has been a member of and in good standing with the bar of this court for at least 5 years, with no discipline imposed; (4) has experience that makes the applicant especially qualified to investigate matters governed by the disciplinary rules of the court and the Colorado Rules of Professional Conduct. **Memorializes the selection criteria for Committee on Conduct membership, formerly decreed through general orders of the Court.**	See Part V – Attorney Discipline, of Section V – Attorney Rules, in Local Rules of Practice and Procedure, for entirety of the disciplinary standards and procedural rules. See also the Colorado Rules of Professional Conduct, the majority of the rules of which are adopted by the U.S. District Court. Colorado rules of procedure and conduct are available on the Colo. Judicial Branch website here.

D.C.COLO.LAttyR 15 Civil Pro Bono Representation	Establishes the U.S. District Court's policies and procedures on civil pro bono representation, including the Standing Committee on Pro Se Litigation and its oversight of the Civil Pro Bono Panel of attorneys.	**(a) Court Appointed Pro Bono Representation in Civil Actions.** The Civil Pro Bono Program provides for the selection and appointment of eligible, volunteer attorneys to represent without compensation eligible, unrepresented parties in civil actions to provide general or limited representation when requested by the court. The program is implemented through the Standing Committee on Pro Se Litigation (Standing Committee), the Civil Pro Bono Panel (Panel) and the Faculty of Federal Advocates (FFA). ***** **(e) Pro Se Party Eligibility.** (1) The following unrepresented parties are eligible for appointment of pro bono counsel: (A) ~~after initial review of the complaint by the Pro Se division of the court,~~an unrepresented non-prisoner ~~unrepresented party~~who has been granted leave to proceed in forma pauperis (IFP) under 28 U.S.C. § 1915; (B) ~~after initial review of the complaint by the Pro Se division of the court,~~ an unrepresented prisoner; and (C) after demonstrating limited financial means, an unrepresented non-prisoner ~~unrepresented party~~who has paid any filing fee in full. (2) A defendant or party responding to a complaint, petition, or appeal who satisfies the criteria above shall be eligible for appointment of pro bono counsel. **(f) Appointment Procedure.** (1) Prerogatives of judicial officers. (A) A judicial officer to whom the civil action is assigned may on motion by an eligible, unrepresented party or on his or her own initiative enter an Appointment Order authorizing appointment of a member of the Panel to ~~represent the party~~provide general or limited representation, ~~and~~ directing the clerk to select an attorney with a relevant subject matter preference or expertise. ----------	See also the Forms page on website for Civil Pro Bono Representation forms, and the Civil Pro Bono Panel page on the Court's website.

		The 2017 revisions to the <u>Civil Pro Bono Representation</u> rule: • **Update the Civil Pro Bono Panel Program to allow appointment of both limited and general representation pro bono counsel;** • **Expand unrepresented parties' eligibility to include potential for appointment of counsel during the initial review process; and acknowledges that appointment of counsel for defendants/respondents is authorized; and** • **Formalize the specific appointment procedure to include limited representation.**	

Local Rule Number and Title or Important Federal Rule Revision	Practice Under Previous Local Rule	New Practice Under Revised Local Rule	Related Federal Rule, Statute, or Other Consideration
Other Federal Rule Amendments			
Federal Appellate Rule 4(a)(4)(B)(iii)- Appeal as of Right -- When Taken/Appeal in a Civil Case - restores a subsection which had been inadvertently deleted in 2009. Subdivision (iii), which concerns amended notices of appeal, now again states: "No additional fee is required to file an amended notice."			
Federal Bankruptcy Rules 1001, 1006, 1015, 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, and new Rule 3015.1. The rule amendments address such areas as: - Administrative Issues (Rules 1001, 1006, and 1015) - Implementing New Chap. 13 Plan Form (Rule 3015 and new Rule 3015.1) - Notice Provisions (Rule 2002) - Filing Proofs of Claim (Rule 3002) - Objections to Claims (Rule 3007) - Determining Amount of Priority Claims (Rule 3012) - Exemptions (Rule 4003) - Closing Cases (Rule 5009) - Scope of Rules (Rule 7001) and - Modifying Official Forms (Rule 9009)			
Federal Rules of Evidence - Rule 803 - Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness/ (16) Statements in Ancient Documents - now limited to statements in documents prepared before Jan. 1, 2008. The federal Advisory Committee on the Rules of Evidence has determined that the ancient documents exception should be limited due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). - Rule 902 - Evidence That Is Self-Authenticating / (13) Certified Records Generated by an Electronic Process or System, and / (14) Certified Data Copied from an Electronic Device, Storage Medium, or File - adds two new subdivisions that would allow certain electronic evidence to be authenticated by a certification of a qualified person (in lieu of that person's testimony at trial).			

Agenda E-19
Rules
March 2017

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee) met in Phoenix, Arizona on January 3, 2017. All members participated except Deputy Attorney General Sally Q. Yates.

Representing the advisory rules committees were: Judge Neil M. Gorsuch, Chair, and Professor Gregory E. Maggs, Reporter, of the Advisory Committee on Appellate Rules; Judge Sandra Segal Ikuta, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Michelle M. Harner, Associate Reporter, of the Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Donald W. Molloy, Chair, Professor Sara Sun Beale, Reporter (by telephone), and Professor Nancy J. King, Associate Reporter (by telephone), of the Advisory Committee on Criminal Rules; and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Evidence Rules.

Also participating in the meeting were: Professor Daniel R. Coquillette, the Standing Committee's Reporter; Professor R. Joseph Kimble and Professor Bryan A. Garner, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy (by telephone), Scott Myers, Derek Webb (by telephone), and Julie Wilson, Attorneys on the Rules Committee Support Staff; Lauren Gailey, Law Clerk to the Standing Committee; Judge Jeremy D. Fogel, Director, Dr. Tim Reagan, and Dr. Emery G. Lee III, of the

Federal Judicial Center; Zachary A. Porianda, Attorney Advisor, Judicial Conference Committee on Court Administration and Case Management (CACM Committee); Judge Robert Michael Dow, Jr., Chair of the Rule 23 Subcommittee, Advisory Committee on Civil Rules; and Judge Paul W. Grimm, former member of the Advisory Committee on Civil Rules. Elizabeth J. Shapiro attended on behalf of the Department of Justice.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted a proposed technical amendment to Rule 4(a)(4)(B) to restore a subsection which had been inadvertently deleted in 2009, with a recommendation that the amendment be approved and transmitted to the Judicial Conference.

On December 14, 2016, the Office of the Law Revision Counsel (OLRC) in the U.S. House of Representatives advised that Rule 4(a)(4)(B)(iii) had been deleted by a 2009 amendment to Rule 4. Subdivision (iii), which concerns amended notices of appeal, states: "No additional fee is required to file an amended notice." The deletion of this subdivision in 2009 was inadvertent due to an omission of ellipses in the version submitted to the Supreme Court. The OLRC deleted subdivision (iii) from its official document as a result, but the document from which the rules are printed was not updated to show deletion of subdivision (iii). As a result, Rule 4(a)(4)(B) was published with subdivision (iii) in place that year and every year since.

The proposed technical amendment restores subdivision (iii) to Rule 4(a)(4)(B). The advisory committee did not believe publication was necessary given the technical, non-substantive nature of this correction.

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

Recommendation: That the Judicial Conference approve the proposed amendment to Appellate Rule 4(a)(4)(B) and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendment to the Federal Rules of Appellate Procedure is set forth in Appendix A, with a December 22, 2016 memorandum submitted to the Standing Committee detailing the proposed amendment.

Information Items

The advisory committee met on October 18, 2016 in Washington, D.C. In light of proposed changes to Appellate Rule 25 regarding electronic filing and service, the advisory committee considered whether Appellate Rules 3(a) and (d) should also be amended to eliminate references to mailing. The advisory committee will continue to review any proposed changes at its next meeting. It also discussed possible changes to Appellate Rule 8(b), which is currently out for public comment. The rule concerns proceedings to enforce the liability of a surety or other security provider who provides security for a stay or injunction pending appeal. The advisory committee learned of a problem in the published draft with the references to forms of security, but determined to postpone acting on the proposed changes until it receives all public comments on the published version of Rule 8(b).

The advisory committee discussed possible changes to Appellate Rule 26.1 regarding disclosure statements given the published proposed changes to Criminal Rule 12.4, also concerning disclosure statements. The advisory committee tentatively decided to recommend conforming amendments to Appellate Rule 26.1, but remains open to a more targeted approach to amending Rule 26.1(a). The advisory committee decided not to create special disclosure rules for bankruptcy cases, absent a recommendation from the Advisory Committee on Bankruptcy Rules.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Official Form Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, new Rule 3015.1, and new Official Form 113, with a recommendation that they be approved and transmitted to the Judicial Conference.

Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, and a proposed official form for chapter 13 plans, Official Form 113, were circulated to the bench, bar, and public for comment in August 2013, and again in August 2014. Rule 3015 was published for comment for a third time, along with new Rule 3015.1, for a shortened three-month period in July 2016. The proposed amendments summarized below are more fully explained in the report from the chair of the advisory committee, attached as Appendix B.

Consideration of a National Chapter 13 Plan Form

The advisory committee began to consider the possibility of an official form for chapter 13 plans at its spring 2011 meeting. At that meeting, the advisory committee discussed two suggestions for the promulgation of a national plan form. Judge Margaret Mahoney (Bankr. S.D. Ala.), who submitted one of the suggestions, noted that "[c]urrently, every district's plan is very different and it makes it difficult for creditors to know where to look for their treatment from district to district." The States' Association of Bankruptcy Attorneys (SABA), which submitted the other suggestion, stressed the impact of the Supreme Court's then-recent decision in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010). Because the Court held that an order confirming a plan is binding on all parties who receive notice, even if some of the plan provisions are inconsistent with the Bankruptcy Code or rules, SABA explained that creditors must carefully scrutinize plans prior to confirmation. Moreover, SABA noted that the Court

imposed the obligation on bankruptcy judges to ensure that plan provisions comply with the Code, and thus uniformity of plan structure would aid not only creditors, but also bankruptcy judges in carrying out their responsibilities. Following discussion of the suggestions, the advisory committee approved the creation of a working group to draft an official form for chapter 13 plans and any related rule amendments.

A proposed chapter 13 plan form and proposed amendments to nine related rules were published for public comment in August 2013. Because the advisory committee made significant changes to the form in response to comments, the revised form and rules were published again in August 2014.

At its spring 2015 meeting, the advisory committee considered the approximately 120 comments that were submitted in response to the August 2014 publication, many of which—including the joint comments of 144 bankruptcy judges—strongly opposed a mandatory national form for chapter 13 plans. Although there was widespread agreement regarding the benefit of having a national plan form, advisory committee members generally did not want to proceed with a mandatory official form in the face of substantial opposition by bankruptcy judges and other bankruptcy constituencies. Accordingly, the advisory committee decided to explore the possibility of a proposal that would involve promulgating a national plan form and related rules, but that would allow districts to opt out of the use of the official form if certain conditions were met.

At its fall 2015 meeting, the advisory committee approved the proposed chapter 13 plan form (Official Form 113) and related amendments to Rules 2002, 3002, 3007, 3012, 4003, 5009, 7001, and 9009—with some technical changes made in response to comments. The advisory committee deferred submitting those items to the Standing Committee, however, in order to allow further development of the opt-out proposal. The advisory committee directed its forms

subcommittee to continue to obtain feedback on the opt-out proposal from a broad range of bankruptcy constituencies and to make a recommendation at the spring 2016 meeting regarding the need for additional publication.

At its spring 2016 meeting, the advisory committee unanimously recommended publication of the two rules that would implement the opt-out proposal, an amendment to Rule 3015 and proposed new Rule 3015.1. The advisory committee also unanimously recommended a shortened publication period of three rather than the usual six months, consistent with Judicial Conference policy, which provides that "[t]he Standing Committee may shorten the public comment period or eliminate public hearings if it determines that the administration of justice requires a proposed rule change to be expedited and that appropriate notice to the public can still be provided and public comment obtained." *Guide to Judiciary Policy*, Vol. 1, § 440.20.40(d). Because of the two prior publications and the narrow focus of the revised rules, the advisory committee concluded that a shortened public comment period would provide appropriate public notice and time to comment, and could possibly eliminate an entire year from the period leading up to the effective date of the proposed chapter 13 plan package.

The Standing Committee accepted the advisory committee's recommendation and Rules 3015 and 3015.1 were published for public comment on July 1, 2016. The comment period ended on October 3. Eighteen written comments were submitted. In addition, five witnesses testified at an advisory committee hearing conducted telephonically on September 27.

A majority of the comments were supportive of the proposal for an official form for chapter 13 plans with the option for districts to use a single local form instead. Some of those comments suggested specific changes to particular rule provisions, which the advisory committee considered. The strongest opposition to the opt-out procedure came from the National Association of Consumer Bankruptcy Attorneys (NACBA), and from three consumer

debtor attorneys who testified at the September 27 hearing. They favored a mandatory national plan because of their concern that in some districts only certain plan provisions are allowed, and plans with nonstandard provisions are not confirmed. In addition, the bankruptcy judges of the Southern District of Indiana stated that they unanimously opposed Rule 3015(c) and (e) and Rule 3015.1 because they said that mandating the use of a "form chapter 13 plan," whether national or local, exceeds rulemaking authority.

At its fall 2016 meeting, the advisory committee unanimously approved Rules 3015 and 3015.1 with some minor changes in response to comments. In addition, it made minor formatting revisions to Official Form 113 (the official plan form previously approved by the advisory committee) and reapproved it.

Finally, the advisory committee recommended that the entire package of rules and the form be submitted to the Judicial Conference at its March 2017 session and, if approved, that the rules be sent to the Supreme Court immediately thereafter so that, if promulgated by the Supreme Court by May 1, they can take effect on December 1, 2017. The advisory committee concluded that promulgating a form for chapter 13 plans and related rules that require debtors to format their plans in a certain manner, but do not mandate the content of such plans, was consistent with the Rules Enabling Act. Further, given the significant opposition expressed to the original proposal of a mandatory national plan form, the advisory committee concluded that it was prudent to give districts the ability to opt out of using it, subject to certain conditions that would still achieve many of the goals sought in the original proposal. Finally, the advisory committee concluded it did not have the ability to address concerns that bankruptcy judges in some districts consistently refuse to confirm plans that are permissible under the Bankruptcy Code. Rather, litigants affected by such improper rulings should seek redress through an appeal.

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

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, and new Rule 3015.1 and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

b. Approve the proposed new Official Form 113 to take effect at the same time as the above listed rules.

The proposed amendments to the Federal Rules of Bankruptcy Procedure and the Official Bankruptcy Forms are set forth in Appendix B, with excerpts from the Advisory Committee's reports.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted a proposed technical amendment to restore the 2015 amendment to Rule 4(m), with a recommendation that it be approved and transmitted to the Judicial Conference.

Civil Rule 4(m) (Summons–Time Limit for Service) was amended on December 1, 2015, and again on December 1, 2016. In addition to shortening the presumptive time for service from 120 days to 90 days, the 2015 amendment added, as an exemption to that time limit, Rule 71.1(d)(3)(A) notices of a condemnation action. The 2016 amendment added to the list of exemptions Rule 4(h)(2) service on a corporation, partnership, or association at a place not within any judicial district of the United States.

The 2016 amendment exempting Rule 4(h)(2) was prepared in 2014 before the 2015 amendment adding Rule 71.1(d)(3)(A) to the list of exemptions was in effect. Once the 2015 amendment became effective, it should have been incorporated into the proposed 2016

amendment then making its way through the Rules Enabling Act process. It was not, and, as a result, Rule 71.1(d)(3)(A) was omitted from the list of exemptions in Rule 4(m) when the 2016 amendment became effective. The proposed amendment restores Rule 71.1(d)(3)(A) to the list of exemptions in Rule 4(m). The proposed amendment is technical in nature—it is identical to the amendment published for public comment in 2013, approved by the Judicial Conference, and adopted by the Court. Accordingly, re-publication for public comment is not required.

The Standing Committee voted unanimously to support the recommendation of the Advisory Committee on Civil Rules.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Civil Rule 4(m) and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendment to the Federal Rules of Civil Procedure is set forth in Appendix C with an excerpt from the Advisory Committee's report.

Information Items

Rules Published for Public Comment

On August 12, 2016, proposed amendments to Rules 5 (Serving and Filing Pleadings and Other Papers); 23 (Class Actions); 62 (Stay of Proceedings to Enforce a Judgment); and 65.1 (Proceedings Against a Surety) were published for public comment. The comment period closes February 15, 2017. Public hearings were held in Washington, D.C. on November 3, 2016, and in Phoenix, Arizona on January 4, 2017. Twenty-one witnesses presented testimony, primarily on the proposed amendments to Rule 23. A third telephonic hearing is scheduled for February 16, 2017.

Pilot Projects

At its September 2016 session, the Judicial Conference approved two pilot projects developed by the advisory committee and approved by the Standing Committee—the Expedited

Procedures Pilot Project and the Mandatory Initial Discovery Pilot Project—each for a period of approximately three years, and delegated authority to the Standing Committee to develop guidelines to implement the pilot projects.

Both pilot projects are aimed at reducing the cost and delay of civil litigation, but do so in different ways. The goal of the Expedited Procedures Pilot Project (EPP) is to promote a change in culture among federal judges generally by confirming the benefits of active case management through the use of the existing rules of procedure. The chief features of the EPP are: (1) holding a scheduling conference and issuing a scheduling order as soon as practicable, but not later than the earlier of 90 days after any defendant is served or 60 days after any defendant appears; (2) setting a definite period for discovery of no more than 180 days and allowing no more than one extension, only for good cause; (3) informal and expeditious disposition of discovery disputes by the judge; (4) ruling on dispositive motions within 60 days of the reply brief; and (5) setting a firm trial date that can be changed only for exceptional circumstances, while allowing flexibility as to the point in the proceedings when the date is set. The aim is to set trial at 14 months from service or the first appearance in 90 percent of cases, and within 18 months of service or first appearance in the remaining cases. Under the pilot project, judges would have some flexibility to determine exactly how to informally resolve most discovery disputes, and to determine the point at which to set a firm trial date.

In addition to finalizing the details of the EPP, work has commenced on developing supporting materials, including a "user's manual" to give guidance to EPP judges, model forms and orders, and additional educational materials. Mentor judges will also be made available to support implementation among the participating judges.

The goal of the Mandatory Initial Discovery Pilot Project (MIDP) is to measure whether court-ordered, robust, mandatory discovery that must be produced before traditional discovery

will reduce cost, burden, and delay in civil litigation. Under the MIDP, the mandatory initial discovery will supersede the initial disclosures otherwise required by Rule 26(a)(1), the parties may not opt out, favorable as well as unfavorable information must be produced, compliance will be monitored and enforced, and the court will discuss the initial discovery with the parties at the initial Rule 16 case management conference and resolve any disputes regarding compliance.

To maximize the effectiveness of the initial discovery, responses must address all claims and defenses that will be raised by any party. Hence, answers, counterclaims, crossclaims, and replies must be filed within the time required by the civil rules, even if a responding party intends to file a preliminary motion to dismiss or for summary judgment, unless the court finds good cause to defer the time to respond in order to consider a motion based on lack of subject matter jurisdiction, lack of personal jurisdiction, sovereign immunity, absolute immunity, or qualified immunity. The MIDP will be implemented through a standing order issued in each of the participating districts. As with the EPP, a "user's manual" and other educational materials are being developed to assist participating judges.

Now that the details of each pilot project are close to being finalized, recruitment of participating districts continues in earnest, with a goal of recruiting districts varying by size as well as geographic location. Although it is preferable to have participation by every judge in a participating district, there is some flexibility to use districts where only a majority of judges participate. The target for implementation of the MIDP is spring 2017, and for the EPP it is fall 2017.

Other Projects

Among the other projects on the advisory committee's agenda is the consideration of the procedure for demanding a jury trial. This undertaking was prompted by a concern expressed to the advisory committee about a possible ambiguity in Rule 81(c)(3), the rule that governs

demands for jury trials in actions removed from state court. Rule 81(c)(3)(A) provides that a party who demanded a jury trial in accordance with state law need not renew the demand after removal. It further provides that a party need not make a demand "[i]f the state law *did* not require an express demand" (emphasis added). Before the 2007 Style Project amendments, this provision excused the need to make a demand if state law *does* not require a demand. Recognizing that the Style Project amendments did not affect the substantive meaning of the rules, most courts continue to read Rule 81(c)(3)(A) as excusing a demand after removal only if state law does not require a demand at any point. However, as expressed to the advisory committee, replacing "does" with "did" created an ambiguity that may mislead a party who wants a jury trial to forgo a demand because state law, although requiring a demand at some point after the time of removal, did not require that the demand be made by the time of removal.

Robust discussion of this issue at the June 2016 meeting of the Standing Committee prompted a suggestion by some that the demand requirement be dropped and that jury trials be available in civil cases unless expressly waived, as in criminal cases. The advisory committee has undertaken some preliminary research of local federal rules and state court rules to compare various approaches to implementing the right to jury trial and to see whether local federal rules reflect uneasiness with the present up-front demand procedure. An effort also will be made to get some sense of how often parties who want a jury trial fail to get one for failing to make a timely demand.

The advisory committee is also reviewing Rule 30(b)(6) (Notice or Subpoena Directed to an Organization). A subcommittee has been formed to consider whether it is feasible and useful to address by rule amendment some of the problems that bar groups have regularly identified with depositions of entities. This is the third time in twelve years that Rule 30(b)(6) has been on the advisory committee's agenda. It was studied carefully a decade ago. The conclusion then

was that the problems involve behavior that cannot be effectively addressed by a court rule. The question was reassessed a few years later with a similar conclusion. The issue has been raised again by 31 members of the American Bar Association Section of Litigation. The subcommittee has not yet formed any recommendation as to whether the time has come to amend the rule, but it has begun working on initial drafts of possible amendments in an effort to evaluate the challenges presented.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no action items.

Information Items

On August 12, 2016, proposed amendments to Rules 12.4 (Disclosure Statement); 45(c) (Additional Time After Certain Kinds of Service); and 49 (Serving and Filing Papers) were published for public comment. The comment period closes February 15, 2017.

At its spring 2016 meeting, the advisory committee formed a subcommittee to consider a suggestion that Rule 16 (Discovery and Inspection) be amended to address discovery in complex cases. The original proposal submitted by the National Association of Criminal Defense Lawyers and the New York Council of Defense Lawyers provided a standard for defining a "complex case" and steps to create reciprocal discovery. The subcommittee determined that this proposal was too broad, but determined that there might be a need for a narrower, targeted amendment. After much discussion at the fall 2016 meeting, the advisory committee determined that it would be useful to hold a mini-conference to obtain feedback on the threshold question of whether an amendment is warranted, gather input about the problems an amendment might address, and get focused comments and critiques of specific proposals. Invited participants include a diverse cross-section of stakeholders, including criminal defense attorneys from both

large and small firms, public defenders, prosecutors, Department of Justice attorneys, discovery experts, and judges. The mini-conference will be held on February 7, 2017, in Washington, D.C.

Another subcommittee was formed to consider a conflict in the case law regarding Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts (The Answer and Reply). That rule—as well as Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts—provides that the petitioner/moving party "*may* submit a reply . . . within a time period fixed by the judge" (emphasis added). The conflict involves the use of the word "may." Some courts have interpreted the rule as affording a petitioner the absolute right to file a reply. Other courts have interpreted the rule as allowing a reply only if permitted by the court.

The subcommittee presented its preliminary report at the fall 2016 meeting. Discussion concluded with a request that the subcommittee draft a proposed amendment to be presented to the advisory committee at its next meeting.

As previously reported, the Standing Committee referred to the advisory committee a request by the CACM Committee to consider rules amendments to address concerns regarding dangers to cooperating witnesses posed by access to information in case files. A subcommittee was formed to consider the suggested amendments. In its preliminary consideration of the CACM Committee's suggestions, the subcommittee concluded that any rules amendments would be just one part of any solution to the cooperator issue. This feeling was shared by others and, as a result, the Administrative Office Director created a task force to take a broad look at the issue and possible solutions. While the task force is charged with taking a broad view, the subcommittee will continue its work to develop possible rules-based solutions.

The task force is comprised of members of the rules committees and the CACM Committee and will also include participation of key stakeholders from the Criminal Law

Committee, the Department of Justice, the Bureau of Prisons, the Sentencing Commission, a Federal Public Defender, and a clerk of court. The Task Force held its first meeting on November 16, 2016. It anticipates issuing a final report, including any rules amendments developed and endorsed by the rules committees, in January 2018.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no action items.

Information Items

The Advisory Committee on Evidence Rules met on October 21, 2016 at Pepperdine University School of Law in Los Angeles. On the day of the meeting, the advisory committee held a symposium to review case law developments on Rule 404(b), possible amendments to Rule 807 (the residual exception to the hearsay rule), and the advisory committee's working draft of possible amendments to Rule 801(d)(1)(A) to provide for broader substantive use of prior inconsistent statements.

At the meeting, the advisory committee discussed the comments made at the symposium, including proposals for amending Rule 404(b). The advisory committee will consider the specific proposals for amending Rule 404(b) at its next meeting.

The advisory committee also discussed possible amendments to Rule 801(d)(1)(A). It decided against implementing the "California rule," under which all prior inconsistent statements are substantively admissible, as it was concerned that there will be cases in which there is a dispute about whether the statement was ever made, making the admissibility determination costly and distracting. The advisory committee is considering whether the rule should be amended to allow substantive admissibility of a prior inconsistent statement so long as it was videotaped. The advisory committee will continue to deliberate on whether to amend Rule 801(d)(1)(A).

Over the past year, the advisory committee has been considering whether to propose an amendment to Rule 807, the residual exception to the hearsay rule. It has developed a working draft of an amendment to Rule 807, and that working draft was reviewed at the symposium. The advisory committee will continue to review and discuss the working draft with a focus on changes that could be made to improve the trustworthiness clause, and deletion of the superfluous provisions regarding material fact and interest of justice.

Also on the advisory committee's agenda are possible amendments to Rule 702 (Testimony by Expert Witnesses). A symposium will be held in conjunction with the Advisory Committee's fall 2017 meeting to consider possible changes to Rule 702 in light of recent challenges to forensic evidence, concerns that the rule is not being properly applied, and problems that courts have had in applying the rule to non-scientific and "soft" science experts.

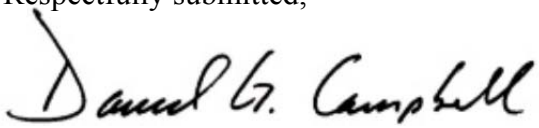
OTHER MATTERS

In 1987, the Judicial Conference established a policy that "[e]very five years, each committee must recommend to the Executive Committee, with a justification for the recommendation, either that the committee be maintained or that it be abolished." A committee's recommendations are presented to the Executive Committee in the form of responses to a Committee Self-Evaluation Questionnaire commonly referred to as the "Five Year Review." Among other things, the Five Year Review asks committees to examine not only the need for their continued existence but also their jurisdiction, workload, composition, and operating processes.

The Standing Committee discussed a version of the Five Year Review that had been completed by the Advisory Committee on Bankruptcy Rules and concluded that the answers to most questions applied across all the rules committees. Accordingly, the Standing Committee decided to complete and submit a single combined Five Year Review for all the rules

committees. Because the existence of the Standing Committee is required by statute, it recommended its continued existence. It also recommended the continued existence of each of the advisory committees as their work promotes the orderly examination and amendment of federal rules in their respective areas. With some elaboration, the Standing Committee also recommended maintaining the jurisdiction, workload, composition, and operating processes of all of the rules committees.

Respectfully submitted,



David G. Campbell, Chair

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Appendix A – Proposed Amendment to the Federal Rules of Appellate Procedure
Appendix B – Proposed Amendments to the Federal Rules of Bankruptcy Procedure and Official Bankruptcy Forms
Appendix C – Proposed Amendment to the Federal Rules of Civil Procedure