

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

**SUBMITTED FOR PUBLIC COMMENT**

*Comments Due by February 15, 2012*

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

A SUMMARY FOR BENCH AND BAR  
(AUGUST 2011)

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

The Judicial Conference's five Advisory Committees 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 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 rule and form amendments, as well as explanatory committee notes, are in the *Request for Comment* pamphlet posted at <<http://www.uscourts.gov/rules>>. The full text is also available in hard copy on request from the Secretary to the Standing Committee. The synopses on the following pages highlight the major aspects of the proposed amendments.

All comments on these proposed amendments will be carefully considered by the rules committees, which are composed of experienced trial and appellate lawyers, judges, and scholars. The rules committees welcome all comments, whether favorable or adverse. Written or electronic comments must be received by the Secretary to the Standing Committee no later than February 15, 2012. Comments may be sent electronically to <[rules\\_comments@ao.uscourts.gov](mailto:rules_comments@ao.uscourts.gov)> or by mail to the address set out at the end of this brochure.

Members of the public who wish to present oral testimony may appear at public hearings on 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 hearing date. The Secretary's mailing address and the dates and locations of the scheduled public hearings are set out at the end of this brochure.

The proposed amendments would become effective on December 1, 2013, if they are approved, with or without revision, by the relevant advisory committee, the Standing Committee, the Judicial Conference, and the Supreme Court, and if Congress does not act to defer, modify, or reject them. The revisions to the Official Bankruptcy Forms would become effective on December 1, 2012, if they are approved by the rules committees and the Judicial Conference.

## **I. Proposed Amendments to the Federal Rules of Appellate Procedure and Form 4**

The proposed amendments to **Rules 13 and 14** revise those rules to address permissive interlocutory appeals from the United States Tax Court under 26 U.S.C. § 7482(a)(2). Under proposed new Rule 13(b), such appeals will be governed by Rule 5. The proposed amendment to Rule 14 largely carries forward the current rule's list of Appellate Rules provisions that do not apply to appeals from the Tax Court. (The only change to that list is the deletion of Rule 5.) Because the list of excluded provisions dates to the original adoption of the Appellate Rules in 1968, comment is especially sought on whether any Appellate Rules provisions should be added to or deleted from the list in the light of current practice. Comment is also sought on the effect of the proposed addition (to Rule 14) of a global provision defining references to the district court and district clerk to include the Tax Court and its clerk; a similar definition — of considerably narrower application — is currently found in Rule 13(d)(1).

The proposed amendment to **Rule 24(b)** treats appeals from the Tax Court in a separate subsection to eliminate confusion about the Tax Court's status as a judicial entity.

**Rule 28** would be amended to remove the requirement of separate statements of the case and of the facts. The amended rule would instead provide for one "statement." This change would allow the brief to present the factual and procedural history chronologically, but would also permit flexibility to depart from chronological ordering. Parallel conforming amendments are proposed for **Rule 28.1**.

The proposed amendment to **Form 4** replaces questions 10 and 11 with a single revised question to ensure that a person seeking to appeal *in forma pauperis* is not required to divulge information about legal expenses that may be privileged or otherwise protected and is not needed to rule on a request. The proposed amendments would also make certain technical amendments to Form 4 to bring it into conformity with changes approved by the Judicial Conference in 1997 but not subsequently transmitted to Congress.

## **II. Proposed Amendments to the Federal Rules of Bankruptcy Procedure and Official Forms**

The proposed amendment to **Rule 1007(b)** relieves individual debtors of the obligation to file Official Form 23 if the provider of a personal financial management course notifies the court that the debtor has completed the course. A parallel conforming amendment would be made to **Rule 5009(b)**, relieving the clerk of the duty to send a notice to an individual debtor who has not filed the statement within 45 days after the first date set for the meeting of creditors if a course provider has already provided notification of the debtor's completion of the course.

Amended **Rule 3007(a)** would allow the use of a negative-notice procedure for objecting to claims and clarify the method for serving claim objections. The proposed amendment also clarifies that, to the extent possible, objections to a claim should be served by first-class mail to the designated recipient on the proof of claim. Additional service under Rule 7004(b)(4) or (5) is required for objections to federal claims, and under Rule 7004(h) for objections to claims filed by insured depository institutions.

The proposed amendment to **Rule 9006(d)** draws attention to the fact that the rule prescribes default deadlines for serving motions and written responses. The proposal amends the rule title to add a reference to the "time for motion papers," and the coverage of subdivision (d) is expanded to address the time to serve a written response to a motion, not just opposing affidavits. The proposed amendments to **Rules 9013 and 9014** add a cross-reference in those rules to the times under Rule 9006(d).

**Official Form 6C** is amended to reflect the Supreme Court's decision in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010), by allowing a debtor to state the value of the claimed exemption as "the full fair market value of the exempted property." This would avoid any misperception that the debtor is required to provide a specific dollar amount for the exemption.

The proposed amendment to **Official Form 7** would make the definition of "insider" consistent with the Bankruptcy Code's definition of the word by deleting the phrase "any owner of 5 percent or more of the voting or equity securities of a corporate debtor," and adding in its place the phrase "any persons in control of a corporate debtor."

The proposed amendments to **Official Forms 22A and 22C** align the allowable deduction for telecommunication expenses with the IRS list of Other Necessary Expenses.

**Official Form 22C** is also amended to conform to the Supreme Court's decision in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010), by directing an above-median-income Chapter 13 debtor to list any changes in the income and expenses reported on the form that have already occurred or are virtually certain to occur during the 12 months following the filing of the petition.

### **III. Proposed Amendments to the Federal Rules of Civil Procedure**

The proposed amendments to **Rule 45** simplify various provisions, notably those dealing with where subpoenas can command compliance. In particular, the amendments direct that the court where the action is pending is the "issuing court" no matter where compliance is required, and they collect in one new subsection all provisions about where compliance can be required. As at present, however, they provide that court enforcement of a subpoena should be sought in the compliance district.

The amendments reject a line of cases that found authority in the current rule to compel parties or party officers to travel more than 100 miles from outside the state to testify at trial, and introduce limited authority for a court asked to enforce another court's subpoena to transfer a subpoena-related motion to the court that issued the subpoena. Finally, they relocate and somewhat broaden the existing requirement for notice to the other parties before a subpoena is served.

Comments are especially sought on whether additional notices should be required concerning production of subpoenaed materials, whether the standard for transferring subpoena-related motions should be broadened, and whether authority should be added to the rule to permit the court to order party and party officer witnesses to travel longer distances than other witnesses to testify at trial in some circumstances.

The proposed amendment to **Rule 37** conforms to the proposed amendments to Rule 45.

### **IV. Proposed Amendments to the Federal Rules of Criminal Procedure**

The proposed amendment to **Rule 11** expands the plea colloquy to advise a defendant who is pleading guilty or *nolo contendere* of possible immigration consequences of the plea. The proposed amendment is made in response to the Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), which held that a defense attorney's failure to advise the defendant concerning the risk of removal fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment.

The proposed amendment to **Rule 12** clarifies which motions must be raised before trial, if the basis for the motion is then reasonably available and a trial on the merits is not necessary to determine the motion. The proposed amendment also addresses the consequences of an untimely motion, providing that Rule 52 does not apply and that, with two exceptions, the court may consider the defense, objection, or request raised by an untimely motion if the party shows "cause and prejudice," a phrase chosen to reflect the Supreme Court's interpretation of "good

cause” in the current rule. For motions asserting failure to state an offense or double jeopardy, the party must show only prejudice.

Comment is sought on all aspects of the revised rule, including the standard for late-filed motions asserting the defense of double jeopardy. Although the law is not uniform, most cases currently give double-jeopardy claims preferential treatment under Rule 12 and analyze a late-filed claim for “plain error.” The advisory committee decided that rather than have three different standards in the rule — cause plus prejudice, prejudice only, and plain error — it would be better to abandon the “plain error” test and have double-jeopardy claims, like claims of failure to state an offense, be governed by the prejudice-only standard. The advisory committee determined that using the “prejudice-only” standard for double jeopardy claims was unlikely to change the result in any case. The proposed amendment to **Rule 34** conforms to the proposed amendment to Rule 12.

## **V. Proposed Amendment to the Federal Rules of Evidence**

The proposed amendment aligns **Rule 803(10)** with the Supreme Court’s ruling in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). *Melendez-Diaz* held that certificates reporting the results of forensic tests conducted by analysts are “testimonial” within the meaning of the Confrontation Clause, as construed in *Crawford v. Washington*, 541 U.S. 36 (2004), making the admission of such certificates in lieu of in-court testimony a violation of the accused’s right of confrontation. The amendment adopts a “notice-and-demand” procedure that would require production of the person who prepared the certificate stating the absence of a public record only if the defendant, after receiving notice from the government, made a timely pretrial demand for production of the witness.

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

- Appellate Rules in Columbus, Ohio, on January 31, 2012, and in Washington, D.C., on February 3, 2012;
- Bankruptcy Rules in Washington, D.C., on January 13, 2012, and in Chicago, Illinois, on February 10, 2012;
- Civil Rules in Washington, D.C., on November 7, 2011, in Phoenix, Arizona, on January 4, 2012, and in Chicago, Illinois, on January 27, 2012;
- Criminal Rules in Phoenix, Arizona, on January 6, 2012, and in Washington, D.C., on February 6, 2012; and
- Evidence Rules in Phoenix, Arizona, on January 7, 2012, and in Washington, D.C., on January 17, 2012.

**Those wishing to testify should contact the Secretary at the address below, in writing, at least 30 days before the hearing.**

Written comments on the proposed 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 amendments may also be sent electronically to <[rules\\_comments@ao.uscourts.gov](mailto: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 amendments and the accompanying committee notes can be found on the federal rulemaking website, located at <<http://www.uscourts.gov/rules>>. For further information, copies of this brochure, the *Request for Comment* pamphlets, and other materials, contact:**

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  
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