

Rule Changes

Judicial Conference

The Judicial Conference of the United States is made up of the chief judge of each judicial circuit, the Chief Judge of the Court of International Trade, and a district judge from each regional judicial circuit. *28 USC §331* gives the Conference administrative and policy oversight of the federal courts.

Part of its function is to continually study the practice and procedure rules in use as prescribed by the Supreme Court for the federal district, bankruptcy, and appellate courts. The Conference may modify or abrogate any rule found to be inconsistent with federal law or other rules. The Conference also recommends additions and changes as appropriate to “promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay” to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.

Committees

As presiding officer of the Judicial Conference, the Chief Justice of the United States appoints judges, lawyers, and legal scholars to a standing Committee on Rules of Practice and Procedure. Among other duties, the standing committee advises the Conference on possible amendments to the procedural rules in the various federal courts. The standing committee functions through separate advisory committees for the Federal Rules of Civil, Criminal, Bankruptcy, and Appellate Procedure, and the Rules of Evidence.

The advisory committees develop new rules and modify existing rules based on input from judges, lawyers, and other legal professionals. They gather feedback about existing rules, propose new rules and amendments, publish and circulate them for comment, and conduct public hearings on the proposals. Following this process, the standing committee recommends new rules and amendments to the Conference for approval. Approved rules and amendments are then transmitted to the Supreme Court for formal adoption.

Annual Report

The statute requires the Chief Justice to summon the Judicial Conference into session annually, at such time and place in the

United States as he or she may designate. Traditionally, the Chief Justice has called the annual meeting in September and a semi-annual session in March.

At the September session, the Standing Committee publishes its annual report recommending that the Conference approve rules and amendments for publication or adoption. The report contains proposed rule amendments and committee’s comments regarding the reasons the new rule or amendment is needed.



Keeping Track of Changes

The activities of the Judicial Conference and its committees usually produce a new crop of rules and rule changes that are effective on December 1 each year. The effective date is usually more than a year after the approval, to give ample time for necessary adjustments. The process and reports of the Conference can be tracked at the federal court Website (www.uscourts.gov).

The following chart summarizes federal rule changes that became effective December 1, 2010, and the report of the Standing Committee discussing the amendments. Summaries are from http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Supreme%20Court%202009/ST_Report_Sept_2009.pdf.

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Rules of Appellate Procedure

Rule	Amendment	Reason for Change
Rule 1 – Scope of Rules Rule 1(b) – Definition	Amendment to Rule 1 clarifies that the word “state” when used in the rules includes the District of Columbia and any United States commonwealth or territory.	
4	The amendments to Rule 4(a)(7) correct cross-references to Civil Rule 58(a), which was renumbered as part of the restyling of the Civil Rules, effective December 1, 2007.	Technical and conforming
Rule 29 – Brief of Amicus Curiae 29(a) – When Permitted 29(c) – Contents and Form	The reference to a “Territory, Commonwealth, or the District of Columbia” was deleted as unnecessary in light of the new definition in Rule 1(b). The amendments to Rule 29(c) require an amicus curiae to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party’s counsel contributed money with the intention of funding the preparation or submission of the brief, and to identify every person (other than the amicus, its members, and its counsel) who contributed money that was intended to fund the brief’s preparation or submission.	The disclosure requirement as intended serves to deter counsel from using an amicus brief to circumvent page limits on the parties’ brief. It also is intended to help judges assess whether the amicus itself considers the issue sufficiently important to justify the cost and effort of filing an amicus brief.
Form 4	The revision of Form 4, Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis, limits the disclosure of personal-identifier information on the form consistent with the privacy provisions of Rule 25(a)(5).	

Bankruptcy

Rule	Amendment	Reason for Change
1007 – Lists, Schedules, and Statements; Time Limits	In an involuntary case, the list in subdivision (a)(2), and the schedules, statements, and other documents required by subdivision (b)(1) shall be filed by the debtor within 14 days of the entry of the order for relief.	Shortens the time for a debtor in an involuntary case to file the list of creditors that must be included on schedules filed in the case
1007(c) – Time limits Official Form 23	1007(c) extends the deadline for Chapter 7 debtors to file a statement of completion of the mandatory course in personal financial management. A revision to Official Form 23 adjusts the deadline accordingly.	The deadline was changed from 45 days to 60 days.
1014 – Dismissal and Change of Venue	Authorizes a court to determine the district in which a case should proceed when multiple petitions – including a chapter 15 petition – involving the same debtor are pending in different districts.	Conforming for Chapter 15, which was added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Chapter 15 governs ancillary and other cross-border insolvency cases.
1015 – Consolidation or Joint Administration of Cases Pending in the Same Court	Explicitly recognizes a court’s authority to consolidate or jointly administer cases when one or more of the petitions – including a petition under chapter 15 – is filed by, against, or regarding the same debtor.	Conforming for new Chapter 15.

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Bankruptcy (cont'd)

Rule	Amendment	Reason for Change
1018 – Applicability of Rules in Part VII Governing Adversary Proceedings	<p>Amendments apply selected Part VII rules designated to govern proceedings contesting an involuntary petition to proceedings contesting a chapter 15 petition for recognition.</p> <p>The amendments also clarify that Rule 1018 does not apply to matters that are “merely related” to a contested involuntary petition.</p>	Conforming for new Chapter 15.
1019 Conversion of Chapter 11, Chapter 12, or Chapter 13 Case to Chapter 7 Case	Provides a new time period to object to a claim of exemptions when a case is converted to Chapter 7 from Chapter 11, 12, or 13. The new time period does not apply if the conversion occurs more than one year after the entry of the first order confirming a plan, or if the case was previously pending under Chapter 7 and the objection period had expired in the original Chapter 7 case.	Previously, creditors were not allowed to object to a debtor’s claim of exemptions when the case was converted.
Rule 4001	Rule 4001 deals with relief from automatic stay, the use, sale, or lease of property, use of cash collateral, and obtaining credit. Adjusts the time deadlines in the rule consistent with the amendments to Rule 9006(a) that took effect in December 2009, which simplify the method to compute time under the rules.	Conforming to Rule 9006(a).
Rule 4004 – Grant or Denial of Discharge	Clarifies that the time deadline governing the filing of a complaint objecting to a debtor’s discharge in a Chapter 7 case also applies to a motion objecting to the discharge. The amendments also set a deadline to file a motion in a chapter 13 case objecting to a debtor’s discharge. In chapter 11 and 13 cases, a court must withhold entering the discharge if the individual debtor fails to file a statement attesting to the completion of a mandatory personal financial-management course.	
Rule 5009 – Closing Chapter 7, Chapter 12, and Chapter 13 Cases	Requires a foreign representative to file a final report describing the nature and results of that representative’s activities in the court. The foreign representative must notify interested parties of the report. Those parties have 30 days to file objections. The amendments also require the clerk to notify individual chapter 7 and chapter 13 debtors that their case may be closed without the entry of a discharge if they fail to file a timely statement that they have completed a personal financial-management course.	Conforming for new Chapter 15.
Rule 7001 – Scope of Rules of Part VII	<p>Objections to a discharge under §§ 727(a)(8), 727(a)(9), or 1328(f) are not treated as adversary proceedings:</p> <p>727(a)(8) – the debtor has been granted a discharge under this section, under section 1141 this title, or under section 14, 371, or 476 of the bankruptcy act, in a case commenced within eight years before the date of the filing of the petition;</p> <p>727(a)9 – the debtor has been granted discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the bankruptcy act, in the case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least 100% of the allowed unsecured claims in such case, or 70% of such claims, and the plan was proposed by the debtor in good faith, and was the debtor’s best effort.</p> <p>1328(f) - the debtor has received a discharge 1) in a case filed under Chapter 7, 11, or 12 during the four-year period preceding the date of the order for relief under Chapter 13, or 2) in a case filed under Chapter 13 during the 2-year period preceding the date of such order.</p>	These objections typically are resolved more easily than other discharge objections and do not require the more elaborate procedures applicable to adversary proceedings.

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Bankruptcy (cont'd)

Rule	Amendment	Reason for Change
Rule 9001 – General Definitions	Applies the definitions of words and phrases listed in § 1502 of the Code, governing cross-border insolvencies, to the Rules.	Conforming for new Chapter 15.
New Rule 5012	New Rule 5012 sets out notice provisions and establishes procedures in chapter 15 cases for obtaining court approval of an agreement or protocol coordinating insolvency proceedings pending in another country involving the debtor.	Conforming for new Chapter 15.
Official Form 1, Exhibit D	Modifies the debtor's statement of compliance with the credit-counseling requirement. The reference in the statement to the five-day time period in which an individual debtor requested credit counseling, but failed to obtain it before filing a chapter 7 petition, is revised and the time period increased to seven days.	Conforms to similar changes to 11 U.S.C. § 109(h)(3)(A)(ii).
Criminal Rules		
Rule	Amendment	Reason for Change
12.3 – Notice of a Public-Authority Defense	Provides that a victim's address and telephone number should be disclosed to the defense when a public-authority defense is raised only if the defendant establishes a need for the information.	The amendment parallels a similar change made in 2008 to Rule 12.1, dealing with notice of an alibi defense, providing the court with discretion to order disclosure of the information or to fashion an alternative procedure that gives the defendant the information necessary to prepare a defense but also protects the victim's interests. The amendments are consistent with the Crime Victims' Rights Act (18 U.S.C. § 3771).
21 – Transfer for Trial	Rule 21(b) now requires a court to consider the convenience of victims – as well as the convenience of the parties and witnesses and the interests of justice – in determining whether to transfer all or part of the proceedings to another district for trial. The amendment would apply only if a defendant moves to transfer the case for convenience; it does not apply to motions for transfer based on prejudice under Rule 21(a).	
32.1 – Revoking or Modifying Probation or Supervised Release	Amendments make clear that only paragraph 18 U.S.C. §3143(a)(1), and not (a)(2), applies to the proceedings. The amendments also clarify the burden of proof in such proceedings, which, under the case law, is to establish by clear and convincing evidence that the person will not flee or pose a danger to any other person or to the community.	The changes are intended to end the confusion over the applicability of 18 U.S.C. § 3143(a) – to which the current rule refers – to proceedings involving the release or detention of a person charged with violating a condition of probation or supervised release.

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Rule	Amendment	Reason for Change
Rule 8 – General Rules of Pleading	Deleted the reference to “discharge in bankruptcy” from Rule 8(c)’s list of affirmative defenses that must be asserted in response to a pleading. Conforms the rule to 11 U.S.C. § 524(a), which provides that a discharge voids a judgment to the extent that it determines the debtor’s personal liability for the discharged debt.	Continued reference to “discharge” in Rule 8’s list of affirmative defenses generated confusion, led to incorrect decisions, and caused unnecessary litigation. The Department of Justice was concerned that courts and litigants should be aware that some categories of debt are excepted from discharge.
Rule 26 – Duty to Disclose; General Provisions Governing Discovery	<p>The work-product privilege now applies to the discovery of draft reports by testifying expert witnesses and most communications between those witnesses and retaining counsel. The amended rule specifically provides that the only communications between lawyer and expert open to discovery are 1) compensation for the expert’s study or testimony; 2) facts or data provided by the lawyer that the expert considered in forming opinions; and 3) assumptions provided to the expert by the lawyer that the expert relied upon in forming an opinion.</p> <p>Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:</p> <p>(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and</p> <p>(ii) a summary of the facts and opinions to which the witness is expected to testify.</p>	Rule 26 was previously interpreted to allow discovery of all communications between counsel and expert witnesses and all draft expert reports, and to require reports from all witnesses offering expert testimony. This resulted in expensive and wasteful efforts by lawyers and experts to avoid creating any discoverable record (such as hiring multiple “consulting” experts), while going to great lengths to discover the opposing parties’ drafts and communications.
Rule 56 – Summary Judgment	<p>There were several changes to Rule 56:</p> <p>Changed language that summary judgment “should” be granted back to “shall” be granted.</p> <p>A party asserting a fact that cannot be genuinely disputed to provide a “pinpoint citation” to the record supporting its fact position.</p> <p>A party may submit an unsworn written declaration, certificate, verification, or statement under penalty of perjury in accordance with 28 U.S.C. § 1746 as a substitute for an affidavit to support or oppose a summary-judgment motion;</p> <p>Courts have options when an assertion of fact has not been properly supported by the party or responded to by the opposing party, including considering the fact undisputed for purposes of the motion, granting summary judgment if supported by the motion and supporting materials, or affording the party an opportunity to amend the motion;</p> <p>A party may file a motion for summary judgment at any time until 30 days after the close of all discovery, unless a different time is set by local rule or the court orders otherwise;</p> <p>“Partial summary judgments” may be entered.</p>	<p>The changes are primarily intended to remedy disparities of standards among Supreme Court cases and local rule variations governing summary-judgment motion practice.</p> <p>The language of the rule was changed from “shall” to “should” in 2007. That change was intended to be a change in style only, and was not intended to change the standard for granting or denying the motion. The language was changed back to avoid confusion.</p>
Civil Form 52 - Report of the Parties’ Planning Meeting	The revision reinstates two provisions that took effect in 2006 but were omitted in the comprehensive revision in 2007. The provisions require that a discovery plan include: (1) a reference to the way that electronically stored information would be handled in discovery or disclosure; and (2) a reference to an agreement between parties regarding claims of privilege or work-product protection.	The two provisions are consistent with amendments to Rule 16(b)(3) that took effect in 2006.

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Evidence

Rule	Amendment	Reason for Change
Rule 804 – Hearsay Exceptions; Declarant Unavailable	Rule 804(b)(3) requires the government to show corroborating circumstances as a condition for admission of an unavailable declarant's statement against penal interest.	The rule previously required only the defendant to make such a showing. A number of courts applied the corroborating-circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the rule did not so provide.

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Communication Corner

Capitalization

Have a communication question? Submit it to the Communication Corner for an answer. Post your questions to the *Facts & Findings* discussion board on NALANet or send them to nalanet@nala.org.

Choose the best answer in each of the following questions.

1. The job of courts is to interpret existing law, not to change the law or to create new law; this is clear from the _____ that creates a particular court.

- A. constitution or statute B. Constitution or statute

2. The _____ intended the federal government to be small, engaging in specific activities only.

- A. founding fathers B. Founding Fathers

3. To increase or decrease the power of the federal government, we must amend the _____; judges are not part of the amendment process.

- A. constitution B. Constitution

ANSWERS: (page references are to the *CLA Review Manual*, 3d ed.)

4. B is correct. The Tenth Amendment is a specific part of a document in existence and must be capitalized. Page 69.
 5. A is correct. The term "federal judges" generally is not capitalized unless it is part of a proper name. Page 68.

4. Of all amendments, the _____ may be the most important: it says the powers of the federal government are few and defined, while the powers of state governments remain numerous and indefinite.

- A. tenth amendment
 B. Tenth Amendment

5. Political power of individuals and states is usurped when _____ insert the meaning of words that no one can find in the Constitution and ignore the plain meaning of other words found there.

- A. federal judges B. Federal judges



1. A is correct. Because neither "constitution" nor "statute" refers to a precise document in existence, neither term is capitalized. Page 69.
 2. B is correct. The term "Founding Fathers" is similar to the Yankees or to a Boy Scout for capitalization purposes. Page 70.
 3. B is correct. When referring to the U.S. Constitution, the term "constitution" always is capitalized. It is a precise document in existence. Page 69.