

**COMMITTEE ON RULES OF
PRACTICE AND PROCEDURE**

**Phoenix, AZ
January 9-10, 2014**

TABLE OF CONTENTS

AGENDA 5

TAB 1 OPENING BUSINESS

**ACTION ITEM: Draft Minutes of the June 3-4, 2013 Meeting of the
 Standing Committee 19**

TAB 2 ADVISORY COMMITTEE ON APPELLATE RULES

**A. Report of the Advisory Committee on Appellate Rules
 (December 16, 2013) 63**

B. Table of Agenda Items (December 2013)..... 73

TAB 3 ADVISORY COMMITTEE ON BANKRUPTCY RULES

**A. Report of the Advisory Committee on Bankruptcy Rules
 (December 12, 2013) 81**

**ACTION ITEM: Proposed Conforming Amendments to
 Bankruptcy Rule 1007 82**

Appendix A – Bankruptcy Rule 1007..... 89

Appendix B – Official Forms

B.1 Official Form B101 95

B.2 Official Form B201 105

**B. Draft Minutes of the September 24-25, 2013 Meeting of the
 Advisory Committee on Bankruptcy Rules..... 111**

TAB 4 ADVISORY COMMITTEE ON CRIMINAL RULES

**Report of the Advisory Committee on Criminal Rules
 (December 20, 2013) 133**

TAB 5 ADVISORY COMMITTEE ON EVIDENCE RULES

**Report of the Advisory Committee on Evidence Rules
 (December 2, 2013) 139**

TAB 6	INTER-COMMITTEE CM/ECF SUBCOMMITTEE	
	Report of the Inter-Committee CM/ECF Subcommittee (December 4, 2013)	145
	<i>Appendix A – Reporters’ Memoranda on Possible Changes to Accommodate CM/ECF</i>	<i>151</i>
	<i>Appendix B – Memorandum to Professor Daniel Capra from Laura Erdman Regarding Analysis of Local Rules Addressing Electronic Filing (November 6, 2013).....</i>	<i>245</i>
	<i>Appendix C – Memorandum to Professor Daniel Capra from Professors Sara Beale and Nancy King Regarding CM/ECF (November 10, 2013)</i>	<i>251</i>
TAB 7	PANEL DISCUSSION: POLITICAL AND PROFESSIONAL CONTEXT OF RULEMAKING	
	A. Hon. Mark R. Kravitz, Dean David F. Levi, Hon. Lee H. Rosenthal & Hon. Anthony J. Scirica, <i>They Were Meant For Each Other: Professor Edward Cooper and the Rules Enabling Act,</i> 46 U. MICH. J.L. REFORM 495 (2013).....	259
	B. Peter G. McCabe, <i>Renewal of the Federal Rulemaking Process,</i> 44 AM. U.L. REV. 1655 (1995)	293
TAB 8	ADVISORY COMMITTEE ON CIVIL RULES	
	A. Report of the Advisory Committee on Civil Rules (December 6, 2013)	339
	ACTION ITEM: Proposed Amendment to Civil Rule 82 for Publication.....	340
	ACTION ITEM: Proposed Amendment to Civil Rule 6(d) for Publication.....	342
	B. Draft Minutes of the November 7-8, 2013 Meeting of the Advisory Committee on Civil Rules	351

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Phoenix, Arizona
January 9-10, 2014

- 1. Welcome and Opening Remarks**
 - A. Welcome and opening remarks by Judge Jeffrey S. Sutton
 - B. Report on September 2013 Judicial Conference session
 - C. Transmission of Judicial Conference-approved proposed rules amendments to Supreme Court
- 2. ACTION: Approving Minutes of June 2013 Committee Meeting**
- 3. Report of the Advisory Committee on Appellate Rules – Judge Steven M. Colloton**
- 4. Report of the Advisory Committee on Bankruptcy Rules – Judge Eugene R. Wedoff**
 - A. **ACTION:** Approving and transmitting to the Judicial Conference proposed conforming amendments to Rule 1007
 - B. Rules published for public comment
- 5. Report of the Advisory Committee on Criminal Rules – Judge Reena Raggi**
- 6. Report of the Advisory Committee on Evidence Rules – Chief Judge Sidney A. Fitzwater**
- 7. Report of the Inter-Committee CM/ECF Subcommittee – Judge Michael A. Chagares**
- 8. Panel Discussion: *Political and Professional Context of Rulemaking***

Professor Daniel R. Coquillette, Judge Marilyn L. Huff (S.D. Cal.),
Peter G. McCabe, Esq., Judge Lee H. Rosenthal (S.D. Tex.),
Judge Anthony J. Scirica (3d Cir.), and Chief Judge Diane P. Wood (7th Cir.)
- 9. Report of the Advisory Committee on Civil Rules – Judge David G. Campbell**
 - A. **ACTION:** Approving publishing for public comment proposed amendments to Rules 82 and 6(d)

- B. Rules published for public comment and public hearings

10. Report of the Administrative Office

- A. Legislative Report
- B. March 2014 Long-Range Planning Meeting of Judicial Conference Committee Chairs

11. Next meeting in Washington, D.C. on May 29-30, 2014

COMMITTEES ON RULES OF PRACTICE AND PROCEDURE
CHAIRS and REPORTERS

<p>Chair, Committee on Rules of Practice and Procedure <i>(Standing Committee)</i></p>	<p>Honorable Jeffrey S. Sutton United States Court of Appeals 260 Joseph P. Kinneary U.S. Courthouse 85 Marconi Boulevard Columbus, OH 43215</p>
<p>Reporter, Committee on Rules of Practice and Procedure <i>(Standing Committee)</i></p>	<p>Professor Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459</p>
<p>Chair, Advisory Committee on Appellate Rules</p>	<p>Honorable Steven M. Colloton United States Court of Appeals U.S. Courthouse Annex, Suite 461 110 East Court Avenue Des Moines, IA 50309-2044</p>
<p>Reporter, Advisory Committee on Appellate Rules</p>	<p>Professor Catherine T. Struve University of Pennsylvania Law School 3501 Sansom Street Philadelphia, PA 19104</p>
<p>Chair, Advisory Committee on Bankruptcy Rules</p>	<p>Honorable Eugene R. Wedoff United States Bankruptcy Court Everett McKinley Dirksen U.S. Courthouse 219 South Dearborn Street Chicago, IL 60604</p>
<p>Reporter, Advisory Committee on Bankruptcy Rules</p>	<p>Professor S. Elizabeth Gibson 5073 Van Hecke-Wettach Hall University of North Carolina at Chapel Hill C.B. #3380 Chapel Hill, NC 27599-3380</p> <p>Professor Troy A. McKenzie New York University School of Law 40 Washington Square South New York, NY 10012</p>

Chair, Advisory Committee on Civil Rules	Honorable David G. Campbell United States District Court 623 Sandra Day O'Connor U.S. Courthouse 401 West Washington Street Phoenix, AZ 85003-2146
Reporter, Advisory Committee on Civil Rules	Professor Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215 Professor Richard L. Marcus University of California Hastings College of the Law 200 McAllister Street San Francisco, CA 94102-4978

Chair, Advisory Committee on Criminal Rules	Honorable Reena Raggi United States Court of Appeals 704S United States Courthouse 225 Cadman Plaza East Brooklyn, NY 11201-1818
Reporter, Advisory Committee on Criminal Rules	Professor Sara Sun Beale Charles L. B. Lowndes Professor Duke Law School 210 Science Drive Durham, NC 27708-0360 Professor Nancy J. King Vanderbilt University Law School 131 21st Avenue South, Room 248 Nashville, TN 37203-1181

Chair, Advisory Committee on Evidence Rules	Honorable Sidney A. Fitzwater Chief Judge United States District Court Earle Cabell Federal Bldg. U.S. Courthouse 1100 Commerce Street, Room 1528 Dallas, TX 75242-1310
Reporter, Advisory Committee on Evidence Rules	Professor Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023

<p>Secretary, Standing Committee and Rules Committee Officer</p>	<p>Jonathan C. Rose Secretary, Committee on Rules of Practice & Procedure and Rules Committee Officer Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Jonathan_Rose@ao.uscourts.gov</p>
<p>Chief Counsel</p>	<p>Andrea L. Kuperman Chief Counsel to the Rules Committees 11535 Bob Casey U.S. Courthouse 515 Rusk Ave. Houston, TX 77002-2600 Phone 713-250-5980 Fax 713-250-5213 Andrea_Kuperman@txs.uscourts.gov</p>
<p>Deputy Rules Committee Officer and Counsel</p>	<p>Benjamin J. Robinson Deputy Rules Committee Officer and Counsel to the Rules Committees Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1516 Fax 202-502-1755 Benjamin_Robinson@ao.uscourts.gov</p>

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
(Standing Committee)

Chair, Standing Committee	Honorable Jeffrey S. Sutton United States Court of Appeals 260 Joseph P. Kinneary U.S. Courthouse 85 Marconi Boulevard Columbus, OH 43215
Reporter, Standing Committee	Professor Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459
Members, Standing Committee	Honorable James M. Cole Deputy Attorney General (ex officio) United States Department of Justice 950 Pennsylvania Avenue, N.W. - Room 4111 Washington, DC 20530 Dean C. Colson, Esq. Colson Hicks Eidson 255 Alhambra Circle Penthouse Coral Gables, FL 33134 Roy T. Englert, Jr., Esq. Robbins Russell Englert Orseck Untereiner & Sauber, LLP 801 K Street, N.W. - Suite 411-L Washington, DC 20006 Gregory G. Garre, Esq. Latham & Watkins LLP 555 Eleventh Street, N.W. Washington, DC 20004-1304 Honorable Neil M. Gorsuch United States Court of Appeals Byron White United States Courthouse 1823 Stout Street, 4th Floor Denver, CO 80257-1823

Members, Standing Committee (cont'd.)

Honorable Susan P. Graber

United States Court of Appeals
Pioneer Courthouse
700 S.W. Sixth Avenue, Suite 211
Portland, OR 97204

Honorable Wallace B. Jefferson

Supreme Court of Texas
Supreme Court Building
201 W. 14th Street, Room 104
Austin, Texas 78701

Dean David F. Levi

Duke Law School
Science Drive and Towerview Road
Room 2012
Durham, NC 27708

Honorable Patrick J. Schiltz

United States District Court
United States Courthouse
300 South Fourth Street – Suite 14E
Minneapolis, MN 55415

Honorable Amy J. St. Eve

United States District Court
Everett McKinley Dirksen
United States Courthouse
219 South Dearborn Street, Room 1260
Chicago, IL 60604

Larry D. Thompson, Esq.

PepsiCo
700 Anderson Hill Road
Purchase, NY 10577

Honorable Richard C. Wesley

United States Court of Appeals
Livingston County Government Center
Six Court Street
Geneseo, NY 14454-1043

Honorable Jack Zouhary

United States District Court
James M. Ashley and Thomas W.L. Ashley
United States Courthouse
1716 Spielbusch Avenue, Room 203
Toledo, OH 43604

<p>Advisors and Consultants, Standing Committee</p>	<p>Professor Geoffrey C. Hazard, Jr. Hastings College of the Law 200 McAllister Street San Francisco, CA 94102</p> <p>Professor R. Joseph Kimble Thomas M. Cooley Law School 300 South Capitol Avenue Lansing, MI 48933</p> <p>Joseph F. Spaniol, Jr., Esq. 5602 Ontario Circle Bethesda, MD 20816-2461</p>
<p>Secretary, Standing Committee and Rules Committee Officer</p>	<p>Jonathan C. Rose Secretary, Committee on Rules of Practice & Procedure and Rules Committee Officer Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Jonathan_Rose@ao.uscourts.gov</p>
<p>Chief Counsel</p>	<p>Andrea L. Kuperman Chief Counsel to the Rules Committees 11535 Bob Casey U.S. Courthouse 515 Rusk Ave. Houston, TX 77002-2600 Phone 713-250-5980 Fax 713-250-5213 Andrea_Kuperman@txs.uscourts.gov</p>
<p>Deputy Rules Committee Officer and Counsel</p>	<p>Benjamin J. Robinson Deputy Rules Committee Officer and Counsel to the Rules Committees Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1516 Fax 202-502-1755 Benjamin_Robinson@ao.uscourts.gov</p>

LIAISON MEMBERS

Liaison for the Advisory Committee on Appellate Rules	Gregory G. Garre, Esq. <i>(Standing)</i>
Liaison for the Advisory Committee on Appellate Rules	Judge Adalberto Jordan <i>(Bankruptcy)</i>
Liaison for the Advisory Committee on Bankruptcy Rules	Roy T. Englert, Jr., Esq. <i>(Standing)</i>
Liaison for the Advisory Committee on Civil Rules	Judge Arthur I. Harris <i>(Bankruptcy)</i>
Liaison for the Advisory Committee on Civil Rules	Judge Neil M. Gorsuch <i>(Standing)</i>
Liaison for the Advisory Committee on Criminal Rules	
Liaison for the Advisory Committee on Evidence Rules	Judge Judith H. Wizmur <i>(Bankruptcy)</i>
Liaison for the Advisory Committee on Evidence Rules	Judge Paul S. Diamond <i>(Civil)</i>
Liaison for the Advisory Committee on Evidence Rules	Judge John F. Keenan <i>(Criminal)</i>
Liaison for the Advisory Committee on Evidence Rules	Judge Richard C. Wesley <i>(Standing)</i>

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Jonathan C. Rose

Secretary, Committee on Rules of Practice &
Procedure and Rules Committee Officer
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1755
Jonathan_Rose@ao.uscourts.gov

Benjamin J. Robinson

Deputy Rules Committee Officer
and Counsel to the Rules Committees
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-1516
Fax 202-502-1755
Benjamin_Robinson@ao.uscourts.gov

Julie Wilson

Attorney Advisor
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-3678
Fax 202-502-1766
Julie_Wilson@ao.uscourts.gov

James H. Wannamaker III

Senior Attorney
Bankruptcy Judges Division
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-254
Washington, DC 20544
Phone 202-502-1900
Fax 202-502-1988
James_Wannamaker@ao.uscourts.gov

Scott Myers

Attorney Advisor
Bankruptcy Judges Division
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-250
Washington, DC 20544
Phone 202-502-1900
Fax 202-502-1988
Scott_Myers@ao.uscourts.gov

Bridget M. Healy

Attorney Advisor
Bankruptcy Judges Division
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-273
Washington, DC 20544
Phone 202-502-1900
Fax 202-502-1988
Bridget_Healy@ao.uscourts.gov

Frances F. Skillman

Paralegal Specialist
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-3945
Fax 202-502-1755
Frances_Skillman@ao.uscourts.gov

FEDERAL JUDICIAL CENTER

<p>Tim Reagan <i>(Rules of Practice & Procedure)</i> Senior Research Associate Federal Judicial Center Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 6-436 Washington, DC 20002 Phone 202-502-4097 Fax 202-502-4199</p>	<p>Marie Leary <i>(Appellate Rules Committee)</i> Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4069 Fax 202-502-4199 mleary@fjc.gov</p>
<p>Molly T. Johnson <i>(Bankruptcy Rules Committee)</i> Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 315-824-4945 mjohnson@fjc.gov</p>	<p>Emery G. Lee <i>(Civil Rules Committee)</i> Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4078 Fax 202-502-4199 elee@fjc.gov</p>
<p>Laural L. Hooper <i>(Criminal Rules Committee)</i> Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4093 Fax 202-502-4199 lhooper@fjc.gov</p>	<p>Catherine Borden <i>(Evidence Rules Committee)</i> Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4090 Fax 202-502-4199 cborden@fjc.gov</p>

TAB 1

THIS PAGE INTENTIONALLY BLANK

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 3-4, 2013
Washington, D.C.

Draft Minutes as of September 12, 2013

TABLE OF CONTENTS

Attendance.....	1
Introductory Remarks and Recent Developments.....	3
Approval of Minutes of the Last Meeting.....	4
Reports of the Advisory Committees:	
Civil Rules.....	4
Evidence Rules.....	15
Criminal Rules.....	17
Appellate Rules.....	25
Bankruptcy Rules.....	26
Report of the Administrative Office.....	39
Next Committee Meeting.....	39

ATTENDANCE

The spring meeting of the Judicial Conference Committee on Rules of Practice and Procedure (“Standing Committee”) was held in Washington, D.C., on Monday and Tuesday, June 3 and 4, 2013. The following members were present:

Judge Jeffrey S. Sutton, Chair
Deputy Attorney General James M. Cole
Dean C. Colson, Esq.
Roy T. Englert, Jr., Esq.
Gregory G. Garre, Esq.
Judge Neil Gorsuch
Judge Marilyn L. Huff
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Larry D. Thompson, Esq.
Judge Richard C. Wesley
Judge Diane P. Wood
Judge Jack Zouhary

Also participating were Professor Geoffrey C. Hazard, Jr., and Professor R. Joseph Kimble, consultants to the Standing Committee; and Peter G. McCabe, Administrative Office Assistant Director for Judges Programs. In addition to the Deputy Attorney General, the Department of Justice was represented at various points by Stuart F. Delery, Esquire, Theodore J. Hirt, Esquire, Christopher Kohn, Esquire, Elizabeth J. Shapiro, Esquire, and Allison Stanton, Esquire. Judge Michael A. Chagares, Chair of the Inter-Committee CM/ECF Subcommittee, also participated.

Providing support to the Standing Committee were:

Professor Daniel R. Coquillette	The Standing Committee's Reporter
Jonathan C. Rose	The Standing Committee's Secretary and Chief, Rules Committee Support Office
Benjamin J. Robinson	Deputy Rules Officer and Counsel to the Rules Committees
Julie Wilson	Rules Office Attorney
Andrea L. Kuperman	Chief Counsel to the Rules Committees
Joe Cecil	Senior Research Associate, Research Division, Federal Judicial Center
Scott Myers	Attorney, Bankruptcy Division, AO
James Wannamaker	Attorney, Bankruptcy Division, AO
Bridget M. Healy	Attorney, Bankruptcy Division, AO

Representing the advisory committees were:

- Advisory Committee on Appellate Rules —
 - Judge Steven M. Colloton, Chair
 - Professor Catherine T. Struve, Reporter (by telephone)
- Advisory Committee on Bankruptcy Rules —
 - Judge Eugene R. Wedoff, Chair
 - Professor S. Elizabeth Gibson, Reporter
 - Professor Troy A. McKenzie, Associate Reporter
- Advisory Committee on Civil Rules —
 - Judge David G. Campbell, Chair
 - Judge Paul W. Grimm, Chair of Discovery Subcommittee (by telephone)
 - Judge John G. Koeltl, Chair of Duke Subcommittee (by telephone)
 - Professor Edward H. Cooper, Reporter
 - Professor Richard L. Marcus, Associate Reporter
- Advisory Committee on Criminal Rules —
 - Judge Reena Raggi, Chair
 - Professor Sara Sun Beale, Reporter
 - Professor Nancy King, Associate Reporter

Advisory Committee on Evidence Rules —
Chief Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Sutton opened the meeting by thanking the chairs, reporters, committee members and staff for their extraordinary work in preparation for this meeting with its heavy agenda.

He reported that in April 2013, the Supreme Court adopted without change and sent to Congress the package of fifteen proposed rule changes previously approved by the Judicial Conference at its September meeting. Rules and forms to be amended are listed below.

- Appellate Rules 13, 14, 24, 28, and 28.1, and Form 4
- Bankruptcy Rules 1007(b)(7), 4004(c)(1), 5009(b), 9006(d), 9013, and 9014
- Civil Rules 37 and 45
- Criminal Rule 11
- Evidence Rule 803(10)

In accordance with the provisions of Sections 2072 and 2075 of Title 28, United States Code, these amendments will take effect on December 1, 2013, if Congress does not enact legislation to reject, modify, or defer them. They will govern in proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

Judge Sutton also stated that the Standing Committee would try this year to advance the timing of its report to the Judicial Conference to have it available by the first week in July. After the Judicial Conference meeting in September, an equivalent effort will be made to have the package of amendments approved by the Conference available to the Supreme Court no later than early October. Under the old schedule, proposed rule changes typically did not arrive at the Court until mid- to late-December after approval by the Judicial Conference at its meeting in September.

This new process will enlarge the time available and increase scheduling flexibility for the Court to address the proposed rule changes while still adhering to the timelines mandated by the Rules Enabling Act.

Judge Sutton also reported that the Chief Justice had made appointments for all Rules Committee vacancies in May 2013 so that the new committee members could be notified in time to attend their respective committee meetings this fall. This represented a tremendous effort on the part of all responsible to expedite the appointment process. Judge Sutton expressed his thanks on behalf of all the Rules Committee chairs to Laura Minor, Judge Hogan, and the Chief Justice.

He further expressed his intention to invite retiring Standing Committee members Judges Huff and Wood to participate as panelists at the January meeting, when their exceptional contributions would be formally recognized.

APPROVAL OF MINUTES OF THE LAST MEETING

Action: The Standing Committee, by voice vote without objection, approved the minutes of its last meeting, held on January 3–4, 2013, in Cambridge, Massachusetts.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge David G. Campbell, assisted by the advisory committee's two reporters, Professor Edward H. Cooper and Professor Richard L. Marcus, presented the report of the Civil Rules Advisory Committee. The advisory committee sought approval to publish for public comment a number of proposed amendments.

ACTION ITEMS

A. Proposed Action: Publication of Revised Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37 (the Duke Conference rules package)

Judge Campbell first presented the advisory committee's recommendation for publication of a series of amendments aimed at improving the pretrial process of civil litigation, which are the product of a conference on civil litigation that the Civil Rules Committee hosted at Duke University School of Law in 2010. The proposed revisions recommended for publication include changes to Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37. These recommendations were little changed in their basic thrust from the proposals that were presented for discussion at the January 2013 meeting of the Standing Committee. However, a number of revisions were made both to the amendments and to the committee notes to address the concerns expressed at the January meeting.

Judge Campbell first explained how the proposed revised rules relate to the three major themes of the Duke Conference. He stressed the primary role of Judge Koeltl and his Duke Conference Subcommittee as well as the advisory committee's two reporters in the development of the package of proposed amendments. These amendments are designed to reduce the costs and delays of civil litigation and to promote the aim of the rules "to assure the just, speedy and inexpensive determination of every action and proceeding."

The three main themes repeatedly stressed at the Duke Conference were: (1) early and active judicial case management, (2) the necessity for proportionality in discovery, and (3) a duty of cooperation in the discovery process by counsel. The conclusion of the Duke Conference was that at present some or all of these elements are too often missing in civil litigation. The proposed rule changes address these three areas.

Case Management Proposals

The case management proposals reflect a perception that the early stages of litigation often take far too long. The most direct aim at early case management is reflected in proposed amendments to Rules 4(m) and 16(b). Another important proposal relaxes the Rule 26(d)(1) discovery moratorium to permit early delivery of Rule 34 requests to produce, but sets the time to respond after the first Rule 26(f) conference.

Rule 4(m): Time to Serve the Summons and Complaint: Rule 4(m) would be revised to shorten the time to serve the summons and complaint from 120 days to 60 days. As under the current rule, a judge would retain the ability to extend the time for service for good cause. The amendment responds to the commonly expressed view that four months to serve the summons and complaint is too long.

A concern raised by the Department of Justice about confusion over the applicability of Rule 4(m) to condemnation actions is addressed by amending the last sentence: “This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A).”

Rule 16(b)(2): Time for Scheduling Order: The proposed amendment to Rule 16(b)(2) would reduce the present requirements for issuing a scheduling order by 30 days to 90 days after any defendant is served or 60 days after any defendant appears. The addition of a new provision allows the judge to extend the time for a scheduling order on finding good cause for delay.

Rule 16(b): Actual Conference: Present Rule 16(b)(1)(B) authorizes issuance of a scheduling order after receiving the parties’ Rule 26(f) report or after consulting “at a scheduling conference **by telephone, mail, or other means.**” The proposed amendment would eliminate the bolded language. Judge Campbell explained that the advisory committee believes that in the absence of a Rule 26(f) report, an actual conference by simultaneous communication among the parties and court is a very valuable case management tool. A judge would retain the ability to issue a scheduling order based only on the Rule 26(f) report.

Rules 16(b)(3), 26(f): Additional Subjects: The proposals add preservation of electronically stored information (ESI) and agreements under Evidence Rule 502 on waiver of privilege or work product protection to the “permitted contents” of a scheduling order and to the Rule 26(f) discovery plan. A third proposal would add a new Rule 16(b)(3)(B)(v), permitting a scheduling order to “direct that before moving for an order relating to discovery the movant must request a conference with the court.” A number of courts now have local rules similar to this proposal. Experience has shown that an informal pre-motion conference with the court often resolves a discovery dispute.

Rule 26(d)(1): Early Rule 34 Requests: After considering a variety of proposals that

would allow discovery requests to be made before the parties' Rule 26(f) conference in order to enhance its focus and specificity, the advisory committee limited the proposed change to Rule 34 requests to produce by adding a new Rule 26(d)(2) that would permit the delivery of such requests before the scheduling conference.

A corresponding change would be made to Rule 34(b)(2)(A), setting the time to respond to a request delivered under Rule 26(d)(2) within 30 days after the parties' first Rule 26(f) conference. As Rule 34 requests frequently involve heavy discovery burdens, the advisory committee thought that early court consideration of such requests might be useful.

Proposals to Incorporate Proportionality

Several proposals seek to promote responsible use of discovery proportional to the needs of the case. Some important changes address the scope of discovery directly by amending Rule 26(b)(1) and by requiring clearer responses to Rule 34 requests to produce. Others tighten the presumptive limits on the number and duration of depositions and the number of interrogatories, and for the first time add a presumptive limit of 25 to the number of requests for admission other than those that relate to the genuineness of documents. Yet another proposed change explicitly recognizes the district court's existing authority to issue a protective order specifying an allocation of expenses incurred by discovery.

Rule 26(b)(1): Adopting Rule 26(b)(2)(C)(iii) Cost-Benefit Analysis: Given the widespread respect for balanced discovery principles embodied in Rule 26(b)(2)(C)(iii), the advisory committee proposed to transfer the analysis required by that rule to become a limit on the scope of discovery permitted by Rule 26(b)(1). Under the new proposed Rule 26(b)(1), "discovery must be proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."

A corresponding change is made by amending Rule 26(b)(2)(C)(iii) to cross-refer to (b)(1); thus, the court remains under a duty to limit the frequency or extent of discovery that exceeds these limits, on motion or on its own.

Other changes are also made in Rule 26(b)(1). Under the amended rule, all discovery is limited to "matter that is relevant to any party's claim or defense." The ability to extend discovery to "any matter relevant to the subject matter involved in the action" is eliminated. The parties' claims or defenses are those identified in the pleadings.

Rule 26(b)(1) also would be amended by revising the penultimate sentence: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Many cases continue to cite the "reasonably calculated" language as though it defines the scope of discovery, and judges often hear lawyers argue that this sentence sets a broad standard for appropriate discovery.

To eliminate this potential for improper expansion of the scope of discovery, this sentence would be revised to read: “Information within this scope of discovery need not be admissible in evidence to be discoverable.”

The proposed revision of Rule 26(b)(1) also omits its current specific reference to “the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.” Discovery of such matters is so deeply entrenched in practice that the current reference is superfluous.

Several discovery rules cross-refer to Rule 26(b)(2) as a reminder that it applies to all methods of discovery. Transferring the restrictions of Rule 26(b)(2)(C)(iii) to become part of subdivision (b)(1) makes it appropriate to revise the cross-references to include both (b)(1) and (b)(2).

Rule 26(c): Allocation of Expenses: Another proposal adds to Rule 26(c)(1)(B) an explicit recognition of the court’s authority to enter a protective order that allocates the expenses of discovery.

Rules 30, 31, 33, and 36: Presumptive Numerical Limits: Rules 30 and 31 establish a presumptive limit of 10 depositions by the plaintiffs, or by the defendants, or by third-party defendants. Rule 30(d)(1) establishes a presumptive time limit of one 7-hour day for a deposition by oral examination. Rule 33(a)(1) sets a presumptive limit of “no more than 25 written interrogatories, including all discrete subparts.” There are no presumptive numerical limits for Rule 34 requests to produce or for Rule 36 requests to admit. The proposals reduce the limits in Rules 30, 31, and 33. They add to Rule 36, for the first time, presumptive numerical limits.

The proposals would reduce the presumptive limit on the number of depositions from 10 to 5, and would reduce the presumptive duration to 1 day of 6 hours. Rules 30 and 31 continue to provide that the court must grant leave to take more depositions “to the extent consistent with Rule 26(b)(1) and (2).”

The presumptive number of Rule 33 interrogatories under the proposed amendment is reduced to 15. Rule 36 requests to admit under the proposed rule would have a presumptive limit of 25, but the rule would expressly exempt requests to admit the genuineness of documents. After due consideration, a proposal to limit Rule 34 requests to produce was rejected because of a concern that a limit might simply prompt blunderbuss requests.

Rule 34: Objections and Responses: Discovery burdens can be pushed out of proportion to the reasonable needs of a case by those asked to respond, not only those who make requests. The proposed amendments to Rule 34 address objections and actual production by adding several specific requirements.

Objections are addressed in two ways. First, Rule 34(b)(2)(B) would require that the grounds for objecting to a request be stated with specificity. Second, Rule 34(b)(2)(C) would require that an objection “state whether any responsive materials are being withheld on the basis of that objection.” This provision responds to the common complaint that Rule 34 responses often begin with a “laundry list” of objections, then produce volumes of materials, and finally conclude that the production is made subject to the objections. The requesting party is left uncertain whether anything actually has been withheld.

Actual production is addressed by new language in Rule 34(b)(2)(B) and a corresponding addition to Rule 37(a)(3)(B)(iv). Present Rule 34 recognizes a distinction between permitting inspection of documents, ESI, or tangible things, and actually producing copies. However, if a party elects to produce materials rather than permit inspection, the current rule does not indicate when such production is required to be made. The new provision would direct that a party electing to produce state that copies will be produced, and directs that production be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response. Rule 37 is further amended by adding authority to move for an order to compel production if “a party fails to produce documents.”

Enhancing Cooperation

Reasonable cooperation among adversaries is vitally important to successful use of the resources provided by the Civil Rules. Participants at the Duke Conference regularly pointed to the costs imposed by excessive adversarial behavior and wished for some rule that would enhance cooperation.

Proposed Addition to Rule 1: The advisory committee determined that proposals to mandate cooperation would be problematic. Instead, it settled on a more modest proposal – an addition to Rule 1. The parties are made to share responsibility along with the court for achieving the high aspirations expressed in Rule 1: “[T]hese rules should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”

Standing Committee Discussion of Proposed Duke Conference Amendments

Following the presentation of Judge Campbell and the advisory committee reporters, Judge Sutton, echoed by every other Standing Committee member who spoke, thanked them, Judge Koeltl, the members of the Duke Conference subcommittee and the full Civil Rules Advisory Committee for the countless hours of painstaking deliberation and work reflected in the careful crafting of these proposals. Professor Cooper then offered to entertain any questions from the Standing Committee concerning all elements of the Duke Conference amendments package.

One member expressed curiosity about the reasons for a small list of what he suspected were “unnecessary tweaks” in the current rules, which could distract those submitting comments and others from the truly significant and major positive changes to the civil litigation process made by other parts of the Duke Conference amendments package. He commented on his list of tweaks as follows.

He first expressed substantial skepticism as to the wisdom of changing the current text of Rule 1 to emphasize the duty of parties to cooperate. He thought little practical impact would be achieved. Rule 1 as written, he believed, has achieved a certain talismanic quality with the passage of time. Tinkering with its aspirational language seemed to him perilously close to the committee simply talking to itself.

As to the proposals’ attempt to limit discovery by refining the definition of its permissible scope, he found that unlikely to succeed. He recalled the various efforts to redefine the scope of discovery over the years first to broaden it, and then later to narrow it. The sequence reminded him of Karl Marx’s observations about history repeating itself first as tragedy and then as farce. He thought that the current proposal effectively brought us back to the most constricted definition of the permissible scope of discovery. In his view, all the various changes over time resulted in less practical impact on cases than any of their authors had expected. For the same reasons, he did not think this tweak of accepted discovery scripture would achieve very much, but did not oppose its publication.

Pursuing his list, he agreed with the change of the length of a deposition day from 7 hours to 6 if that had proven to be a more reasonable definition of a deposition day.

Concerning the proposed changes to Rule 16, he found the emphasis on face-to-face or simultaneous communication in a Rule 16 conference to be a distracting and almost counterproductive change. His practical experience as a judge in a far flung, heavy caseload district was that the achievement of simultaneous communication by a judge and opposing counsel was a “big deal, highly time-consuming, and unnecessary in very many cases.” He acknowledged that counsel for most parties would love to “shmooze” with the judge, but have no real need to do so. He predicted that the change would just lead to the widespread delegation of discovery issues to magistrate judges.

Judge Campbell responded to several of the foregoing points. First, he observed that there was broad consensus of his committee that increased cooperation by counsel on discovery matters would in fact be helpful. However, any attempt to make it mandatory in the rules would likely just enhance satellite litigation on the issue. The purpose of the Rule 1 change was to emphasize that the duty of cooperation applied to the parties and not solely to the judge. It would also give the Federal Judicial Center (“FJC”) a hook on which to hang their instruction to judges about cooperation as an element of best practices in case management.

There was an even broader consensus on the efficacy of simultaneous communication

in Rule 16(f) conferences as a case management tool. A spur to early case involvement by judges was widely thought to be central to speeding things up. Early exposure by the parties to the judge tends to eliminate a lot of collateral motion practice and frivolous delay. Once counsel get a sense of how a judge is likely to rule on a given topic, a lot of delay-causing tactics are simply never tried.

Judge Campbell said he has a 15- or 20-minute Rule 16 scheduling conference in every civil case. He also requires a joint telephone call before the filing of any written discovery motion. Professor Cooper added that there was initial committee sentiment to make a Rule 16 conference mandatory. However, after further examination and the expression of opinion by other judges, the advisory committee realized that in some cases the Rule 26(f) report shows that a Rule 16 conference really is not necessary.

Judge Sutton observed that all of these points were likely to provoke many comments upon publication. The initially skeptical member of the Standing Committee also conceded that he had misunderstood that a Rule 16 conference would simply be encouraged, but not mandatory under the proposed amendment. However, he stressed his thought that the advisory committee was doing a lot. For that very reason, it should want public comments only on the consequential and important changes. The proposed changes to Rule 1 and to the definition of the permissible scope of discovery did not, he thought, come close to the hurdle or threshold of importance for a rule change and thus presented a significant risk of merely distracting people from a focus on the important changes.

Another member praised the package, found no harm in publication of the proposed change to Rule 1, and found the text of the proposed Rule 16 clear enough that a Rule 16 conference was discretionary as opposed to mandatory. Judge Campbell stressed again that proposed Rule 16(b) makes clear that a Rule 26(f) report OR a Rule 16 conference meets the requirements of the proposed rules.

Another participant observed that the package added up to enshrining in the rules a series of practices that a judge may adopt, but doesn't have to. He thought a better approach to these discovery issues might well be an educational strategy implemented by the FJC as opposed to a strategy that relied on these permissive but not mandatory proposed changes in discovery rules.

The Department of Justice representative said that the Department shared virtually all of the concerns raised by the skeptics, but was doing its best to arrive at a timely position on the merits of the proposed changes. In the meantime, it supported publication of the proposed changes and thought the public comments would likely be illuminating and helpful. The representative observed that certain types of litigation by the Department, such as those relating to "pattern and practice," require full discovery, as well as initial time limits both long enough and sufficiently flexible for the government to get adequate discovery in some of its cases.

A final comment was that the package overall was an “amazing job.” This member observed that the committee note should include the rationale for cutting the number of depositions from 10 to 5 and questioned why the proposal contained no limit on requests for production. On the latter point, Judge Campbell responded that the advisory committee’s sentiment was that the most useful discovery tool in many cases was a set of targeted production requests under Rule 34. The advisory committee thought that a limit on them might simply provoke blunderbuss production requests. When pressed whether some limit on Rule 34 requests would not help, Judge Campbell replied that in his court he did set a presumptive limit of 25.

Judge Sutton expressed his own concerns about the proposed change to Rule 1. However, he thought it would be anomalous to subtract from publication the only proposed remedial change that addressed one of the three major prongs of concerns expressed at the Duke Conference – cooperation by counsel.

After Judge Campbell expressed agreement with those who thought that an FJC education effort was also important, Judge Sutton called for a vote on publication of the proposed amendments to the rules relating to discovery. Publication of the package of Duke Conference amendments received unanimous support from the Standing Committee with the exception of three members who dissented from the decision to publish the proposed change to Rule 1.

Action: The Standing Committee, by voice vote, approved publication of the proposed amendments to Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37, with three members objecting to the proposed amendment to Rule 1.

B. Proposed Action: Publication of Revised Rule 37(e)

The Duke Conference also addressed the need to focus on the issues of preservation requirements and sanctions with a particular emphasis on electronic discovery.

In January 2013, the Standing Committee preliminarily approved proposed amendments to Rule 37(e) for publication in August 2013, with the understanding that the advisory committee would present at the June 2013 meeting a revised proposal for publication that addressed concerns expressed in January.

The fundamental thrust of the proposal presented for publication remains as presented during the Standing Committee’s January 2103 meeting – to amend the rule to address the overly broad preservation many litigants and potential litigants believe they have to undertake to ensure they will not later face sanctions. The proposal grew out of the suggestion made by a panel at the 2010 Duke Conference that the advisory committee attempt to adopt rule amendments to address preservation and sanctions. The Discovery Subcommittee set to work on developing amendments soon thereafter. The advisory committee hosted a mini-conference in September 2011 to evaluate the various proposed

approaches the subcommittee had identified. From that point, the subcommittee refined the approach that was first presented to the Standing Committee in January 2013.

The proposed amendment focuses on sanctions rather than attempting directly to regulate the details of preservation. But it provides guidance for a court by recognizing that a party that adopts reasonable and proportionate preservation measures in anticipation of litigation should not be subject to sanctions. In addition, the amendment provides a uniform national standard for culpability findings to support the imposition of sanctions. Except in exceptional cases in which a party's actions irreparably deprive another party of any meaningful opportunity to present or defend against the claims in the litigation, sanctions may be imposed only on a finding that the party acted willfully or in bad faith and that the conduct caused substantial prejudice. The amendment rejects the view adopted in some cases, such as *Residential Funding Corp. v. DeGeorge Finan. Corp.*, 306 F.3d 99 (2d Cir. 2002), that permits sanctions for negligence in failing to meet preservation obligations.

Judge Campbell gave a short explanation of how the concerns expressed at the January 2013 meeting had been addressed by tweaks in the rule or note language, and also reviewed the five questions specifically posed in the request for public comment. Slight changes in the rule and note text were thought necessary to make clear that a court could order curative measures beyond merely orders to a party to remedy the failure to preserve discoverable information. Similarly, changing the rule text to focus on "the party's actions" rather than simply "the party's failure" would operate to prevent the imposition of sanctions in the absence of willfulness or bad faith only if "the party's actions" as opposed to an "act of God" deprived the opponent of a meaningful opportunity to litigate the case.

Significant efforts were made to refine the rule's attempt to preserve a line of cases that allow the imposition of sanctions in cases of failure to preserve, not involving bad faith or willfulness, where a party's actions "irreparably deprive a party of any meaningful opportunity to present or defend against claims in the litigation." To address a concern that this provision should not apply to the deprivation of opportunity to litigate a minor claim in the case, the advisory committee had tweaked the text and added language to the note that explains that the provision requires an impact on the overall case. The advisory committee also recognized the concern that this provision could swallow the rule's limits on sanctions, but continued to think it necessary to avoid overruling a substantial body of case law. It was thought that public comment would assist in pointing out the need for any additional revisions. Other concerns expressed in January about whether the proposed rule could be construed as relating to sanctions for attorney conduct or as displacing other laws relating to preservation requirements outside the discovery context were eliminated by appropriate revisions in the committee note.

Members of the advisory committee believed that the coverage of the proposed new Rule 37(e) was coextensive with that provided under the prior version and therefore elimination of the prior version was warranted.

The questions for public comment are:

1. Should the rule be limited to sanctions for electronically stored information?
2. Should Rule 37(e)(1)(B)(ii) be retained in the rule?
3. Should the provisions of the current Rule 37(e) be retained in the rule?
4. Should there be an additional definition of “substantial prejudice” under Rules 37(e)(1)(B)(i)? If so, what should be included in that definition?
5. Should there be an additional definition of willfulness or bad faith under Rule 37(e)(1)(B)(i)?

Standing Committee Discussion of Proposed Amendments to Rule 37(e)

There was a short committee discussion concerning Rule 37(e). It was observed that electronic discovery is rapidly becoming the most burdensome aspect of discovery and therefore may provoke the most comment.

Judge Campbell answered questions and elaborated on the proposal. He stressed that one major goal of the amendments to Rule 37(e) was to distinguish between the negligent and intentional loss of evidence. He also explained that an example of a critical evidentiary loss is the loss of the instrumentality causing injury before the defendant can examine it, and an example of a curative measure would be requiring the restoration of back-up tapes in the case of a loss of evidence.

A Standing Committee member expressed his disappointment that specific safe harbors were not a part of the amendments package. He said that the ability to preserve something that should have been discoverable in the context of a lawsuit was virtually impossible in a large organization. He thought that was particularly true with respect to the ever expanding social media. He asked if drafting some specific safe harbors, particularly for large organizations, should be attempted.

Judge Campbell replied that his committee has tried to address some of these concerns by strengthening the emphasis on the relevance requirements and by adding substantial prejudice as prerequisite to triggering sanctions for the loss or absence of evidence. The attempts at a “safe harbor” provision ran into a roadblock of serious dimensions. No one has any idea what ESI will look like 5-10 years from now.

Action: The Standing Committee, by voice vote without objection, approved publication of the proposed amendments to Rule 37(e), as revised after the January 2013 meeting.

C. Proposed Action: Publication of Proposals to Abrogate Rule 84, Amend Rule 4(d)(1)(D), and Retain Current Forms 4 and 5 as a Part of Rule 4

Judge Campbell presented the recommendation that the Standing Committee approve

the publication for comment of proposals that would abrogate Rule 84 and the Official Forms, and amend Rule 4(d)(1)(D) to incorporate present Forms 5 and 6 as official Rule 4 Forms.

A Rule 84 Subcommittee was formed to study Rule 84 and Rule 84 forms. The subcommittee found that these forms are used very infrequently and there is little indication that they often provide meaningful help to pro se litigants.

In addition, there is an increasing tension between the pleading forms in Rule 84 and emerging pleading standards. The pleading forms were adopted in 1938 as an important means of educating the bench and bar on the dramatic change in pleading standards effected by Rule 8(a)(2). They – and all the other forms – were elevated in 1948 from illustrations to a status that “suffice[s] under these rules.” The range of topics covered by the pleading forms omits many of the categories of actions that comprise the bulk of today’s federal docket. Indeed some of the forms are now inadequate, particularly the Form 18 complaint for patent infringement. Attempting to modernize the existing forms, and perhaps to create new forms to address such claims as those arising under the antitrust laws (*Twombly*) or implicating official immunity (*Iqbal*), would be a time-consuming undertaking. Such an undertaking might be warranted if in recent years the pleading forms had provided meaningful guidance to the bar in formulating complaints. However, the subcommittee’s work has suggested that few, if any, lawyers consult the forms when drafting complaints. They either use their own forms, or refer to other sources, such as forms drafted by the Administrative Office’s working group on forms.

Two forms require special consideration. Rule 4(d)(1)(D) requires that a request to waive service of process be made by Form 5. The Form 6 waiver of service of summons is not required, but is closely tied to Form 5. The advisory committee has concluded that the best course is to abrogate Rule 84, but preserve Forms 5 and 6 by amending Rule 4(d)(1)(D) to incorporate them recast as Rule 4 Forms attached directly to Rule 4.

*Standing Committee Discussion of Proposed Abrogation of
Rule 84 and Amendment to Rule 4*

The Standing Committee’s discussion was short. The current Rule 84 forms have become an obsolete appendage. The discussion of pleading standards in *Twombly* and *Iqbal* cases is simply illustrative of the many potential difficulties generated by the presence of obsolete forms in the Civil Rules. One member thought those cases should be specifically mentioned in any advisory committee note discussing the abrogation of Rule 84 and its forms. However, the prevailing view of other members and the reporters was that the Standing Committee should adhere to its practice of not taking a position on particular cases.

A final observation was that unless the Civil Rules Advisory Committee was prepared to undertake a thorough review of all of the civil forms, they should be abolished. It was further observed that the AO forms committee was a more than satisfactory substitute.

Action: The Standing Committee, by voice vote without objection, approved publication of the proposed amendments to Rules 84 and 4.

INFORMATION ITEMS

Judge Campbell agreed with Judge Sutton that the items contained in the information section of the Civil Rules Advisory Committee's report could be read rather than reviewed at this meeting.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Chief Judge Sidney A. Fitzwater, assisted by the advisory committee's reporter, Professor Daniel J. Capra, presented the report of the Evidence Rules Committee. The advisory committee sought final Standing Committee approval and transmittal to the Judicial Conference of the United States of four proposals: (1) an amendment to Rule 801(d)(1)(B) – the hearsay exemption for certain prior consistent statements – to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility; and (2) amendments to Rules 803(6)-(8) – the hearsay exceptions for business records, absence of business records, and public records – to eliminate an ambiguity uncovered during the restyling project and to clarify that the opponent has the burden of showing that the proffered record is untrustworthy.

ACTION ITEMS

A. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rule 801(d)(1)(B)

The advisory committee proposed that Rule 801(d)(1)(B) be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The amendment is intended to eliminate confusing jury instructions on the permissible use of prior consistent statements. Judge Fitzwater emphasized that this amendment would preserve the rule of *Tome v. United States*, 513 U.S. 150 (1995). Under that case, a prior consistent statement is not hearsay only if it was made prior to the time when the motive to fabricate arose.

A member of the Standing Committee observed that if a witness was in court and available to be cross-examined, there seemed little reason to exclude prior consistent statements on any basis. The advisory committee's reporter observed that this current amendment represented a small step in that direction.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rule 801(d)(1)(B) for transmission to the Judicial Conference for its approval.

B. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 803(6)-(8) (Hearsay Exceptions for Business Records, Absence of Business Records, and Public Records) – Burden of Proof As To Trustworthiness

The advisory committee proposed that Rules 803(6)-(8) be amended to address an ambiguity uncovered during restyling, but left unaddressed. Subsequent restyling efforts in Texas revealed the ambiguity could be misinterpreted as placing the burden of proof on a proponent of a proffered record to show that it was trustworthy.

The proposed amendments clarify that the *opponent* has the burden of showing that the proffered record is untrustworthy. The reasons espoused by the advisory committee for the amendments are: first, to resolve a conflict in the case law by providing uniform rules; second, to clarify a possible ambiguity in the rules as originally adopted and as restyled; and third, to provide a result that makes the most sense, as imposing a burden of proving trustworthiness on the proponent is unjustified given that the proponent must establish that all the other admissibility requirements of these rules are met – requirements that tend to guarantee trustworthiness in the first place.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 803(6)-(8) for transmission to the Judicial Conference for its approval.

INFORMATION ITEMS

Judge Fitzwater noted as an informational matter that the Evidence Rules Advisory Committee had received a suggestion from a judge in the 9th Circuit to consider an amendment to Rule 902 to include federally recognized Indian tribes on the list of public entities that issue self-authenticating documents. The advisory committee decided not to pursue consideration of such a rule without further guidance from the Standing Committee. It believed that other rules might well impact Indian tribes. Judge Campbell noted that this spring the 9th Circuit had reversed a case of his involving the admission of a tribal document verifying membership in a tribe on the very ground that federally recognized tribes were not included in the Rule 902 list of public entities that can issue self-authenticating documents. Judge Sutton noted that the Appellate Rules Advisory Committee had previously dealt with the ability of Indian tribes to file amicus briefs by deciding to wait for a reasonable period to see if the 9th Circuit adopted a local rule allowing the filing of such briefs. He noted that this particular issue appeared to be one involving considerations of tribal “dignity” – perhaps an inherently more political area where the Rules Committees should move with caution. However, he placed the practical concerns raised in a case like Judge Campbell’s involving self-authentication of tribal documents in a different category. There he believed that some action by the Evidence Rules Advisory Committee might be warranted.

Finally, Judge Fitzwater reminded the Standing Committee of the symposium scheduled at the University of Maine School of Law in Portland this October, which will address the intersection of the Rules of Evidence and emerging technologies. This symposium will present an opportunity to discuss the alternatives to validate electronic signatures currently presented in the proposed amendments to the Bankruptcy Rules.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Reena Raggi, assisted by the advisory committee's two reporters, Professor Sara Sun Beale and Professor Nancy King, presented the report of the Criminal Rules Advisory Committee. In summary, this report presented three items for action by the Standing Committee:

1. Approval to transmit to the Judicial Conference a proposed amendment to Rule 12 (pretrial motions), and a conforming amendment to Rule 34;
2. Approval to transmit to the Judicial Conference proposed amendments to Rules 5 and 58 (adding consular notification); and
3. Approval to transmit to the Judicial Conference a technical and conforming amendment to Rule 6 (the Grand Jury).

These recommendations were reviewed at the Standing Committee meeting as follows.

ACTION ITEMS

A. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 12 (Pretrial Motions) and 34

These proposed amendments have their origin in a 2006 request from the Department of Justice that "failure to state an offense" be deleted from current Rule 12(b)(3) as a defect that can be raised "at any time," in light of the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625, 629-31 (2002) (holding that "failure to state an offense" is not a jurisdictional defect).

The advisory committee's efforts to craft such an amendment have sparked extensive and protracted discussions over time within the advisory committee and between the advisory committee and the Standing Committee regarding various aspects of Rule 12. This interplay has resulted in three separate amendment proposals being presented to the Standing Committee, the third of which was approved for publication in August 2011. In response to the thoughtful public comments received and on its own further review, the advisory committee further revised its third proposal for amendment to Rule 12, but did not believe the revisions require republication. The submitted proposals had the unanimous approval

of the advisory committee.

The substantive features of the proposed amendment to Rule 12 (which also restyles this rule) can be summarized as follows:

(1) By contrast to current Rule 12(b)(1), which now starts with an unexplained cross-reference to Rule 47 (discussing the form, content, and timing of motions), the proposed revised Rule 12(b)(1) would achieve greater clarity by stating the rule’s general purpose – to address the filing of pretrial motions (relocated from current Rule 12(b)) – before cross-referencing Rule 47.

(2) Proposed Rule 12(b)(2) identifies motions that may be made at any time separately from Rule 12(b)(3), which identifies motions that must be made before trial. This provides greater clarity – visually as well as textually. The current Rule 12(b)(3) identifies motions that may be made at any time only in an ellipsis exception to otherwise mandatory motions alleging defects in the indictment or information.

(3) Proposed Rule 12(b)(2) recognizes lack of jurisdiction as the only motion that may be made “at any time while the case is pending,” thus implementing the Justice Department’s request not to accord that status to a motion raising the failure to state an offense.

(4) Proposed Rule 12(b)(3) provides clearer notice with respect to motions that must be made before trial.

(a) At the start, it clarifies that its motion mandate is dependent on two conditions:

- i. the basis for the motion must be reasonably available before trial, and
- ii. the motion must be capable of resolution before trial.

This ensures that motions are raised pretrial when warranted while safeguarding against a rigid filing requirement that could be unfair to defendants.

(b) Proposed Rule 12(b)(3)(A)-(B) provides more specific notice of the motions that must be filed pretrial if the just-referenced twin conditions are satisfied. While the general categories of “defect[s] in instituting the prosecution” (current Rule 12(b)(3)(A)) and “defect[s] in the indictment or information (current Rule 12(b)(3)(B)) are retained, they are now clarified with illustrative non-exhaustive lists.

Proposed Rule 12(b)(3)(A) thus lists as defects in instituting the prosecution that must be raised before trial:

- i. improper venue,
- ii. preindictment delay,
- iii. violation of the constitutional right to a speedy trial,
- iv. selective or vindictive prosecution, and
- v. error in grand jury or preliminary hearing proceedings.

Proposed Rule 12(b)(3)(B) lists as defects in the indictment or information that must be raised before trial:

- i. duplicity,
- ii. multiplicity,
- iii. lack of specificity,
- iv. improper joinder, and
- v. failure to state an offense.

The inclusion of failure to state an offense in Rule 12(b)(3)(B) accomplishes the amendment originally sought by the Department of Justice.

The proposed rule does not include double jeopardy or statute of limitations challenges among required pretrial motions in light of concerns raised in public comments. The advisory committee believes that subjecting such motions to a rule mandate is premature, requiring further consideration as to the appropriate treatment of untimely filings.

(5) Proposed Rule 12(b)(3)(C)-(E) duplicates the current rule in continuing to require that motions to suppress evidence, to sever charges or defendants, and to seek Rule 16 discovery must be made before trial.

(6) Proposed Rule 12(c) identifies both the deadlines for filing motions and the consequences of missing those deadlines. Grouping these two subjects together in one section is a visual improvement over the current rule, which discusses deadlines in (c) and consequences in later provision (e). More specifically,

- (a) Proposed Rule 12(c)(1) tracks the current rule's language in recognizing the discretion afforded district courts to set motion deadlines. Nevertheless, it now adds a default deadline – the start of trial – if the district court fails to set a motion deadline. This affords defendants the maximum time to make mandatory pretrial motions, but it forecloses an argument that, because the district court did not set a motion deadline, a defendant need not comply with the rule's mandate to file certain motions before trial.
- (b) Proposed Rule 12(c)(2) explicitly acknowledges district court discretion to extend or reset motion deadlines at any time before trial. This discretion, which is implicit in the current rule, permits district

courts to entertain late-filed motions at any time before jeopardy attaches as warranted. It also allows district courts to avoid subsequent claims that defense counsel was constitutionally ineffective for failing to meet a filing deadline.

- (c) Proposed Rule 12(c)(3)(A) retains current Rule 12(e)'s standard of "good cause" for review of untimely motions (with the exception of failure to state an offense discussed separately in submitted Rule 12(c)(3)(B)). At the same time, the submitted rule does not employ the word "waiver" as in the current rule because that term, in other contexts, is understood to mean a knowing and affirmative surrender of rights.

With respect to "good cause," the proposed committee note indicates that courts have generally construed those words, as used in current Rule 12(e), to require a showing of both cause and prejudice before an untimely claim may be considered. The published proposed amendment substituted cause and prejudice for good cause, hoping to achieve greater clarity, but after reviewing public comments and further considering the issue, the advisory committee decided to retain the term "good cause," to avoid both any suggestion of a change from the current standard and arguments based on some constructions of "cause and prejudice" in other contexts, notably, the miscarriage of justice exception to this standard in habeas corpus jurisprudence.

The amended rule, like the current one, continues to make no reference to Rule 52 (providing for plain error review of defaulted claims), thereby permitting the courts of appeals to decide if and how to apply Rules 12 and 52 when arguments that should have been the subject of required Rule 12(b)(3) motions are raised for the first time on appeal.

- (d) Insofar as the submitted amendment, at Rule 12(b)(3)(B), would now require a defendant to raise a claim of failure to state an offense before trial, the proposed Rule 12(c)(3)(B) provides that the standard of review when such a claim is untimely is not "good cause" (*i.e.*, cause and prejudice) but simply "prejudice." The advisory committee thought that this standard provides a sufficient incentive for a defendant to raise such a claim before trial, while also recognizing the fundamental nature of this particular claim and closely approximating current law, which permits review without a showing of "cause."

The committee note to accompany the proposed amendment to Rule 12 has been revised to make clear that the amendment is not intended to disturb the existing broad discretion of the trial judge to set, reset, or decline to reset deadlines for pretrial motions.

A conforming amendment to Rule 34 that omits language requiring a court to arrest judgment if “the indictment or information does not charge an offense” is also presented for publication.

Standing Committee Discussion of Proposed Amendments to Rule 12

Judge Raggi noted that the default deadline for filing the mandatory pretrial motions specified by Rule 12 would be at the start of trial when the jury is empaneled and jeopardy attaches when the jury is sworn.

Deputy Attorney General James Cole acknowledged that the Department of Justice originally prompted a review of this rule. He expressed the Department’s gratitude to the Criminal Rules Advisory Committee and the Standing Committee for their years of hard work. He thought this proposed amendment would provide greater clarity regarding mandatory pretrial motions and therefore strongly supported it.

Another member wondered whether any defendant realistically would ever have “prejudice” resulting in the grant of relief after failing to file a mandatory pretrial motion. He discounted speculation that defense attorneys might try to “game” the system by failing to raise a defective indictment (*e.g.*, missing an element of the crime) until after jeopardy had attached. He pointed out that the attorney would risk the defect being noticed by the judge, and it could be cured by a proper instruction to the jury. Another member responded that a “prejudice” issue would likely arise on a post-trial motion only after jeopardy had attached and a defendant had been convicted. He predicted that district and appellate courts might arrive at differing conclusions on what amounted to “prejudice” in the context of a new Rule 12.

A final concern was raised about how information protected by grand jury secrecy under Rule 6(e) might be raised in the context of a Rule 12 motion and how such information would relate to the mandatory filing and prejudice issues. The response of the reporters was that such information would be governed by the “reasonably available” standard of the rule. If such information was not “reasonably available” pretrial and was sufficiently important to the motion, a court would have discretion to hear the motion at issue at a later time.

Judge Raggi asked that former advisory committee chair Judge Richard Tallman and current subcommittee chair Judge Morrison England be commended for their enormously important contributions to producing this final version of a proposed comprehensive amendment to Rule 12. Judge Sutton added his personal inclusion of Judge Raggi and Professors Sara Sun Beale and Nancy King to the list of those whom the Standing Committee should commend for their outstanding efforts. The members of the Standing

Committee unanimously agreed.

Finally, Judge Sutton expressed his personal thanks to the chairs and members of the Criminal Rules Advisory Committee, whose efforts over the years had culminated in such a worthwhile compromise resolving the major prior difficulties and stumbling blocks to amending the rule.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 12 and 34 for transmission to the Judicial Conference for its approval.

B. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 5 and 58 (Consular Notification)

The advisory committee also recommended approval of its second proposal to amend Rules 5 and 58 to provide for advice concerning consular notification, as amended following publication.

In 2010, the Justice Department, at the urging of the State Department, proposed amendments to Rules 5 and 58, the rules specifying procedures for initial proceedings in felony and misdemeanor cases respectively, to provide notice to defendants of consular notification obligations arising under Article 36 of the multilateral Vienna Convention on Consular Relations (“Vienna Convention”), as well as various bilateral treaties.

The first proposed amendments responding to this request were published for public comment and subsequently approved by the advisory committee, the Standing Committee, and the Judicial Conference. In April 2012, however, the Supreme Court returned the amendments to the advisory committee for further consideration.

At its April 2012 meeting, the advisory committee identified two possible concerns with the returned proposal: (1) perceived intrusion on executive discretion in conducting foreign affairs, both generally and specifically as it pertains to deciding how, or even if, to carry out treaty obligations; and (2) perceived conferral on persons other than the sovereign signatories to treaties – specifically, criminal defendants – of rights to demand compliance with treaty provisions.¹

¹ Insofar as Article 36 of the Vienna Convention provides for signatory nations to advise detained foreign nationals of other signatory nations of an opportunity to contact their home country’s consulate, litigation has not yet resolved whether such a provision gives rise to any individual rights or remedies. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) (holding that suppression of evidence was not appropriate remedy for failure to advise foreign national of ability to have consulate notified of arrest and detention regardless of whether Vienna Convention conferred any individual rights). Thus, the advisory committee concluded that the remand of the amendment proposal from the Supreme Court could be understood to suggest that the rule may have gotten ahead of settled law on this matter.

The amendments were redrafted to respond to these concerns. The redrafted amendments were carefully worded to provide notice without any attending suggestion of individual rights or remedies. Indeed, the committee note emphasizes that the proposed rules do not themselves create any such rights or remedies. The Standing Committee approved publication of the redrafted amendments in June 2012.

Upon review of received public comments, as well as its own further consideration, the advisory committee made the following changes to the proposed amendments, none of which requires further publication.

The introductory phrase of submitted Rules 5(d)(1) and 58(b)(2) now provides for the specified advice to be given to all defendants, in contrast to the published rule, which had provided for consular notification to be given “if the defendant is held in custody and is not a United States citizen.”

The change was made to avoid any implication that the arraigning judicial officer was required to ascertain a defendant’s citizenship, an inquiry that could involve self-incrimination. Providing consular notice to all defendants without such an inquiry parallels Rule 11(b)(1)(O) (which the Supreme Court has now transmitted to Congress), which provides for all defendants to be given notice at the plea proceeding of possible immigration consequences without specific inquiry into their nationality or status in the United States.

As for the “in custody” requirement, interested parties disagreed as to when a defendant was “in custody” or “detained.” Providing notice to all defendants at their initial appearance not only avoids the need to resolve this question, it avoids the need to consider a further notice requirement when defendants initially admitted to bail are subsequently remanded. Thus, while the advisory committee is mindful of the need to avoid adding unnecessary notice requirements to rules governing initial appearances, sentences, etc., it concluded, as now stated in the proposed committee note, that “the most effective and efficient method of conveying this [consular notification] information is to provide it to every defendant, without attempting to determine the defendant’s citizenship.”

Standing Committee Discussion of the Proposed Amendments to Rules 5 and 58

Deputy Attorney General Cole again commended Judge Raggi and her committee for its excellent work in assisting to conform the Criminal Rules with the treaty obligations of the United States.

Another member inquired whether judges would simply read the materials specified in the rule as an advisory notice to the defendant or whether the judge’s reading of the notice was intended to provoke a response from the defendant. There was unanimous agreement with the position of the advisory committee that all the amended rule proposals sought to accomplish was simply to give the notification required by the treaty to the defendant of a foreign nation.

Deputy Attorney General Cole observed that treaty violations occur mostly in state court. The amended Rules 5 and 58 thus provide a good model for the states. Professor Beale observed that 47 percent of defendants in the federal courts are not U.S. citizens. This rule provides the basis for the court to make a good record of the notification it has provided.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 5 and 58, as amended following publication, for transmission to the Judicial Conference for its approval.

C. Proposed Action: Transmission to the Judicial Conference of Proposed Technical and Conforming Amendment to Rule 6 (The Grand Jury)

The Office of the Law Revision Counsel informed the Administrative Office of a reorganization of chapter 15 of Title 50 of the United States Code. This revision has made incorrect a current statutory reference in Rule 6(e)(3)(D) to the code section defining counter-intelligence. The proposed amendment would simply substitute a reference to the correct section of Title 50 for the current one that is now obsolete.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendment to Rule 6 for transmission to the Judicial Conference for its approval.

INFORMATION ITEM

The Department of Justice has urged amendment of Criminal Rule 4 to facilitate service of process on foreign corporations. It submits that the current rule impedes prosecution of foreign corporations that have committed offenses punishable in the United States, but that cannot be served for lack of a last known address or principal place of business in the United States. It argues that this has created a “growing class of organizations, particularly foreign corporations” that have gained “an undue advantage” over the government relating to the initiation of criminal proceedings. The advisory committee has referred the matter to a subcommittee for further study and report.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Steven M. Colloton, assisted by the advisory committee’s reporter, Professor Catherine T. Struve (by telephone), presented the report of the Appellate Rules Advisory Committee. In conjunction with the Bankruptcy Rules Advisory Committee’s proposal to amend Part VIII of the Bankruptcy Rules – the rules that govern appeals from bankruptcy court to a district court or bankruptcy appellate panel (“BAP”) – the Appellate Rules Advisory Committee sought final approval of a proposed amendment to Appellate Rule 6 (concerning appeals to the court of appeals in a bankruptcy case).

ACTION ITEM

A. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Appellate Rule 6

The proposed amendment to Appellate Rule 6 would: (1) update that rule's cross-references to the Bankruptcy Part VIII Rules, (2) amend Rule 6(b)(2)(A)(ii) to remove an ambiguity dating from the 1998 restyling, (3) add a new Rule 6(c) to address permissive direct appeals from the bankruptcy court under 28 U.S.C. § 158(d)(2), and (4) revise Rule 6 to take account of the range of methods available now or in the future for dealing with the record on appeal.

Proposed Appellate Rule 6(c) would treat the record on direct appeals differently than existing Rule 6(b) treats the record on bankruptcy appeals from a district court or BAP. Rule 6(b) contains a streamlined procedure for redesignating and forwarding the record on appeal, because in the appeals covered by Rule 6(b), the appellate record already will have been compiled for purposes of the appeal to the district court or the BAP. In a direct appeal, the record generally will be compiled from scratch. The closest model for the compilation and transmission of the bankruptcy court record is the set of rules chosen by the Bankruptcy Rules Part VIII project for appeals from the bankruptcy court to the district court or the BAP. Thus, proposed Rule 6(c) incorporates the relevant Part VIII rules by reference while making some adjustments to account for the particularities of direct appeals to the court of appeals.

Both the Bankruptcy Rules Part VIII project and the project to revise Appellate Rule 6 have highlighted changes in the treatment of the record. The Appellate Rules were drafted on the assumption that the record on appeal would be available only in paper form. The proposed Part VIII Rules are drafted with a contrary presumption in mind: the default principle under those rules is that the record will be made available in electronic form. In revising Rule 6(b) and in drafting new Rule 6(c), the Appellate Rules Committee adopted language that can accommodate the various ways in which the lower-court record could be made available to the court of appeals – *e.g.*, in paper form, in electronic files that can be sent to the court of appeals, or by means of electronic links.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Appellate Rule 6 for transmission to the Judicial Conference for its approval.

INFORMATION ITEMS

Two other matters were briefly discussed during Judge Colloton's presentation. First, a Standing Committee member inquired whether the conversion of page limits to word limits in appellate briefs may not have resulted in the filing of longer appellate briefs. Judge Colloton said a review of the matter would be part of the advisory committee's broader review of other page limits for appellate filings.

Another Standing Committee member prompted a general discussion of whether

appellate courts are sufficiently responsive to the need for swift adjudication of proceedings under the Hague Convention on the Civil Aspects of International Child Abduction. While appellate consideration of stay applications is usually prompt, decisions on the merits can sometimes be delayed. The discussion resulted in a preliminary suggestion that a letter from the advisory committee chair to chief judges of the circuits might be appropriate to remind them of the Supreme Court's concern about expediting these cases as expressed in the opinions in *Chafin v. Chafin*, 133 S. Ct. 1017 (2013). Judge Colloton agreed to discuss the matter with Judge Sutton, bearing in mind that letters to chief judges from the committees should be employed sparingly if they are to have the desired effect.

Other members of the Standing Committee were of the view that despite the traditional reluctance of the rules committees to endorse provisions that require the expediting of specific classes of cases, stronger measures than mere exhortation may be required.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Eugene Wedoff, assisted by the advisory committee's two reporters, Professor Elizabeth Gibson and Professor Troy McKenzie, presented the report of the Bankruptcy Rules Advisory Committee. The advisory committee sought the Standing Committee's final approval and transmission to the Judicial Conference of most of the previously published items: the revision of the Part VIII Rules and amendments to 10 other rules and 5 official forms. Because the advisory committee made significant changes after publication to one set of published forms – the means test forms – it requested that those forms be republished.

The advisory committee also requested publication for public comment of (1) the remaining group of modernized forms for use in individual-debtor bankruptcy cases, and (2) a chapter 13 plan form and implementing rule amendments.

ACTION ITEMS

In brief, the actions sought from the Standing Committee by Judge Wedoff and his committee were as follows.

1. Approval for transmission to the Judicial Conference of amendments to Rules 1014, 7004, 7008, 7012, 7016, 7054, 8001-8028, 9023, 9024, 9027, and 9033, and Official Forms 3A, 3B, 6I, and 6J;
2. Approval for transmission to the Judicial Conference without publication of a conforming amendment to Official Form 23;
3. Approval for republication in August 2013 of amendments to the means test forms – Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2 – along with the initial publication of Official Form 22A-1Supp; and

4. Approval for publication in August 2013 of amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5005, 5009, 7001, 9006, and 9009, and Official Forms 101, 101A, 101B, 104, 105, 106Sum, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec, 107, 112, 113, 119, 121, 318, 423, 427, 17A, 17B, and 17C.

Judge Wedoff first discussed the rules recommended for transmission to the Judicial Conference and the forms sought to be approved by the Judicial Conference with an effective date of December 1, 2013.

A. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 7008, 7012, 7016, 9027, and 9033

Amendments to Rules 7008, 7012, 7016, 9027, and 9033 are proposed in response to *Stern v. Marshall*, 131 S. Ct. 2594 (2011). The Bankruptcy Rules follow the Judicial Code's division between core and non-core proceedings. The current rules contemplate that a bankruptcy judge's adjudicatory authority is more limited in non-core proceedings than in core proceedings. For example, parties are required to state whether they do or do not consent to final adjudication by the bankruptcy judge in non-core proceedings. There is no comparable requirement for core proceedings. *Stern*, which held that a bankruptcy judge did not have authority under Article III of the Constitution to enter final judgment in a proceeding deemed core under the Judicial Code, has introduced the possibility that such a proceeding may nevertheless lie beyond the power of a bankruptcy judge to adjudicate finally. In other words, a proceeding could be "core" as a statutory matter but "non-core" as a constitutional matter.

The proposals would amend the Bankruptcy Rules in three respects. First, the terms "core" and "non-core" would be removed from Rules 7008, 7012, 9027, and 9033 to avoid possible confusion in light of *Stern*. Second, parties in all bankruptcy proceedings (including removed actions) would be required to state whether they do or do not consent to entry of final orders or judgment by the bankruptcy judge. Third, Rule 7016, which governs pretrial procedures, would be amended to direct bankruptcy courts to decide the proper treatment of proceedings.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 7008, 7012, 7016, 9027, and 9033 for transmission to the Judicial Conference for its approval.

B. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 8001-8028 (Part VIII of the Bankruptcy Rules)

On Tuesday morning, June 4, 2013, the Standing Committee meeting opened with a presentation by Professor Elizabeth Gibson of the comprehensive set of amendments to Part VIII of the bankruptcy appellate rules. These amendments are designed with the goal of making the bankruptcy appellate rules consistent with the Federal Rules of Appellate Procedure. Professor Gibson observed that this project of conforming and restyling the bankruptcy appellate rules, which is now finally approaching conclusion, has been a lengthy

one – ongoing since she first became a reporter to the Bankruptcy Rules Advisory Committee.

In summary, she noted that the proposed amendments to Rules 8001-8028 (Part VIII of the Bankruptcy Rules) constitute a comprehensive revision of the rules governing bankruptcy appeals to district courts, bankruptcy appellate panels, and with respect to some procedures, courts of appeals. This multi-year project attempted to bring the bankruptcy appellate rules into closer alignment with the Federal Rules of Appellate Procedure; to incorporate a presumption favoring the electronic transmission, filing, and service of court documents; and to adopt a clearer style. Existing rules have been reorganized and renumbered, some rules have been combined, and provisions of other rules have been moved to new locations. Much of the language of the existing rules has been restyled.

In general, the public comments reflected a positive response to the proposed revision of the Part VIII rules. Thus, the advisory committee unanimously voted to recommend them for final approval to the Standing Committee with the post-publication changes listed by Professor Gibson as follows:

Rule 8003. Several comments pointed out that the provision in subdivision (d) directing the clerk of the appellate court to docket an appeal “under the title of the bankruptcy court action” is unclear since “action” might refer to the overall bankruptcy case or to an adversary proceeding within the case. The advisory committee agreed that this was an instance in which the Appellate Rules’ language needs to be modified for the bankruptcy context. It voted to change the wording in Rule 8003(d)(2) and the parallel provision in Rule 8004(c)(2) to “under the title of the bankruptcy case and the title of any adversary proceeding.”

Rule 8004. The clerk of a BAP commented on Rule 8004(c)(3), which directed the dismissal of an appeal if leave to appeal is denied. She stated that appellants sometimes file a motion for leave to appeal when leave is not required and in that situation, although the motion is denied, dismissal is not appropriate. The advisory committee voted to delete the sentence in question, which is not contained in either the current bankruptcy rule or the appellate rule from which the proposed rule is derived.

Rule 8005. Several comments questioned whether an election to have an appeal heard by the district court, rather than the BAP, must still be made by a statement in a separate document. At the spring meeting, the advisory committee approved for publication an amendment to the notice of appeal form, Official Form 17A, that will include a section for making an election under this rule. That form, which if approved will take effect on the same date as the rule, will clarify that the separate-document rule no longer applies.

The advisory committee agreed with one of the comments it received, which recommended that the BAP clerk notify the bankruptcy clerk if an appeal is transferred to the district court, and it voted to add a sentence to that effect in subdivision (b).

Rule 8007. The advisory committee agreed that the rule should be clarified to

eliminate the possibility of filing a motion for a stay in the appellate court prior to the filing of a notice of appeal.

Rule 8013. One comment suggested that district courts be allowed to require a notice of motion in bankruptcy appeals if they otherwise follow that practice in their court. Another comment made a similar suggestion concerning proposed orders. The advisory committee agreed with these comments and added “Unless the court orders otherwise” to subdivision (a)(2)(D)(ii).

Rule 8016. Two comments raised questions about subdivision (f), which addressed the consequences of failing to file a brief on time. It was unclear why the provision was located in the rule governing cross-appeals, and it seemed to be inconsistent with a provision in Rule 8018. The advisory committee thought that the comments were well taken, and it voted to delete the subdivision.

Rule 8018. The advisory committee voted to reword the provision to clarify that dismissal of an appeal or cross-appeal can occur only upon motion of a party or on the court’s own motion, after which the appellant would have an opportunity to respond.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 8001-8028 (Part VIII of the Bankruptcy Rules) for transmission to the Judicial Conference for its approval.

C. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rule 1014(b)

Rule 1014(b) governs the procedure for determining where cases will proceed if petitions are filed in different districts by, against, or regarding the same debtor or related debtors. The rule currently provides that, upon motion, the court in which the first-filed petition is pending may determine – in the interest of justice or for the convenience of the parties – the district or districts in which the cases will proceed. Except as otherwise ordered by that court, proceedings in the cases in the other districts “shall be stayed by the courts in which they have been filed” until the first court makes its determination.

The proposed amendment both clarifies and narrows the scope of the stay provision. The current rule applies a blanket rule that all the later-filed cases are stayed while the first court makes the venue determination. The amended rule would limit the stay to situations in which the first court finds that the rule in fact applies and that a stay is needed.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendment to Rule 1014(b) for transmission to the Judicial Conference for its approval.

D. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 7004(e)

Rule 7004(e) governs the time during which a summons is valid after its issuance in an adversary proceeding. The current rule provides that a summons is valid so long as it is served within 14 days of its issuance. The advisory committee sought final approval of an amendment to reduce that period from 14 days to 7 days.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendment to Rules 7004(e), with a minor technical revision, for transmission to the Judicial Conference for its approval.

E. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 7008 and 7054

Rules 7008(b) and 7054 would be amended to change the procedure for seeking attorney's fees in bankruptcy proceedings. The advisory committee proposed the amendments in order to clarify and to promote uniformity in the procedures for seeking an award of attorney's fees. Rule 7054 would be amended to include much of the substance of Civil Rule 54(d)(2). Rule 7008(b), which currently addresses attorney's fees, would be deleted. Just as the procedure for seeking attorney's fees in civil actions is governed exclusively by Civil Rule 54(d), Bankruptcy Rule 7054 would provide the exclusive procedure for seeking an award of attorney's fees in bankruptcy cases, unless the governing substantive law requires the fees to be proved at trial as an element of damages.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 7008 and 7054 for transmission to the Judicial Conference for its approval.

F. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 9023 and 9024

Rule 9023, which governs new trials and amendment of judgments, and Rule 9024, which governs relief from judgments or orders, would be amended to include a cross-reference to proposed Rule 8008, which governs indicative rulings. The advisory committee proposed these amendments in order to call attention at an appropriate place in the rules to that new bankruptcy appellate rule. Rule 8008 prescribes procedures for both the bankruptcy court and the appellate court when an indicative ruling is sought. It therefore incorporates provisions of both Civil Rule 62.1 and Appellate Rule 12.1. Because a litigant filing a post-judgment motion that implicates the indicative-ruling procedure will not encounter a rule similar to Civil Rule 62.1 in either the Part VII or Part IX rules, the advisory committee decided that it would be useful to include a cross-reference to Rule 8008 in the rules governing post-judgment motions.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 9023 and 9024 for transmission to the Judicial Conference for its approval.

G. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Official Forms 3A, 3B, 6I, and 6J

Official Forms 3A (Application for Individuals to Pay the Filing Fee in Installments), 3B (Application to Have the Chapter 7 Filing Fee Waived), 6I (Schedule I: Your Income), and 6J (Schedule J: Your Expenses) were selected for the initial-implementation stage of the Forms Modernization Project (“FMP”) because they make no significant change in substantive content and simply replace existing forms that apply only in individual-debtor cases. The restyled forms all involve the debtors’ income and expenses, and they are employed by a range of users: the courts, U.S. trustees, and case trustees, for varied purposes. The publication of these forms has already provided valuable feedback on the FMP approach to form design, and, if adopted, their use will provide a helpful gauge of the effectiveness of the FMP approach. Published last August, these forms were recommended by the advisory committee, unanimously, for final approval with some post-publication changes.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Official Forms 3A, 3B, 6I, and 6J, with the post-publication changes, for transmission to the Judicial Conference for its approval.

H. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Official Form 23

The Supreme Court has approved an amendment to Rule 1007(b)(7), due to go into effect on December 1, 2013, that will relieve individual debtors of the obligation to file Official Form 23 if the provider of an instructional course concerning personal financial management directly notifies the court that the debtor has completed the course. The preface and instructions to Official Form 23 would be amended to reflect that change by stating that a debtor should file the form only if the course provider has not already notified the court of the debtor’s completion of the course.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Official Form 23 for transmission to the Judicial Conference for its approval without publication.

I. Proposed Action: Republication of Proposed Amendments to Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2, and Publication of Proposed New Official Form 22A-1Supp

Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2, the restyled means-test forms for individual debtors under chapters 7, 11, and 13, were published for comment in August 2012. Because it determined that the changes made in response to comments were of sufficient significance to require republication, the advisory committee requested that the newly revised means-test forms be published for public comment in August. Along with the republication of Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2, the advisory committee requested publication of new Official Form 22A-1Supp, which was created in response to the comments.

Action: The Standing Committee, by voice vote without objection, approved for publication the proposed amendments to Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2 as revised and Form 22A-1Supp.

J. Proposed Action: Publication of Rules Related to New Chapter 13 Plan Form

For the past two years, the advisory committee has studied the creation of a national plan form for chapter 13 cases. The twin goals of the project have been to bring more uniformity to chapter 13 practice and to simplify the review of chapter 13 plans by debtors, courts, trustees, and creditors. These goals are consistent with the Supreme Court's decision in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010), which held that an order confirming a procedurally improper chapter 13 plan was nevertheless entitled to preclusive effect and that bankruptcy judges must independently review chapter 13 plans for conformity with applicable law.

The advisory committee approved a draft plan and accompanying rule amendments at its April 2013 meeting in New York. The advisory committee voted unanimously to seek publication of the form and rule amendments related to the new chapter 13 plan.

Professor Troy McKenzie led the following discussion, which summarizes the amendments to the Bankruptcy Rules that the Standing Committee voted to publish with the chapter 13 plan form.

Rule 2002. The Bankruptcy Rules describe categories of events that trigger the obligation to provide notice. Rule 2002 currently requires 28 days' notice of the time to file objections to confirmation of a chapter 13 plan as well as of the confirmation hearing itself. An amendment to Rule 3015(f), however, would require that objections to confirmation of a chapter 13 plan be filed at least seven days before the confirmation hearing.

The advisory committee proposed to retain the 28-day period for notice of a chapter 13 confirmation hearing, but to amend Rule 2002 in light of the new time period for objections to confirmation in Rule 3015(f). Thus, Rule 2002 would require 21 days' notice of the time to file objections to confirmation.

Rule 3002. Rule 3002(a) would be amended to require a secured creditor, as well as an unsecured creditor, to file a proof of claim in order to have an allowed claim. In keeping with Code § 506(d), however, the amendment also makes clear that the failure of a secured creditor to file a proof of claim does not render the creditor's lien void. Second, Rule 3002(c) would be amended to change the calculation of the claims bar date. Rather than 90 days from the meeting of creditors under Code § 341, the bar date would be 60 days after the petition is filed in a chapter 13 case. The amended rule includes a provision for an extension of the bar date when the debtor has failed to provide in a timely manner a list of creditors' names and addresses for notice purposes. In response to concerns raised during a mini-conference held in Chicago, the amended rule would also include a longer bar date for certain supporting documents required for mortgage claims on a debtor's principal residence. With those claims, the mortgagee would be required to file a proof of claim within the 60-

day period but would have an additional 60 days to file a supplement with the supporting documents.

Rule 3007. Objections to claims are governed by Rule 3007. Because the plan form permits some determinations regarding claims to be made through the plan, the advisory committee proposed an amendment to Rule 3007. The amended rule would provide an exception to the need to file a claim objection if a determination with respect to that claim is made in connection with plan confirmation under proposed Rule 3012.

Rule 3012. The proposed amendment would provide that the amount of a secured claim under Code § 506(a) may be determined in a proposed plan, subject to objection and resolution at the confirmation hearing. Current Rule 3012 provides for the valuation of a secured claim by motion only. The amended rule would also make clear that a chapter 13 plan would not control the amount of a claim entitled to priority treatment or the amount of a secured claim of a governmental unit.

Rule 3015. Rule 3015 governs the filing of a chapter 13 plan as well as plan modifications and objections to confirmation. The advisory committee proposed extensive amendments to the rule. They include an amended subdivision (c) requiring use of the official form for chapter 13 plans, a new 7-day deadline in Rule 3015(f) for filing objections to confirmation, and an amended subdivision (g) providing when the plan terms control over contrary proofs of claim. These amendments dovetail with proposed amendments to Rules 2002, 3007, and 3012.

Rule 4003. Code § 522(f) permits a debtor to avoid certain liens encumbering property that is exempt from the debtor's estate. Current Rule 4003(d) provides that lien avoidance under this section of the Code requires a motion. The plan form, however, would include a provision for a debtor to request lien avoidance as permitted by § 522(f). The advisory committee proposed an amendment to Rule 4003(d) to give effect to that part of the plan form.

Rule 5009. The advisory committee has included a procedure in proposed amended Rule 5009(d) for the debtor to obtain an order confirming that a secured claim has been satisfied. The language of the proposed amended rule permits the debtor to request entry of the order but does not specify the requirements for lien satisfaction.

Rule 7001. The advisory committee proposed to amend Rule 7001(2) so that determinations of the amount of a secured claim (under amended Rule 3012) and lien avoidance (under amended Rule 4003(d)) through a chapter 12 or chapter 13 plan would not require an adversary proceeding.

Rule 9009. In order to ensure use of the chapter 13 plan form without significant alterations, the advisory committee proposed an amendment to Rule 9009. Because greater uniformity is a principal goal of the plan form, proposed amended Rule 9009 would limit the range of permissible changes to forms.

Action: The Standing Committee, by voice vote without objection, approved for publication the proposed rule amendments related to the proposed new chapter 13 plan.

K. Proposed Action: Publication of Proposed Amendments to Rule 5005 (electronic signatures)

Rule 5005 governs the filing and transmittal of papers. The advisory committee sought approval to publish for public comment a proposed amendment to Rule 5005 that would create a national bankruptcy rule permitting the use of electronic signatures of debtors and other individuals who are not registered users of CM/ECF, without requiring the retention of the original document bearing a handwritten signature.

The proposed amendment to Rule 5005 would allow the electronic filing of a scanned signature page bearing the original signature of a debtor or other non-filing user to be treated the same as a handwritten signature without requiring the retention of hard copies of documents. The scanned signature page and the related document would have to be filed as a single docket entry to provide clarity about the document that was being attested to by the non-filing user. The amended rule would also provide that the user name and password of a registered user of the CM/ECF system would be treated as that individual's signature on electronically filed documents. The validity of a signature submitted under the amended rule would still be subject to challenge, just as is true for a handwritten signature.

The proposal incorporates recommendations from the Inter-Committee CM/ECF Subcommittee, which is chaired by Judge Michael A. Chagares and which includes members of the Standing Committee, each of the advisory committees, and the Committee on Court Administration and Case Management. As noted, the amended rule would provide that the scanned signature of a non-filing user, when filed as part of a single filing with an electronic document, serves as a signature to that document – without any requirement that the original be retained. The subcommittee noted that once a non-filing user has a signature scanned, there is no assurance that the signature was to the original document – and that concern is greater than with a hard copy, as it is less likely that a hard copy signature page would be attached to a number of documents. The subcommittee suggested publishing two alternative solutions to this issue. The advisory committee agreed with that suggestion and presented its proposed amendment to the Standing Committee with the suggested alternatives incorporated.

One alternative would be for the rule to state that the filing by the registered user is deemed a certification that the scanned signature was part of the original document. The second alternative would keep the filing lawyer out of the matter of any attestation about authenticity by using notaries public for that purpose. The Standing Committee accepted the recommendation of the CM/ECF Subcommittee and the Bankruptcy Rules Advisory Committee that Rule 5005(a)(3)(B) be published with both alternatives. It was agreed that publication of proposed Rule 5005(a)(3)(B) with both alternatives would allow careful public consideration of the problem of assuring that scanned signatures are a part of the

original document. It would assure input from interested and knowledgeable members of the public on how best to protect against the possible misuse of electronic signatures.

Judges Fitzwater and Sutton again reminded the Standing Committee that the Evidence Rules Advisory Committee is hosting a technology symposium in Portland, Maine in October 2013, which would provide another forum to solicit public comment on alternative methods to verify electronic signatures.

Judge Chagares noted that the CM/ECF Subcommittee will examine whether there are other technology issues related to the Next Generation of CM/ECF that should be addressed across all the sets of rules. Professor Capra, the reporter to the subcommittee, will work with the advisory committee reporters to identify rules affected by electronic filing and CM/ECF. If common issues arise across the different sets of rules, a model might be developed for the sake of uniformity.

Action: The Standing Committee, by voice vote without objection, approved publication of the proposed amendment to Rule 5005, including an invitation for comment on the proposed alternative methods for assuring that a signature is part of the original document.

L. Proposed Action: Publication of Proposed Amendments to Rule 9006(f)

Rule 9006(f), which is modeled on Civil Rule 6(d), provides three additional days for a party to act “after service” if service is made by mail or under Civil Rule 5(b)(2)(D), (E), or (F). At the January 2013 meeting, the Standing Committee approved for publication a proposed amendment to Civil Rule 6(d) that would clarify that only the party that is served by mail or under the specified provisions of Civil Rule 5 – and not the party making service – is permitted to add three days to any prescribed period for taking action after service is made. Because Rule 9006(f) contains the same potential ambiguity as current Civil Rule 6(d), the advisory committee requested approval to publish a parallel amendment of the bankruptcy rule.

Action: The Standing Committee, by voice vote without objection, approved publication of the proposed amendments to Rule 9006(f).

M. Proposed Action: Publication of Official Form 113 (new national Chapter 13 form)

The advisory committee recommended publication for public comment of a national plan form for chapter 13 cases. As described above in Item J, the plan form is the product of more than two years of study and consultation by the advisory committee.

The plan form includes ten parts. Beginning with a notice to interested parties (Part 1), the plan form covers: the amount, source, and length of the debtor’s plan payments (Part 2); the treatment of secured claims (Part 3); the treatment of the trustee’s fees, administrative claims, and other priority claims (Part 4); the treatment of unsecured claims not entitled to priority (Part 5); the treatment of executory contracts and unexpired leases (Part 6); the order

of distribution of payments by the trustee (Part 7); the reversion of property of the estate with the debtor (Part 8); and nonstandard plan terms (Part 9). Part 10 is the signature box.

The plan form contains a number of significant features. First, it permits a debtor to propose to limit the amount of a secured claim (Part 3, § 3.2), to avoid certain liens as provided by the Bankruptcy Code (Part 3, § 3.4), and to include nonstandard terms that are not part of – or that deviate from – the official form (Part 9). In order to make any of these particular terms effective, however, the debtor must clearly indicate in Part 1 that the plan includes one or more of them by marking the appropriate checkbox. Thus, the face of the document will put the court, the trustee, and creditors on notice that the plan contains terms that may require additional scrutiny. Second, the plan form makes clear when it will control over a creditor's contrary proof of claim. For example, a debtor may propose to limit the amount of a nongovernmental secured claim under Code § 506(a) because the collateral securing it is worth less than the claim. The proposed amount of the secured claim would be binding, subject to a creditor's objection to the plan and a final determination of the issue in connection with plan confirmation. Otherwise, a creditor's proof of claim will control the amount and treatment of the claim, subject to a claim objection.

The treatment of nonstandard plan provisions has been a concern during the process of drafting the plan. As described earlier, Part 1 requires the debtor to indicate whether the plan form includes nonstandard terms. In order to give further assurance that the debtor has filed a plan form that otherwise adheres to the official form, the plan's signature box includes a certification to that effect. Thus, the plan form requires that the debtor's attorney (or the debtor, if pro se) must certify by signing the plan that all of its provisions are identical to the official form, except for nonstandard provisions located in Part 9.

Action: The Standing Committee, by voice vote without objection, approved publication of Official Form 113 (new national chapter 13 plan form).

N. Proposed Action: Publication of Individual Debtor Forms

The advisory committee requested publication of the following individual debtor forms to be effective December 2015:

- | | |
|--------|--|
| 101 | Voluntary Petition for Individuals Filing for Bankruptcy |
| 101A | Initial Statement About an Eviction Judgment Against You |
| 101B | Statement About Payment of an Eviction Judgment Against You |
| 104 | List in Individual Chapter 11 Cases of Creditors Who Have the 20 Largest Unsecured Claims Against You and Are Not Insiders |
| 105 | Involuntary Petition Against an Individual |
| 106Sum | Summary of Your Assets and Liabilities and Certain Statistical Information |

106A/B	Schedule A/B: Property
106C	Schedule C: The Property You Claim as Exempt
106D	Schedule D: Creditors Who Hold Claims Secured by Property
106E/F	Schedule E/F: Creditors Who Have Unsecured Claims
106G	Schedule G: Executory Contracts and Unexpired Leases
106H	Schedule H: Your Codebtors
106Dec	Declaration About an Individual Debtor's Schedules
107	Statement of Financial Affairs for Individuals Filing for Bankruptcy
112	Statement of Intention for Individuals Filing Under Chapter 7
119	Bankruptcy Petition Preparer's Notice, Declaration, and Signature
121	Statement About Your Social Security Numbers
318	Order of Discharge
423	Certification About a Financial Management Course
427	Cover Sheet for Reaffirmation Agreement

The advisory committee also requested approval to publish for comment an instruction booklet for individuals.

Although the normal effective date for official bankruptcy forms published in 2013 would be December 1, 2014, Judge Wedoff noted that the effective date for the restyled individual-debtor forms that will be initially published this summer will be delayed at least until December 1, 2015, in order to permit them to go into effect at the same time as the restyled forms for non-individual cases.

Action: The Standing Committee, by voice vote without objection, approved publication of the Individual Debtor Forms, along with an instruction booklet for individuals.

O. Proposed Action: Publication of Official Forms 17A, 17B, and 17C

The advisory committee proposed publishing Official Forms 17A, 17B, and 17C, in connection with the revision of Part VIII of the Bankruptcy Rules, which govern bankruptcy appeals. Form 17A would be an amended and renumbered notice-of-appeal form, and Forms 17B and 17C would be new.

Proposed Form 17A would include in the Notice of Appeal a section for the appellant's optional statement of election to have the appeal heard by the district court rather than by the bankruptcy appellate panel. It would only be applicable in districts for which appeals to a bankruptcy appellate panel have been authorized.

New Form 17B – the Optional Appellee Statement of Election to Proceed in the District Court – would be the form that an appellee would file if it wanted the appeal to be heard by the district court and the appellant or another appellee did not make that election.

New Form 17C – Certificate of Compliance with Rule 8015(a)(7)(B) or 8016(d)(2) – would provide a means for a party to certify compliance with the provisions of the bankruptcy appellate rules that prescribe limitations on brief length based on number of words or lines of text (the “type-volume limitation”). It is based on Appellate Form 6, which implements the parallel provisions of Appellate Rule 32(a)(7)(B).

The advisory committee sought approval for publication this summer so that the proposed amendments would be scheduled to take effect December 1, 2014, the same effective date as is anticipated for the revised Part VIII rules.

Action: The Standing Committee, by voice vote without objection, approved publication of Official Forms 17A, 17B, and 17C.

REPORT OF THE ADMINISTRATIVE OFFICE

Benjamin Robinson gave a short report on recent activity by the Rules Committee Support Office (RCSO) to deal with the expected flood of public comments arising from the publication of the proposed amendments to the Civil Rules and Bankruptcy Rules in August 2013. He stated that 250 public comments had been received after the January 2013 meeting of the Standing Committee and were being held for filing during the comment period. These showed some earmarks of an organized letter writing campaign and more were expected.

After consulting with the Administrative Conference of the United States and others heavily involved in rule-making activities, Mr. Robinson worked with the webmasters and designers of regulations.gov – a website currently used by more than 30 departments and 150 agencies for their rulemaking activities. As a result of these efforts, on August 15, 2013, the RCSO will activate a website on regulations.gov that will allow the electronic filing and docketing of comments on proposed rules. This new system should add to the transparency and realtime accessibility of public comments to the committees, their reporters, and the general public.

CONCLUDING REMARKS

Judge Sutton confirmed with Judge Campbell that one of the public hearings on the proposed Civil Rules would take place on Thursday, January 9, 2014. Attendance by

members of the Standing Committee is encouraged but not required. Mr. Robinson noted that the RCSO would attempt to make the hearing available in courthouses through video conference and otherwise by teleconference. Judge Sutton confirmed that the Standing Committee will meet on Friday, January 10. The Standing Committee dinner will be Thursday evening, January 9. Judge Sutton then thanked everyone for the productive meeting and declared it adjourned.

NEXT MEETING

The Standing Committee will hold its next meeting in Phoenix, Arizona on January 9 and 10, 2014.

THIS PAGE INTENTIONALLY BLANK

TAB 2

THIS PAGE INTENTIONALLY BLANK

TAB 2A

THIS PAGE INTENTIONALLY BLANK

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

DATE: December 16, 2013

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

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

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules canceled its meeting scheduled for October 3-4, 2013, due to the lapse in appropriations. Thus, rather than report on actions taken by the Committee, I highlight in Part II of this Report some of the Committee's current projects on which it would welcome input from the Standing Committee.

The Committee's full study agenda is attached. The Committee's next meeting is scheduled for April 28-29, 2013.

II. Highlights of the Committee's current work

Parts II.A and II.B discuss two projects that address possible amendments to Rule 4's treatment of the deadlines for filing notices of appeal. Parts II.C and II.D discuss two projects concerning requirements for filings in the courts of appeals – one concerning length limits, and one concerning amicus filings in connection with petitions for panel rehearing and/or rehearing en banc.

A. Rule 4(a)(4)

A lopsided circuit split has developed concerning whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as “timely” under Appellate Rule 4(a)(4), and the Committee is considering whether and how to amend the Rule to answer this question.

Caselaw in the wake of *Bowles v. Russell*, 551 U.S. 205 (2007), holds that statutory appeal deadlines are jurisdictional but that nonstatutory appeal deadlines are nonjurisdictional claim-processing rules. Rule 4(a)(4) provides that “[i]f a party timely files in the district court” certain post-judgment motions, “the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion.” The statutory provision setting the deadlines for civil appeals – 28 U.S.C. § 2107 – does not mention such tolling motions.

A number of circuits have ruled that the Civil Rules’ deadlines for post-judgment motions are nonjurisdictional claim-processing rules. In this view, where a district court purports to extend the time for making such a motion, and no party objects to that extension, the district court has authority to decide the motion on its merits. But does the motion count as a “timely” one that, under Appellate Rule 4(a)(4), tolls the time to appeal? The Third, Seventh, Ninth, and Eleventh Circuits have issued post-*Bowles* rulings stating that such a motion does not toll the appeal time, and pre-*Bowles* caselaw from the Second Circuit accords with this position. However, the Sixth Circuit has held to the contrary.

There is substantial support among Committee members for clarifying the meaning of “timely” in Rule 4(a)(4). This provision tolls a jurisdictional appeal period, and its meaning should be clear and uniform across the circuits. The first and most basic question in considering such an amendment is whether to implement the majority approach (i.e., that postjudgment motions made outside the deadlines set by the Civil Rules are never “timely” under Rule 4(a)(4)) or the minority approach (i.e., that a motion made – without a timeliness objection – within a purported extension of the relevant deadline can qualify as “timely” under Rule 4(a)(4)).

An amendment adopting the majority approach would work the least change in current law. It would also make the answer explicit in the Rule’s text, and thus more accessible to pro se litigants and less-experienced lawyers. Such an amendment arguably tracks the spirit of the Court’s decision in *Bowles*, which overruled the Court’s prior decisions concerning the “unique circumstances” doctrine “to the extent they purport to authorize an exception to a jurisdictional rule.” Of the initial trio of Supreme Court cases establishing the unique circumstances doctrine, two involved erroneous district court assurances concerning the timeliness of postjudgment motions that were in fact untimely; thus, interpreting “timely” in Rule 4(a)(4) to require compliance with the relevant Civil Rules deadline seems to accord with the *Bowles* Court’s overruling of the unique circumstances doctrine with respect to jurisdictional appeal deadlines. Drafting such an amendment would be

relatively straightforward, and some Committee members have noted that such an amendment would help to clarify and simplify the computation of appeal deadlines. Here is a sketch of a possible new Rule 4(a)(4)(C) that would implement the majority view:

(C) **Timely Defined.** For purposes of Rule 4(a)(4)(A), a motion is timely if it is made within the time allowed by the Federal Rules of Civil Procedure. A motion made after that time is not rendered timely for purposes of Rule 4(a)(4)(A) by:

(i) a court order that exceeds the court's authority (if any) to extend the deadline for the motion under the Federal Rules of Civil Procedure, or

(ii) another party's consent or failure to object.

A cross-reference to this new provision could be added in Rule 4(a)(4)(A) itself:

(A) If a party ~~timely~~ files in the district court any of the following motions under the Federal Rules of Civil Procedure and the motion is timely as defined in Rule 4(a)(4)(C), the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

As noted above, an amendment adopting the minority approach could be seen as an effort to change one effect of the *Bowles* decision. Some Committee members have expressed hesitancy to attempt to countermand via a rule amendment a result that the Supreme Court adopted via decisional law. On the other hand, there have been past instances where a rule amendment was designed to change the result of a Supreme Court decision; one example is the 1993 amendment to Appellate Rule 3(c), which responded to *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). And some Committee members have expressed support for an approach that would preserve appeal rights for litigants who delay filing a notice of appeal in reliance upon a court order purporting to extend a deadline for a postjudgment motion. Drafting such an amendment seems more challenging than drafting an amendment to implement the majority approach, in part because the amendment would need to make clear what sort of errors can be forgiven and what sort cannot. Here is a sketch of one possible alternative:

(C) **Timely Defined.** For purposes of Rule 4(a)(4)(A), a motion is timely if it is:

(i) made within the time allowed by the relevant Federal Rule of Civil Procedure; or

(ii) made within the time designated for making the motion by a court order, if the court order is entered within the time limit prescribed by this

Rule 4(a) for filing a notice of appeal.

B. Rule 4(c)'s inmate-filing provision

This project concerns Rule 4(c)(1)'s inmate-filing provision for notices of appeal. The Committee is considering amendments to the Rule that might address, *inter alia*, whether an inmate must prepay postage in order to benefit from the inmate-filing rule; whether and when an inmate must provide a declaration attesting to the circumstances of the filing; whether the inmate must use a legal mail system when one exists in the relevant institution; and whether a represented inmate can benefit from the inmate-filing rule.

Appellate Rule 4(c)(1) provides:

If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

The original impetus for the Committee's study of this rule was Judge Diane Wood's suggestion that the Committee consider clarifying whether Rule 4(c)(1)'s inmate-filing rule requires prepayment of postage. The Seventh Circuit has held that when the institution has no legal mail system, the third sentence of Rule 4(c)(1) requires that postage be prepaid. *See United States v. Craig*, 368 F.3d 738, 740 (7th Cir. 2004). By contrast, the Seventh and Tenth Circuits have indicated that, if the institution has a legal mail system and the inmate uses that system, prepayment of postage is not required for timeliness. *See Ingram v. Jones*, 507 F.3d 640, 644 (7th Cir. 2007), and *United States v. Ceballos-Martinez*, 387 F.3d 1140, 1144 (10th Cir. 2004). The Committee has discussed the possibility of eliminating the postage-prepayment requirement, either for all inmates, or for inmate filers who certify that they are indigent, but has not reached a consensus in support of either of those approaches. Both Supreme Court Rule 29.2 and Rule 4(c) always have required inmates to prepay postage, and some Committee members are reluctant to eliminate that requirement. The Constitution requires the state or federal government to provide indigent inmates with stamps to mail certain legal documents to court, *Bounds v. Smith*, 430 U.S. 817, 824-25 (1977), so an inmate presumably would have a remedy if enforcement of the prepayment requirement interfered with the inmate's constitutional right of access to the courts.

The Committee also has discussed whether to amend the Rule to make clear that the declaration mentioned in the Rule suffices to show timely filing but is not required if timeliness can be shown by other evidence. Participants in the Committee's discussions have observed that it is

useful for the Rule to include a directive to the inmate to submit the declaration, because the declaration provides helpful information and preserves that information while recollections are fresh. But participants noted it may be better policy to allow an inmate to provide proof of timely deposit even if the inmate initially did not provide a declaration. One possible approach might be to permit the inmate to show good cause why the absence of the declaration should be excused. A “good cause” standard, however, could give rise to satellite litigation. Instead, one might add language that explicitly contemplates alternative means of showing timeliness: “Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746₂, or by a notarized statement, ~~either of which must that sets forth the date of deposit and states that first-class postage has been prepaid.~~ Timely filing also may be shown by other [proof] [evidence] that the notice was timely deposited with first-class postage prepaid.”

Committee members also have discussed the possibility of promulgating an official form that would walk an inmate through statements that would suffice to establish eligibility for the inmate-filing rule. These Committee members recognize that there is a trend away from reliance on official forms, as evidenced by the published proposals to abrogate Civil Rule 84 and almost all of the Official Forms that accompany the Civil Rules. But the Civil Rules proposal seems consistent with an approach that retains a few select forms as an official part of the Rules, and that selects those forms for retention on the basis of their salience to and entwinement with a particular mechanism set by a Rule. Forms may be especially useful to pro se litigants. And assisting pro se litigants in turn assists the Clerk’s Office that must process their filings. Use of an official form could reduce the time needed for a clerk or a judge to review the filing.

Participants in the Committee’s discussions have questioned the usefulness of the current Rule’s requirement that “[i]f an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule.” The 1998 Committee Note provided this rationale for the requirement: “Some institutions have special internal mail systems for handling legal mail; such systems often record the date of deposit of mail by an inmate, the date of delivery of mail to an inmate, etc. The Advisory Committee amends the rule to require an inmate to use the system designed for legal mail, if there is one, in order to receive the benefit of this subdivision.”

Use of a mail system that logs the date of the inmate’s deposit is desirable. But the Rule itself does not actually refer to a mail system that logs the date; it instead refers to “a system designed for legal mail.” Given that inmates are unlikely to consult the 1998 Committee Note when applying Rule 4(c)(1), it might be desirable to revise the Rule to provide a functional definition. For example, the Rule could state: “If the institution has a mail system that will log the date when an inmate deposits a piece of mail with the institution for mailing, the inmate must use that system to receive the benefit of this rule.” Another alternative is to delete this sentence altogether – a change that would bring Rule 4(c)(1) into closer parallel with Supreme Court Rule 29.2.

C. Length limits

The Appellate Rules set length limits for briefs using a type-volume formula plus a safe harbor in the form of a (shorter) page limit. But the length limits for rehearing petitions and some other papers are set in pages, and the Committee is considering whether to propose changes in the Rules that set those length limits.

The Committee is focusing on two possible options. One would replace the page limits with a type-volume-plus-safe-harbor provision modeled on the Rules' length limits for briefs. Under that approach, the existing page limits in Rules 5, 21, 27, 35, and 40 would be shortened, and an alternative would be added in each rule that would approximate the existing page limits through the use of type-volume limits. The Committee would need to determine how much to shorten the page limits; the goal would be to provide a workable page limit for those who would find it difficult to compute a type-volume limit, without introducing an incentive for lawyers to circumvent the type-volume limits by using the page limits. One principal concern with this approach is that pro se filers and others who must file typewritten or handwritten pleadings would be allowed fewer pages than under the current rules.

The other option would retain the current page limits for papers prepared without the aid of a computer, but would set roughly equivalent type-volume limits for papers prepared on computers. The idea here is that attorneys who typically prepare pleadings by computer would have little incentive to shift to typewritten or handwritten pleadings in order to circumvent the type-volume limitation by using page limits. But an amendment that applies type-volume limitations to computer-aided papers would not disadvantage pro se filers. Research discovered at least one set of state rules that distinguishes between papers prepared by computer and papers prepared by other means. *See* Cal. Rules of Court Rule 8.204(c) (“(1) A brief produced on a computer must not exceed 14,000 words, including footnotes.... (2) A brief produced on a typewriter must not exceed 50 pages.”).

The Committee's inquiries have also disclosed evidence suggesting that the 1998 amendments to Rule 32(a)(7), adopting a type-volume limitation of 14,000 words for a principal brief to replace the former 50-page limit, caused an increase in the permitted length of a brief. One participant observed that, prior to 1998, the D.C. Circuit had adopted a word limit and had chosen 12,500 words as the appropriate limit. The Committee's liaison to the Circuit Clerks researched this question further. Based on the average word count per page in 210 briefs filed by attorneys during the last four years in which old Rule 28(g) was in effect, the equivalent of 50 pages would have been 13,000 words. The clerk also used CM/ECF to research the word length of principal briefs filed in 2008 under the current type-volume limits. In a set of more than 1,000 briefs, only some 15 percent were more than 12,500 words. The Committee may consider whether the word count should be adjusted as part of the length-limit project.

D. Amicus briefs on rehearing

The second brief-related project concerns the possibility of addressing amicus filings in connection with petitions for panel rehearing and/or rehearing en banc. Matters that could be addressed by a proposed rule include length, timing, and other topics that Rule 29 addresses with respect to amicus filings at the merits-briefing stage.

A principal policy question is whether the federal rules should address this matter at all. Attorneys who file briefs in support of petitions for rehearing understandably seek clear guidance about the filing deadlines for, and permitted length of, such briefs. Most circuits have no local rule on the topic, and attorneys have reported frustration with their inability to obtain accurate guidance. From the perspective of the courts, however, the Committee has heard expressions of concern that a new appellate rule concerning amicus briefs at the rehearing stage may encourage a proliferation of filings at that stage. The Committee will consider these competing views in its evaluation.

A related question is whether any new rule on this subject should permit a circuit to opt out of any its provisions by local rule or by order in a case. The Committee is aware of the Rules Committees' general reluctance to encourage local rulemaking. But in this instance, there may well be reasons for local variation, given that rules concerning amicus filings need to mesh with the rules and practices concerning the parties' filings and with the court's internal practices in connection with rehearing petitions.

As to the particulars of a possible new rule, one issue is length. Appellate Rule 29(d) provides that amicus filings in connection with the merits briefing of an appeal are presumptively limited to half the permissible length of "a party's principal brief." Appellate Rules 35(b) and 40(b) presumptively limit a party's rehearing petition to 15 pages; thus, if one were to apply the same half-length approach to amicus filings in support of a rehearing petition, such filings would be limited to 7½ pages. The few existing local circuit provisions allow greater lengths, ranging roughly from 10 to 15 pages. The Committee's discussions may focus on whether to follow the half-length approach (which, rounding up, would produce a limit of 8 pages), or whether to choose a length limit within the 10- to 15-page range. The Committee may also discuss whether to specify length limits for amicus filings in opposition to a rehearing petition.

Another question is timing. Appellate Rule 29(e) provides that an amicus must file its brief and motion "no later than 7 days after the principal brief of the party being supported is filed." The Appellate Rules set a presumptive deadline (in most cases) of 14 days (after entry of judgment) for a party to file a petition for hearing and/or rehearing en banc. For amicus filings at the rehearing stage, questions arise whether the deadline should be the same as the party's deadline or a certain number of days later than the party's deadline. Using the later deadline would track Rule 29's approach and also would accord with three of the four local circuit rules on point. Some participants have suggested that amicus briefs will be more useful and less redundant if the amici have an

opportunity to review the party's brief before filing a brief in support. On the other hand, courts of appeals may dislike any rule that extends the time for resolving rehearing petitions, and a later deadline for amicus briefs could do so. *Cf. Fry v. Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723, 725 (7th Cir. 2009) (Easterbrook, Chief Judge, in chambers). If the Committee proceeds in this area, then it also would have to consider whether to address amicus filings in support of the party opposing rehearing and amicus filings that support neither party.

The Committee may also consider whether a proposed rule should address other questions concerning amicus filings in connection with rehearing. See for example the following provisions concerning merits briefs: Rules 29(a) (requirement of court leave or party consent, plus exceptions); 29(b) (content of motion for leave to file); 29(c) (requirements of disclosure and form); 29(g) (oral argument). Should a new rule on amicus filings incorporate, as default provisions, some or all of Rules 29(a) – (c)? The Committee might, for example, consider subjecting later amicus filings to the disclosure requirements set by Rule 29(c). It may be less urgent to address matters of form than matters of disclosure; on the other hand, the application of Rule 32's form requirements to amicus filings in connection with rehearing could be relatively uncontroversial. A national rule could also set default rules addressing whether an amicus must obtain court permission in order to file a brief. One option would be to apply current Rule 29(a), thus allowing certain governmental amici to file without party consent or court leave and allowing any amicus to file without court leave if the parties consent. Another option would be to require all amici to obtain court leave in order to file a brief in connection with a rehearing petition.

The Committee would also need to consider where to place any such provisions. Placing the new provisions in Rule 29 would allow would-be amici to find all of the amicus-specific provisions in one rule, although some renumbering would be required. An alternative would be to add the new provisions to Rules 35 and 40, though that could cause some redundancy.

TAB 2B

THIS PAGE INTENTIONALLY BLANK

Advisory Committee on Appellate Rules Table of Agenda Items — December 2013

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 04/13
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/13
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/13
08-AP-H	Consider issues of "manufactured finality" and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13
08-AP-J	Consider FRAP implications of conflict screening	Committee on Codes of Conduct	Discussed and retained on agenda 11/08

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
08-AP-L	Amend FRAP 6(b)(2)(A)(ii) to remove ambiguity	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11 Draft approved 04/12 for submission to Standing Committee Approved for publication by Standing Committee 06/12 Published for comment 08/12 Draft approved 04/13 for submission to Standing Committee Approved by Standing Committee 06/13 Approved by Judicial Conference 09/13
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09
09-AP-A	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	ABA Council of Appellate Lawyers	Discussed and retained on agenda 04/09
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12; Committee will revisit in 2017

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
09-AP-C	Consider possible FRAP amendments in the light of project to revise Part VIII of the Bankruptcy Rules	Bankruptcy Rules Committee	Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11 Draft approved 04/12 for submission to Standing Committee Approved for publication by Standing Committee 06/12 Published for comment 08/12 Draft approved 04/13 for submission to Standing Committee Approved by Standing Committee 06/13 Approved by Judicial Conference 09/13
09-AP-D	Consider implications of Mohawk Industries, Inc. v. Carpenter	John Kester, Esq.	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/13
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13
11-AP-F	Consider amendment authorizing discretionary interlocutory appeals from attorney-client privilege rulings	Amy M. Smith, Esq.	Discussed and retained on agenda 04/13
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12
12-AP-E	Consider treatment of length limits for petitions for rehearing en banc under Rule 35	Professor Neal K. Katyal	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
12-AP-F	Consider amending FRAP 42 to address class action appeals	Professors Brian T. Fitzpatrick and Brian Wolfman and Dean Alan B. Morrison	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13
13-AP-B	Amend FRAP to address permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc	Roy T. Englert, Jr., Esq.	Discussed and retained on agenda 04/13
13-AP-C	Consider possible rules for expediting proceedings under Hague Convention on the Civil Aspects of International Child Abduction	Hon. Steven M. Colloton	Discussed by Appellate Rules Committee 04/13 Discussed by Standing Committee 06/13
13-AP-D	Revise Rule 6(b)(2)(B)(iii)'s list of contents of record on appeal, and revise Rule 3(d)(1) in light of electronic filing	Hon. S. Martin Teel, Jr.	Awaiting initial discussion
13-AP-E	Consider treatment of audiorecordings of appellate arguments	Appellate Rules Committee	Awaiting initial discussion
13-AP-F	Consider items included for purposes of length limit in Rule 35(b)(2)	Gregory G. Garre, Esq.	Awaiting initial discussion
13-AP-G	Consider clarifying which items can be excluded when calculating length under Rule 28.1(e)	Appellate Rules Committee	Awaiting initial discussion
13-AP-H	Consider possible amendments to FRAP 41 in light of Bell v. Thompson, 545 U.S. 794 (2005), and Ryan v. Schad, 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Awaiting initial discussion

TAB 3

THIS PAGE INTENTIONALLY BLANK

TAB 3A

THIS PAGE INTENTIONALLY BLANK

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

FROM: Honorable Eugene R. Wedoff, Chair
Advisory Committee on Bankruptcy Rules

DATE: December 12, 2013

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on September 24 and 25, 2013, at the University of St. Thomas School of Law in Minneapolis, Minnesota. The draft minutes of that meeting are set out in Appendix C to this report.

At the meeting the Advisory Committee discussed a number of suggestions for rule and form amendments that were submitted by bankruptcy judges, members of the bar, and court personnel. It also discussed several ongoing projects.

The Committee is presenting one action item at this time—a technical, conforming amendment to Rule 1007(a). Part II of this report discusses that amendment. In addition, the report discusses some rule and form amendments for which final approval or publication will be sought at the June 2014 Standing Committee meeting. Part III provides the Standing Committee

with an overview of the comments that have been received to date on the proposed official form for chapter 13 plans and implementing rule amendments, which were published in August. Part IV reports on the limited reaction so far to the published amendment to Rule 5005 regarding electronic signatures. Finally, Part V provides a preview of the restyled bankruptcy forms for non-individual debtors—the final installment of the Forms Modernization Project.

II. Action Item—Rule 1007(a)(1) and (2) for Final Approval Without Publication

Subdivisions (a)(1) and (a)(2) of Rule 1007 require the filing at the outset of a case of the names and addresses of all entities included on “Schedules D, E, F, G, and H.” The restyled schedules for individual cases that were published for comment in August 2013 use slightly different designations. Under the new numbering and lettering protocol of the proposed forms, the schedules referred to in Rule 1007(a)(1) and (a)(2) will become Official Forms 106 D, E/F, G, and H—reflecting a combination of what had been separate Schedules E and F into a single Schedule E/F. In order to make Rule 1007(a) consistent with the new form designations, the Advisory Committee voted unanimously at the fall meeting to propose a conforming amendment to subdivision (a)(1) and (a)(2) of that rule. The text of the proposed amendment is included in Appendix A.

The schedules and other individual forms published in 2013 (other than the means test forms) are proposed to take effect on December 1, 2015—a year later than normal—in order to coincide with the effective date of the restyled non-individual forms. That timeline means that if the Standing Committee approves without publication the conforming amendments to Rule 1007(a)(1) and (a)(2) at this or the June 2014 meeting, the rule amendments will be able to go into effect at the same time as the forms.

The Advisory Committee recommends that conforming amendments to Rule 1007(a)(1) and (a)(2), which change references to Schedules E and F to Schedule E/F, be approved and forwarded to the Judicial Conference.

III. Comments on the Proposed Chapter 13 Plan Form and Related Rule Amendments

Over the past two years, the Advisory Committee undertook to create an official form for plans in chapter 13 cases. Acting on the advice of the Working Group tasked with leading the project, the Advisory Committee has proposed a draft form together with related amendments to nine of the Bankruptcy Rules (Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009). If adopted, the official form would supplant a patchwork of local forms in chapter 13 cases. The Standing Committee approved publication of the form and accompanying rule amendments at its June 2013 meeting.

As anticipated, the proposed form and rule amendments have drawn a significant number of comments. Approximately two dozen public comments have been submitted, including an omnibus submission from the National Association of Chapter Thirteen Trustees that combines

comments from individual chapter 13 trustees around the country. The great majority of comments relate to the proposed official form rather than the rule amendments. In the main, the comments submitted thus far are detailed and constructive. Only a small number oppose adoption of the form or amended rules.

One issue raised in the comments concerns the provision of multiple options in the plan form when one or more of those options may conflict with the prevailing law in a particular judicial district. This feature of the form reflects the divergence of interpretations about aspects of chapter 13 upon which the Advisory Committee does not take a position. Several comments have suggested that the Advisory Committee should add language clarifying that the provision of an option on the form does not necessarily mean the option is available under the law of the debtor's district. The Working Group will consider all of the suggestions set out in the comments and will make recommendations for any changes in the form and rules at the Advisory Committee's spring 2014 meeting. At that meeting, the Advisory Committee will determine the extent to which it will recommend final approval of the form and rules or propose changes that would require republication.

IV. Comments on the Proposed Amendments to Rule 5005(a)

At its June 2013 meeting, the Standing Committee approved for publication amendments to Rule 5005 (Filing and Transmittal of Papers). The amendments would permit the use of electronic signatures of debtors and other individuals who are not registered users of CM/ECF without requiring the retention of the original document bearing a handwritten signature. This national rule would supersede the current array of local rules, many of which require the registered user (usually an attorney) who is filing documents electronically to preserve the originals of all filed documents bearing the signature of a debtor or other non-registered user for a specified period of time. Under the proposed amendments to Rule 5005, new subdivision (a)(3) would allow scanned signatures of non-registered users to be treated the same as handwritten signatures—without requiring the retention of the hand-signed documents—if the scanned signature page bearing the individual's original signature is part of a single filing.

On the recommendation of the Standing Committee's Subcommittee on CM/ECF, the Standing Committee voted to include in the published amendments alternative means of providing assurance that a scanned signature was actually part of the original document filed electronically. Under one option, the act of filing by a registered person would be deemed the person's certification that the scanned signature was part of the original document. The other option would require a certification by a notary public. The August publication materials called attention to these options and specifically invited comment on them.

So far the publication of the Rule 5005 amendment has produced little response. Only two comments have been submitted on it to date. Both were submitted by bankruptcy attorneys. One expressed confusion about when original documents must be retained under the proposed rule, and the other erroneously read the proposed rule as requiring the entire document, not just

the signature page, to be scanned—a requirement that would require much more storage space on the court’s computer system.

Because the fall meeting of the Advisory Committee on Evidence Rules was canceled due to the government shutdown, the planned symposium on electronic evidence, which would have included a panel on electronic signatures, did not take place.

V. Preview of the Revised Official Forms for Non-Individual Debtors

As the Advisory Committee has previously reported, it is engaged in a multi-year project to revise many of the official bankruptcy forms. The Bankruptcy Official Forms Modernization Project (“FMP”) began its work in 2008. The project is being carried out by an ad hoc group composed of members of the Advisory Committee’s Subcommittee on Forms, working in liaison with representatives of other relevant Judicial Conference committees. The dual goals of the FMP are to improve the official bankruptcy forms and to improve the interface between the forms and available technology.

The Advisory Committee decided to implement the modernized forms in stages in order to allow for fuller testing of the technological features and to facilitate a smoother transition. A small number of the modernized forms became effective on December 1, 2013; others will become effective December 1, 2014; and the majority of the forms are expected to become effective on December 1, 2015. At its fall 2013 meeting, the Advisory Committee reviewed drafts of the revised forms for non-individual debtors. The FMP is continuing to revise them in response to comments provided by members of the Advisory Committee and others whose input was sought. The FMP anticipates that the Advisory Committee will vote to recommend the non-individual forms for publication at its spring meeting and will bring them to the Standing Committee in June.

The FMP’s decision to create separate forms for individual and non-individual debtors rested on two considerations. First, the information that needs to be provided by the two groups of debtors differs somewhat. Using separate forms allows the elimination of unnecessary requests for information. Second, the level of sophistication of the persons completing the forms also differs between the two groups. Individual forms are often completed by pro se debtors with no legal training, and in all individual cases the forms need to be understood by the debtor, who is unlikely to be trained in either law or accounting, but who is required to declare that the information provided is true and correct. Non-individual debtors, on the other hand, must always be represented by counsel, and the person responsible for signing the petition on behalf of the debtor typically is knowledgeable about business and perhaps also legal matters.

These differences are reflected in the design of the two proposed petition forms, which are included in Appendix B to this report. Official Form 201, the petition for non-individual debtors, contains more open-ended questions than does Form 101, the petition for individuals, which contains lists of potential answers for the debtor to check. The non-individual petition

also includes fewer instructions, definitions, and illustrations than the individual petition. While the individual petition addresses the debtor as “you” and includes an extra column for information to be provided about a spouse when a joint petition is filed, the non-individual petition is addressed to a single debtor, which the form refers to in the third person. The non-individual petition is the shorter of the two because it does not need to include requests for information about fee waivers or payment in installments or about spouses, evictions, or credit counseling. Similar differences are reflected throughout the two sets of forms. In addition, non-individual forms that seek financial information are organized to parallel the manner in which businesses commonly keep their financial records.

Despite these differences, the individual and non-individual debtor forms have a similar look and format. They are also both designed to take advantage of the enhanced technology that will become available in the next generation of CM/ECF. The major change in Next Gen affecting bankruptcy forms will be the ability to store all forms information as data so that authorized users can produce customized reports containing the information they want from the forms, displayed in whatever format they choose. Once the judiciary implements Next Gen, the initial authorized users—judges and clerks’ staff—will be able to use forms data to generate customized reports. The provision of similar access to non-judiciary users, however, will depend on the future development of pertinent policies of the Judicial Conference.

THIS PAGE INTENTIONALLY BLANK

APPENDIX A

THIS PAGE INTENTIONALLY BLANK

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

For Final Approval and Transmittal to the Judicial Conference

1 **Rule 1007. Lists, Schedules, Statements, and Other Documents; Time Limits**

2 (a) CORPORATE OWNERSHIP STATEMENT, LIST OF CREDITORS
3 AND EQUITY SECURITY HOLDERS, AND OTHER LISTS.

4 (1) *Voluntary Case.* In a voluntary case, the debtor shall file with
5 the petition a list containing the name and address of each entity included or to be
6 included on Schedules D, ~~E, F~~ E/E, G, and H as prescribed by the Official Forms.
7 If the debtor is a corporation, other than a governmental unit, the debtor shall file
8 with the petition a corporate ownership statement containing the information
9 described in Rule 7007.1. The debtor shall file a supplemental statement
10 promptly upon any change in circumstances that renders the corporate ownership
11 statement inaccurate.

12 (2) *Involuntary Case.* In an involuntary case, the debtor shall file,
13 within seven days after entry of the order for relief, a list containing the name and
14 address of each entity included or to be included on Schedules D, ~~E, F~~ E/E, G, and
15 H as prescribed by the Official Forms.

16 * * * * *

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

COMMITTEE NOTE

In subdivisions (a)(1) and (a)(2), the references to Schedules are amended to reflect the new designations adopted as part of the Forms Modernization Project.

Because this amendment is made to conform to a change in the designation of the Official Forms that the rule refers to and is technical in nature, final approval is sought without publication.

APPENDIX B

THIS PAGE INTENTIONALLY BLANK

APPENDIX B.1

THIS PAGE INTENTIONALLY BLANK

Fill in this information to identify your case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (if known): _____ Chapter you are filing under:
 Chapter 7
 Chapter 11
 Chapter 12
 Chapter 13

Check if this is an amended filing

Official Form 101

Voluntary Petition for Individuals Filing for Bankruptcy

12/15

The bankruptcy forms use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. For example, if a form asks, “Do you own a car,” the answer would be *yes* if either debtor owns a car. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Identify Yourself

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
<p>1. Your full name</p> <p>Write the name that is on your government-issued picture identification (for example, your driver's license or passport).</p> <p>Bring your picture identification to your meeting with the trustee.</p>	<p>_____</p> <p>First name</p> <p>_____</p> <p>Middle name</p> <p>_____</p> <p>Last name</p> <p>_____</p> <p>Suffix (Sr., Jr., II, III)</p>	<p>_____</p> <p>First name</p> <p>_____</p> <p>Middle name</p> <p>_____</p> <p>Last name</p> <p>_____</p> <p>Suffix (Sr., Jr., II, III)</p>
<p>2. All other names you have used in the last 8 years</p> <p>Include your married or maiden names.</p>	<p>_____</p> <p>First name</p> <p>_____</p> <p>Middle name</p> <p>_____</p> <p>Last name</p> <p>_____</p> <p>First name</p> <p>_____</p> <p>Middle name</p> <p>_____</p> <p>Last name</p>	<p>_____</p> <p>First name</p> <p>_____</p> <p>Middle name</p> <p>_____</p> <p>Last name</p> <p>_____</p> <p>First name</p> <p>_____</p> <p>Middle name</p> <p>_____</p> <p>Last name</p>
<p>3. Only the last 4 digits of your Social Security number or federal Individual Taxpayer Identification number (ITIN)</p>	<p>XXX - XX - _____</p> <p>OR</p> <p>9 XX - XX - _____</p>	<p>XXX - XX - _____</p> <p>OR</p> <p>9 XX - XX - _____</p>

About Debtor 1:

About Debtor 2 (Spouse Only in a Joint Case):

4. Any business names and Employer Identification Numbers (EIN) you have used in the last 8 years

Include trade names and doing business as names

I have not used any business names or EINs.

Business name

Business name

EIN

EIN

I have not used any business names or EINs.

Business name

Business name

EIN

EIN

5. Where you live

Number Street

City State ZIP Code

County

If your mailing address is different from the one above, fill it in here. Note that the court will send any notices to you at this mailing address.

Number Street

P.O. Box

City State ZIP Code

If Debtor 2 lives at a different address:

Number Street

City State ZIP Code

County

If Debtor 2's mailing address is different from yours, fill it in here. Note that the court will send any notices to this mailing address.

Number Street

P.O. Box

City State ZIP Code

6. Why you are choosing this district to file for bankruptcy

Check one:

I Over the last 180 days before filing this bankruptcy filing package, I have lived in this district longer than in any other district.

I I have another reason. Explain. (See 28 U.S.C. § 1408.)

Four horizontal lines for explaining the reason.

Check one:

I Over the last 180 days before filing this bankruptcy filing package, I have lived in this district longer than in any other district.

I I have another reason. Explain. (See 28 U.S.C. § 1408.)

Four horizontal lines for explaining the reason.

Part 2: Tell the Court About Your Bankruptcy Case

7. The chapter of the Bankruptcy Code you are choosing to file under

Check one. (For a brief description of each, see *Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy* (Form B2010)). Also, go to the top of page 1 and check the appropriate box.

- Chapter 7
- Chapter 11
- Chapter 12
- Chapter 13

8. How you will pay the fee

If you file under Chapter ...	Your total fee is...
7	\$306
11	\$1,213
12	\$246
13	\$281

I will pay the entire fee when I file my petition. Please check with the clerk's office in your local court for more details about how you may pay. Typically, if you are paying the fee yourself, you may pay with cash, cashier's check, or money order. If your attorney is submitting your payment on your behalf, your attorney may pay with a credit card or check with a pre-printed address.

I need to pay the fee in installments. If you choose this option, sign and attach the *Application for Individuals to Pay Your Filing Fee in Installments* (Official Form 103A).

I request that my fee be waived (You may request this option only if you are filing for Chapter 7. By law, a judge may waive your fee only if your income is less than 150% of the official poverty line that applies to your family size and you are unable to pay the fee in installments). If you choose this option, you must fill out the *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 103B) and file it with your bankruptcy filing package.

9. Have you filed for bankruptcy within the last 8 years?

- No
- Yes. District _____ When _____ Case number _____
MM / DD / YYYY
- District _____ When _____ Case number _____
MM / DD / YYYY
- District _____ When _____ Case number _____
MM / DD / YYYY

10. Are any bankruptcy cases pending or being filed by a spouse who is not filing this case with you, or by a business partner, or by an affiliate?

- No
- Yes. Debtor _____ Relationship to you _____
District _____ When _____ Case number, if known _____
MM / DD / YYYY
- Debtor _____ Relationship to you _____
District _____ When _____ Case number, if known _____
MM / DD / YYYY

11. Do you rent your residence?

- No. Go to line 12.
- Yes. Has your landlord obtained an eviction judgment against you and do you want to stay in your residence?
 - No. Go to line 12.
 - Yes. Fill out *Initial Statement About an Eviction Judgment Against You* (Form 101A) and file it with this bankruptcy petition.

Part 3: Report About Any Businesses You Own as a Sole Proprietor

12. Are you a sole proprietor of any full- or part-time business?

A sole proprietorship is a business you own as an individual, rather than a separate legal entity such as a corporation, partnership, or LLC.

If you have more than one sole proprietorship, use a separate sheet and attach it to this package.

- No. Go to Part 4.
Yes. Name and location of business

Name of business, if any
Number Street
City State ZIP Code

Check the appropriate box to describe your business:

- Health Care Business (as defined in 11 U.S.C. § 101(27A))
Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
Stockbroker (as defined in 11 U.S.C. § 101(53A))
Commodity Broker (as defined in 11 U.S.C. § 101(6))
None of the above

13. Are you filing under Chapter 11 of the Bankruptcy Code and are you a small business debtor?

For a definition of small business debtor, see 11 U.S.C. § 101(51D).

If you are filing under Chapter 11, the court must know whether you are a small business debtor so that it can set appropriate deadlines.

- No. I am not filing under Chapter 11.
No. I am filing under Chapter 11, but I am NOT a small business debtor according to the definition in the Bankruptcy Code.
Yes. I am filing under Chapter 11 and I am a small business debtor according to the definition in the Bankruptcy Code.

Part 4: Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention

14. Do you own or have any property that poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety? Or do you own any property that needs immediate attention?

For example, do you own perishable goods or livestock that must be fed?

- No
Yes. What is the hazard?

If immediate attention is needed, why is it needed?

Where is the property? Number Street

City State ZIP Code

**Part 5: Explain Your Efforts to Receive a Briefing
About Credit Counseling**
15. Tell the court whether you have received briefing about credit counseling.

The law requires that you receive a briefing about credit counseling before you file for bankruptcy. You must truthfully check one of the following choices. If you cannot do so, you are not eligible to file.

If you file anyway, the court can dismiss your case, you will lose whatever filing fee you paid, and your creditors can begin collection activities again.

About Debtor 1:

You must check one:

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you file this bankruptcy filing package.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

I am not required to receive a briefing about credit counseling because of:

Incapacity. I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

Disability. My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.

Active duty. I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

About Debtor 2 (Spouse Only in a Joint Case):

You must check one:

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you file this bankruptcy filing package.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

I am not required to receive a briefing about credit counseling because of:

Incapacity. I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

Disability. My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.

Active duty. I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

Part 6: Answer These Questions for Reporting Purposes

- 16. What kind of debts do you have?**
- 16a. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as “incurred by an individual primarily for a personal, family, or household purpose.”
- No. Go to line 16b.
 Yes. Go to line 17.
- 16b. **Are your debts primarily business debts?** *Business debts* are debts that you incurred to obtain money for a business or investment or through the operation of the business or investment.
- No. Go to line 16c.
 Yes. Go to line 17.
- 16c. State the type of debts you owe that are not consumer debts or business debts.

- 17. Are you filing under Chapter 7?**
- No. I am not filing under Chapter 7. Go to line 18.
- Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available for distribution to unsecured creditors?**
- Yes. I am filing under Chapter 7. Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available to distribute to unsecured creditors?
- No
 Yes

- 18. How many creditors do you estimate that you owe?**
- | | | |
|----------------------------------|--|--|
| <input type="checkbox"/> 1-49 | <input type="checkbox"/> 1,000-5,000 | <input type="checkbox"/> 25,001-50,000 |
| <input type="checkbox"/> 50-99 | <input type="checkbox"/> 5,001-10,000 | <input type="checkbox"/> 50,001-100,000 |
| <input type="checkbox"/> 100-199 | <input type="checkbox"/> 10,001-25,000 | <input type="checkbox"/> More than 100,000 |
| <input type="checkbox"/> 200-999 | | |

- 19. How much do you estimate your assets to be worth?**
- | | | |
|--|--|--|
| <input type="checkbox"/> \$0-\$50,000 | <input type="checkbox"/> \$1,000,001-\$10 million | <input type="checkbox"/> \$500,000,001-\$1 billion |
| <input type="checkbox"/> \$50,001-\$100,000 | <input type="checkbox"/> \$10,000,001-\$50 million | <input type="checkbox"/> \$1,000,000,001-\$10 billion |
| <input type="checkbox"/> \$100,001-\$500,000 | <input type="checkbox"/> \$50,000,001-\$100 million | <input type="checkbox"/> \$10,000,000,001-\$50 billion |
| <input type="checkbox"/> \$500,001-\$1 million | <input type="checkbox"/> \$100,000,001-\$500 million | <input type="checkbox"/> More than \$50 billion |

- 20. How much do you estimate your liabilities to be?**
- | | | |
|--|--|--|
| <input type="checkbox"/> \$0-\$50,000 | <input type="checkbox"/> \$1,000,001-\$10 million | <input type="checkbox"/> \$500,000,001-\$1 billion |
| <input type="checkbox"/> \$50,001-\$100,000 | <input type="checkbox"/> \$10,000,001-\$50 million | <input type="checkbox"/> \$1,000,000,001-\$10 billion |
| <input type="checkbox"/> \$100,001-\$500,000 | <input type="checkbox"/> \$50,000,001-\$100 million | <input type="checkbox"/> \$10,000,000,001-\$50 billion |
| <input type="checkbox"/> \$500,001-\$1 million | <input type="checkbox"/> \$100,000,001-\$500 million | <input type="checkbox"/> More than \$50 billion |

Part 7: Sign Below

For you

I declare under penalty of perjury that the information provided in this petition is true and correct. I understand that if I make a false statement, I could be fined up to \$250,000 or imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

If I have chosen to file under Chapter 7, I am aware that I may proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under Chapter 7.

If no attorney represents me and I did not pay or agree to pay someone who is not an attorney to help me fill out this document, I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

Signature of Debtor 1

Signature of Debtor 2

Date MM / DD / YYYY

Date MM / DD / YYYY

Debtor 1

First Name Middle Name Last Name

Case number (if known) _____

For your attorney, if you are represented by one

If you are not represented by an attorney, you do not need to file this page.

I, the attorney for the debtor(s) named in this petition, declare that I have informed the debtor(s) about eligibility to proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each chapter for which the person is eligible. I also certify that I have delivered to the debtor(s) the notice required by 11 U.S.C. § 342(b) and, in a case in which § 707(b)(4)(D) applies, certify that I have no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect.

U _____ Date _____
Signature of Attorney for Debtor MM / DD / YYYY

Printed name

Firm name

Number Street

City State ZIP Code

Contact phone _____ Email address _____

Bar number State

For you if you are filing this bankruptcy filing package without an attorney

If you are represented by an attorney, you do not need to file this page.

The law allows you, as an individual, to represent yourself in bankruptcy court, but **you should understand that many people find it extremely difficult to represent themselves successfully. Because bankruptcy has long-term financial and legal consequences, you are strongly urged to hire a qualified attorney.**

To be successful, you must correctly file and handle your bankruptcy case. The rules are very technical, and a misstep or inaction may affect your rights. For example, your case may be dismissed because you did not file a required document, pay a fee on time, attend a meeting or hearing, or cooperate with the court, case trustee, U.S. trustee, bankruptcy administrator, or audit firm if your case is selected for audit. If that happens, you could lose your right to file another case, or you may lose protections, including the benefit of the automatic stay.

You must list all your property and debts in the schedules that you are required to file with the court. Even if you plan to pay a particular debt outside of your bankruptcy, you must list that debt in your schedules. If you do not list a debt, the debt may not be discharged. If you do not list property or properly claim it as exempt, you may not be able to keep the property. The judge can also deny you a discharge of all your debts if you do something dishonest in your bankruptcy case, such as destroying or hiding property, falsifying records, or lying. Individual bankruptcy cases are randomly audited to determine if debtors have been accurate, truthful, and complete. **Bankruptcy fraud is a serious crime; you could be fined and imprisoned.**

If you decide to file without an attorney, the court expects you to follow the rules as if you had hired an attorney. The court will not treat you differently because you are filing for yourself. To be successful, you must be familiar with the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the local rules of the court in which your case is filed. You must also be familiar with any state exemption laws that apply.

Are you aware that filing for bankruptcy is a serious action with long-term financial and legal consequences?

- No
- Yes

Are you aware that bankruptcy fraud is a serious crime and that if your bankruptcy filing package is inaccurate or incomplete, you could be fined or imprisoned?

- No
- Yes

Did you pay or agree to pay someone who is not an attorney to help you fill out this bankruptcy filing package?

- No
- Yes. Name of Person _____
Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

By signing here, I acknowledge that I understand the risks involved in filing without an attorney. I have read and understood this notice, and I am aware that filing a bankruptcy case without an attorney may cause me to lose my rights or property if I do not properly handle the case.

Signature of Debtor 1

Signature of Debtor 2

Date MM / DD / YYYY

Date MM / DD / YYYY

Contact phone

Contact phone

Cell phone

Cell phone

Email address

Email address

APPENDIX B.2

THIS PAGE INTENTIONALLY BLANK

Fill in this information to identify the case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (if known): _____ Chapter _____

Check if this is an amended filing

Official Form 201

Voluntary Petition for Non-Individuals Filing for Bankruptcy

12/15

If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write the debtor's name and the case number (if known). For more information, a separate document, *Instructions for Bankruptcy Forms for Non-Individuals*, is available.

1. Debtor's name

2. All other names debtor used in the last 8 years

Include any assumed names, trade names and *doing business* as names

3. Debtor's federal Employer Identification Number (EIN)

____ - ____ - _____

4. Debtor's address

Principal place of business

Mailing address, if different from principal place of business

Number Street

Number Street

P.O. Box

City State ZIP Code

City State ZIP Code

County

Location of principal assets, if different from principal place of business

Number Street

City State ZIP Code

5. Debtor's website (URL)

6. Type of debtor

Corporation (including Limited Liability Company (LLC) and Limited Liability Partnership (LLP))

Partnership (excluding LLP)

Other. Specify: _____

7. Describe debtor's business

A. Check one:

- Health Care Business (as defined in 11 U.S.C. § 101(27A))
- Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- Railroad (as defined in 11 U.S.C. §101(44))
- Stockbroker (as defined in 11 U.S.C. § 101(53A))
- Commodity Broker (as defined in 11 U.S.C. § 101(6))
- Clearing Bank (as defined in 11 U.S.C. §781(3))
- None of the above

B. Check all that apply:

- Tax-exempt entity (as described in 26 U.S.C. §501)
- Investment company, including hedge fund or pooled investment vehicle (as defined in 15 U.S.C. § 80a-3)
- Investment advisor (as defined in 15 U.S.C. § 80b-2(a)(11))

C. NAICS (North American Industry Classification System) 6-digit code that best describes debtor.
See www.naics.com/search.htm.

8. Under which chapter of the Bankruptcy Code is the debtor filing?

Check one:

- Chapter 7
- Chapter 9
- Chapter 11. Check all that apply:
 - Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than \$2,490,925 (amount subject to adjustment on 4/01/16 and every 3 years after that).
 - The debtor is a small business debtor as defined in 11 U.S.C. § 101(51D).
 - A plan is being filed with this petition.
 - Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).
 - The debtor is required to file periodic reports (for example, 10K and 10Q) with the Securities and Exchange Commission according to § 13 or 15(d) of the Securities Exchange Act of 1934. File the *Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy Under Chapter 11* (Official Form 201A) with this form.
 - The debtor is a shell company as defined in the Securities Exchange Act of 1934 Rule 12b-2.
- Chapter 12

9. Were prior bankruptcy cases filed by or against the debtor within the last 8 years?

- No
- Yes. District _____ When _____ Case number _____
MM / DD / YYYY
- If more than 2 cases, attach a separate list. District _____ When _____ Case number _____
MM / DD / YYYY

10. Are any bankruptcy cases pending or being filed by a business partner or an affiliate of the debtor?

- No
- Yes. Debtor _____ Relationship _____
District _____ When _____
MM / DD / YYYY
- List all cases. If more than 1, attach a separate list. Case number, if known _____

11. Why is venue proper in this district?

Check all that apply:

- Debtor has had its domicile, principal place of business, or principal assets in this district for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other district.
- A bankruptcy case concerning debtor's affiliate, general partner, or partnership is pending in this district.

12. Does the debtor own or have possession of any real property or personal property that needs immediate attention?

- No
- Yes. Answer below for each property that needs immediate attention. Attach additional sheets if needed.

Why does the property need immediate attention? (Check all that apply.)

- It poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety.
What is the hazard? _____
- It needs to be physically secured or protected from the weather.
- It includes perishable goods or assets that could quickly deteriorate or lose value without attention (for example, livestock, seasonal goods, meat, dairy, produce, or securities-related assets or other options).
- Other _____

Where is the property?

Number _____ Street _____

City _____ State _____ ZIP Code _____

Is the property insured?

- No
- Yes. Insurance agency _____
Contact name _____
Phone _____

Statistical and administrative information

13. Debtor's estimation of available funds

Check one:

- Funds will be available for distribution to unsecured creditors.
- After any administrative expenses are paid, no funds will be available for distribution to unsecured creditors.

14. Estimated number of creditors

- | | | |
|----------------------------------|--|--|
| <input type="checkbox"/> 1-49 | <input type="checkbox"/> 1,000-5,000 | <input type="checkbox"/> 25,001-50,000 |
| <input type="checkbox"/> 50-99 | <input type="checkbox"/> 5,001-10,000 | <input type="checkbox"/> 50,001-100,000 |
| <input type="checkbox"/> 100-199 | <input type="checkbox"/> 10,001-25,000 | <input type="checkbox"/> More than 100,000 |
| <input type="checkbox"/> 200-999 | | |

15. Estimated assets

- | | | |
|--|--|--|
| <input type="checkbox"/> \$0-\$50,000 | <input type="checkbox"/> \$1,000,001-\$10 million | <input type="checkbox"/> \$500,000,001-\$1 billion |
| <input type="checkbox"/> \$50,001-\$100,000 | <input type="checkbox"/> \$10,000,001-\$50 million | <input type="checkbox"/> \$1,000,000,001-\$10 billion |
| <input type="checkbox"/> \$100,001-\$500,000 | <input type="checkbox"/> \$50,000,001-\$100 million | <input type="checkbox"/> \$10,000,000,001-\$50 billion |
| <input type="checkbox"/> \$500,001-\$1 million | <input type="checkbox"/> \$100,000,001-\$500 million | <input type="checkbox"/> More than \$50 billion |

16. Estimated liabilities

- | | | |
|--|--|--|
| <input type="checkbox"/> \$0-\$50,000 | <input type="checkbox"/> \$1,000,001-\$10 million | <input type="checkbox"/> \$500,000,001-\$1 billion |
| <input type="checkbox"/> \$50,001-\$100,000 | <input type="checkbox"/> \$10,000,001-\$50 million | <input type="checkbox"/> \$1,000,000,001-\$10 billion |
| <input type="checkbox"/> \$100,001-\$500,000 | <input type="checkbox"/> \$50,000,001-\$100 million | <input type="checkbox"/> \$10,000,000,001-\$50 billion |
| <input type="checkbox"/> \$500,001-\$1 million | <input type="checkbox"/> \$100,000,001-\$500 million | <input type="checkbox"/> More than \$50 billion |

Debtor _____
Name

Case number (if known) _____

Request for Relief, Declaration, and Signatures

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement in connection with a bankruptcy case can result in fines up to \$500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

17. Signature of debtor

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I have been authorized to file this petition on behalf of the debtor.

I have examined the information in this petition and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
MM / DD / YYYY

Ū

Signature of authorized individual

Printed name

Title

18. Signature of attorney

Ū

Signature of attorney for debtor

Date

MM / DD / YYYY

Printed name

Firm name

Number Street

City

State

ZIP Code

Contact phone

Email address

Bar number

State

TAB 3B

THIS PAGE INTENTIONALLY BLANK

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 24 - 25, 2013
At the University of St. Thomas, School of Law
Minneapolis, Minnesota

Draft Minutes

The following members attended the meeting:

Bankruptcy Judge Eugene R. Wedoff, Chair
Circuit Judge Sandra Segal Ikuta
Circuit Judge Adalberto Jordan
District Judge Jean Hamilton
District Judge Robert James Jonker
District Judge Amul R. Thapar
Bankruptcy Judge Arthur I. Harris
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Judith H. Wizmur
Professor Edward R. Morrison
Michael St. Patrick Baxter, Esquire
Richardo I. Kilpatrick, Esquire
J. Christopher Kohn, Esquire
David A. Lander, Esquire (by telephone)
Jill Michaux, Esquire

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Troy A. McKenzie, assistant reporter
Roy T. Englert, Jr., Esq., liaison from the Committee on Rules of Practice and
Procedure (Standing Committee)
Bankruptcy Judge Erithe A. Smith, liaison from the Committee on Bankruptcy
Administration
Jonathan Rose, Secretary, Standing Committee, and Rules Committee Officer
Ramona D. Elliott, Deputy Director /General Counsel, Executive Office for U.S.
Trustees (EOUST)
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
Peter G. McCabe, Assistant Director, Office of Judges Programs, Administrative
Office of the U.S. Courts (Administrative Office)
Benjamin Robinson, Deputy Rules Committee Officer and Counsel to the Rules
Committees (by telephone)
Andrea L. Kuperman, Chief Counsel to the Rules Committees (by telephone)
James H. Wannamaker, Administrative Office
Scott Myers, Administrative Office
Bridget Healy, Administrative Office
Molly Johnson, Federal Judicial Center

District Judge Patrick J. Schiltz, District of Minnesota
Associate Dean Joel Nichols, St. Thomas School of Law
Professor Nancy B. Rappaport, William S. Boyd School of Law, UNLV
Michael T. Bates, Senior Company Counsel, Wells Fargo
Margaret Burks, President, National Association of Chapter 13 Trustees
Jon M. Waage, Chapter 13 Trustee, Middle District of Florida
Raymond J. Obuchowski, on behalf of the National Association of Bankruptcy
Trustees
Debra L. Miller, Chapter 13 Trustee, Northern District of Indiana

The following summary of matters discussed at the meeting is written in the order of the meeting agenda unless otherwise specified, not necessarily in the order actually discussed. It should be read in conjunction with the agenda materials. An electronic copy of the agenda materials is available at <http://www.uscourts.gov/RulesAndPolicies/rules/archives/agenda-books/committee-rules-bankruptcy-procedure.aspx>. Votes and other action taken by the Advisory Committee and assignments by the Chair appear in **bold**.

Introductory Items

1. Greetings and welcome to new member Judge Amul R. Thapar.

The Chair welcomed the Advisory Committee's newest member, Judge Thapar, and thanked Judge Schiltz and Associate Dean Joel Nichols for hosting the Advisory Committee's meeting at the Saint Thomas School of Law. The participants introduced themselves and the Chair recognized Mr. McCabe for his service to all the rules committees and Mr. Wannamaker for his many years of service as primary staff support for the Advisory Committee. The Chair noted that both men would be retiring in the next few months and the Advisory Committee would deeply miss their institutional knowledge and camaraderie.

2. Approval of minutes of New York meeting of April 2 - 3, 2013.

The draft minutes were approved.

3. Oral reports on meetings of other committees:

- (A) June 2013 meeting of the Committee on Rules of Practice and Procedure, including the request for comments on the alternatives included in the proposed amendment of Rule 5005(a)

The Reporter, Chair, and Judge Wizmur gave the report. All of the Advisory Committee's recommendations were approved. The form of the proposed amendment to Rule 5005(a) was modified to provide alternative proposals with respect to electronic signatures of individuals who are not registered users of the judiciary's case management and electronic case filing system (CM/ECF).

Judge Wizmur explained that the Advisory Committee on Evidence did not think there was a need to change the evidence rules in order for electronic signatures to be admissible as evidence. There was, however, concern about how scanned signatures would be validated.

The Reporter and the Chair explained that a cross-committee “CM/ECF Subcommittee” has been created to consider the impact of electronic filing on the existing federal rules. As part of that subcommittee’s initial recommendations, alternative versions of the proposed amendments to Rule 5005(a) have been published for public comment. With respect to individuals who are not registered users of CM/ECF, one proposed version of the rule would deem the registered user’s electronic submission of the signature to validate it. In bankruptcy cases that would mean the debtor’s attorney would validate the debtor’s signature by submitting it as part of a CM/ECF filing. The alternative proposal would require that a notary public validate the signature of the non-registered user.

(B) Cross-committee CM/ECF Subcommittee

The Reporter explained that in addition to weighing in on the proposed amendments to Rule 5005, the CM/ECF Subcommittee has also proposed eliminating the 3-day extension in Rule 9006(f) and Civil Rule 6(d) in cases of electronic service. She said that the proposal would be taken to the Standing Committee in January. Several members supported the idea, and one member suggested that the 3-day extension should be removed for all modes of service. But other members noted occasional problems with electronic service including spam filters, security settings, and the failure of electronic mail servers. The Chair said that he would relate concerns about ineffective electronic service to the Standing Committee.

(C) June 2013 meeting of the Committee on the Administration of the Bankruptcy System.

Judge Smith said that the term of the Bankruptcy Administration Committee’s Chair, Judge Joy Conti, ends this month, and that the new chair, Judge Danny Reeves, begins his term on October 1, 2013.

Judge Smith said that the General Accounting Office has issued its report “Efforts to Consolidate and Share Services between District and Bankruptcy Clerks’ Offices” and that it did not find any evidence that consolidation would save money. She said that the AO has gathered data on shared services and it hopes to have a report at the Committee’s December meeting. She said there appear to be savings in shared services, but that the savings are difficult to quantify.

Judge Smith said that the Committee approved funding for recalled bankruptcy judges and temporary law clerks. The Committee has endorsed the use of video conferencing to save costs where possible, and has again been asked to look at eliminating the Bankruptcy Appellate Panels (BAPs) as a cost savings measure. As it has in the past, the Committee determined eliminating the BAPs would be cost-shifting rather than cost-saving.

With respect to judgeship requests, Judge Smith explained that the Committee has been asked to prioritize judgeship needs. Judge Smith also sent members a copy of the revised *In Forma Pauperis* guidelines that were recently approved by the Judicial Conference.

(D) April 2013 meeting of the Advisory Committee on Civil Rules.

Judge Harris said that the amendments on civil discovery that emerged out of the Duke conference have been approved for publication. Most proposed amendments, if adopted, will automatically apply in bankruptcy proceedings because most of the bankruptcy discovery rules incorporate civil discovery rules. The “Scope and Purpose” rule for bankruptcy (Rule 1001) does not, however, incorporate the civil rule version (Rule 1). Accordingly, if the Advisory Committee decides to track the proposed amendment to Rule 1, a conforming change to Rule 1001 will have to be recommended and approved. In this respect, the Chair approved Judge Harris’ request to put in the dugout consideration of an amendment to Rule 1001 to track proposed changes to Fed. R. Civ. Pro 1.

(E) May 2013 meeting of the Advisory Committee on Evidence.

Judge Wizmur said that in addition to the electronic signature issue with respect to Rule 5005, the Evidence Rules Advisory Committee will hold a mini-conference in Portland, Maine next month (October 2013) to discuss the impact of technology on the rules of evidence.

(F) April 2013 meeting of the Advisory Committee on Appellate Rules.

Judge Jordon said that the Appellate Rules Committee has approved published revisions to Appellate Rule 6 that would (1) update that Rule’s cross-references to the Bankruptcy Part VIII Rules, (2) amend Rule 6(b)(2)(A)(ii) to remove an ambiguity dating from the 1998 restyling, (3) add a new Rule 6(c) to address permissive direct appeals from the bankruptcy court under 28 U.S.C. §158(d)(2), and (4) take account of the range of methods available now or in the future for dealing with the record on appeal.

(G) Bankruptcy Next Generation of CM/ECF Working Group.

Judge Perris and Mr. Waldron said that the development of CM/ECF NextGen continues and that test courts should begin seeing the first release early next year and that full implementation by all bankruptcy courts is targeted for early 2015. Mr. Myers added that the Administrative Office has had a number of conference calls with private forms vendors in connection with the development of NextGen. Some vendors have expressed concern that not all of their competitors will invest the resources to comply with the new requirements and may thereby obtain a competitive pricing advantage for their software. Mr. Myers said the vendors have been told, however, that courts will likely issue deficiency notices to bankruptcy attorneys who submit forms without all the data required by NextGen and that as a result attorneys will seek out vendors that do comply with the new requirements.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

- (A) Recommendation concerning Suggestion 12-BK-B by Matthew T. Loughney (on behalf of the Bankruptcy Noticing Working Group) to amend Rule 2002(f)(7) to require notice of the confirmation of the debtor's chapter 13 plan.

Rule 2002(f)(7) currently requires notice to creditors of the entry of confirmation orders in cases under chapters 9, 11, and 12—but not chapter 13. The Assistant Reporter said that the Administrative Office's Bankruptcy Noticing Working Group has suggested that the rule be expanded to require notice when a chapter 13 confirmation order is entered. The Working Group explained that although courts can order notice of entry of a chapter 13 confirmation order under Rule 9022, adding the notice requirement to Rule 2007(f)(7) would provide clarity about who should receive the notice.

The Assistant Reporter said that the Subcommittee carefully considered the suggestion but concluded that a rule amendment was unnecessary. The Subcommittee first concluded that notice of the chapter 13 plan confirmation hearing, already required by the bankruptcy rules, was sufficient notice of the pending entry of a confirmation order, and that creditors represented by counsel who have entered an appearance in the case will receive electronic notice when the chapter 13 confirmation order is entered on the docket.

The Subcommittee also conducted an informal survey of 77 court clerks and found that approximately 80% reported that the judges in their courts already routinely require some type of notice under Rule 9022. Given that current noticing practices appear to be sufficient, and that the Subcommittee is already considering a separate suggestion to limit certain notice requirements in chapter 13 cases that may be costly and provide little benefit, the Subcommittee recommends that no further action be taken on the suggestion. **The Advisory Committee agreed with the Subcommittee and no further action will be taken on the suggestion.**

Professor Morrison said that, like chapter 13 cases, there seemed to be little benefit to providing notice of entry of the confirmation order in small business chapter 11 cases. At Professor Morrison's request, **the Chair asked the Business Subcommittee to consider removing small business chapter 11 cases from the list in Rule 2002(f)(7).**

- (B) Recommendation concerning Comment 11-BK-12 by Judge Eric L. Frank regarding the negative notice procedure for objections to claims in the proposed amendment to Rule 3007 that was published in 2011.

Judge Harris and the Reporter reminded members that the Advisory Committee previously proposed an amendment to Rule 3007(a) in response to two suggestions submitted on behalf of the Bankruptcy Judges Advisory Group ("BJAG"). The first suggestion (09-BK-H),

from Judge Margaret D. McGarity, proposed an amendment to permit the use of a negative notice procedure for objections to claims. The second suggestion (09-BK-N), from Judge Michael E. Romero, sought clarification of the proper method of serving objections to claims. Judge Romero noted that some courts require service under Rule 7004 because an objection to a claim creates a contested matter and Rule 9014(b) provides that the “motion [initiating a contested matter] shall be served in the manner provided for service of a summons and complaint by Rule 7004.” Other courts have concluded that Rule 3007(a) governs claims objections by specifying the notice recipient of a claims objection.

2011 Proposed Amendments to Rule 3007(a)

The Reporter said that Advisory Committee addressed the suggestions through proposed amendments to Rule 3007(a) published for comment in 2011-12. The amendments adopted an objection procedure to make clear that Rule 7004 applies to claims objections only if the recipient is the United States, an officer or agency of the United States, or an insured depository institution. Otherwise, the claimant must be served by first class mail at the address and name set out on the proof of claim. The proposed amendments also permitted a negative noticing procedure.

The Reporter said that there were two comments in response to the published amendments. Judge Eric Frank questioned whether a negative notice procedure is generally appropriate for an objection to a claim since, under Rule 3001(f), a properly executed and filed proof of claim is entitled to be treated as prima facie evidence of the validity and amount of the claim. Given this evidentiary effect of a proof of claim, Judge Frank suggested that in many situations a claim should not be disallowed by default and without a hearing. The other comment was submitted by Mr. Raymond P. Bell, Jr. (11-BK-015), who agreed with Judge Frank.

In his comment, Judge Frank contended that the problem with the proposed amendment arose more from the Committee Note than from the text of the rule itself. While the rule’s reference to “any deadline to request a hearing” might suggest that a claim can be disallowed just because of the failure to make such a request, it did not expressly say so. The Committee Note, however, stated that the amendment authorized local rules to *require* a claimant to request a hearing or file a response. He therefore suggested that, “at a minimum,” the Committee Note be revised to “state unequivocally that although local rules may impose the obligation on a claimant to respond to a proof of claim, there may [be] matters in which a proof of claim is valid and allowable notwithstanding the failure to file a response to claims objection or request a hearing” In his view, the Committee Note should indicate that, with regard to those matters, the court has a duty to determine whether Rule 3001(f) requires allowance of the claim, even if the claimant does not respond or request a hearing.

At the spring 2012 meeting, the Subcommittee recommended that the proposed amendments to Rule 3007(a) be withdrawn so that they could be considered along with the package of rule amendments accompanying the development of a national chapter 13 plan form. The proposed plan form would allow certain claims to be determined through the plan and the

Subcommittee concluded that the method of service on the claimant should be the same regardless of whether the claim amount was determined through the plan or through a claims objection.

The Proposed 2013 Amendments to Rules 3007 and 3012

In connection with the chapter 13 plan form published for comment in August 2013, the Standing Committee published amendments to Rules 3007 and 3012 that would require enhanced Rule 7004 service for requests to determine the amount of secured and priority claims in chapter 12 and 13 cases. The proposed amendments to Rule 3012 make clear that secured claims can be modified through the plan as well as by claim objection or motion, and that priority claim amounts can be challenged through a claim objection or motion. Regardless of the form of objection, however, the proposed amendment to Rule 3012 appears to require service under Rule 7004. Outside the chapter 12 and chapter 13 context, however, the proposed 2013 amendment to Rule 3007 leaves the current method of objecting to claims unchanged – arguably requiring only that the objection and hearing be mailed or otherwise delivered to the claimant.

The Reporter said that the Subcommittee was asked to try to create a unified approach to the service of claim objections as well as claim modifications accomplished through plans. She said that the Advisory Committee's 2011 proposed amendment to Rule 3007(a) was based on the belief that claim objections should generally be served on the person that the claimant designated on the proof of claim for receipt of notices, rather than according to Rule 7004. She said that the Subcommittee continues to recommend this method of service for claim objections, and that it therefore recommends final approval of Rule 3007(a) as published in 2011 and as shown in the agenda materials beginning at page 98. She added that the Subcommittee also acknowledged Judge Frank's concerns and that it therefore recommends adding language to the Committee Note (as shown at page 99 of the agenda materials) to make clear that an objection to a claim does not automatically overcome the prima facie validity of a proof of claim that is afforded by Rule 3001(f).

The Reporter said that the Subcommittee also continued to recommend the portion of the proposed 2013 amendment to Rule 3012 that would allow a secured claim to be modified through a chapter 12 or 13 plan, along with the more formal Rule 7004 service in that context to increase the likelihood that affected claimants are made aware that the plan proposes to modify their claim. The Reporter said that the Subcommittee now recommends revising published Rule 3012 to clarify that all claims objections, including objections to secured and priority claims, be served on the person designated on the proof of claim in accordance with proposed Rule 3007(a); that secured claims being modified through a plan be governed by the service provision in Rule 3012; and that motions to modify a claim be governed as they currently are, by Rule 9014.

A motion to approve the Subcommittee's recommendations, subject to further amendments after considering comments on the published versions of Rule 3007 and 3012, passed without objection.

- (C) Recommendation concerning conforming amendments of Rule 1007(a)(1) and (a)(2) to reflect the changed designations of the schedules proposed by the Forms Modernization Project.

Judge Harris explained that because schedules E and F are being combined for the Forms Modernization Project, the Subcommittee recommended a technical conforming amendments to Rule 1007(a)(1) and (a)(2) replacing references to schedules E and F with E/F. **A motion to conform the rule to the new form designations, effective when the new forms go into effect, passed without opposition.** The Chair explained that because the proposed amendment was conforming, publication would not be necessary.

- (D) Oral report concerning Suggestion 12-BK-I by Judge John E. Waites (on behalf of the Bankruptcy Judges Advisory Group) to amend Rule 1006(b) to provide that courts may require a minimum initial payment with requests to pay filing fees in installments.

Judge Harris said that the Subcommittee was aware that some courts already require an initial payment with a fee installment application, and that it has asked the FJC to research the prevalence of the practice and the amount of required initial installments. On behalf of the FJC, Ms. Johnson said that she hopes to have research done in time for a Subcommittee call before the spring meeting.

- (E) Oral report concerning Suggestion 12-BK-M by Judge Scott W. Dales to amend Rule 2002(h) to mitigate the cost of giving notice to creditors who have not filed proofs of claim in a chapter 13 case.

Judge Harris reviewed the suggestion. Bankruptcy Rule 2002(a) requires that certain notices go to all creditors. After the claims bar date in a chapter 7 case, however, Rule 2002(h) allows the court to enter an order limiting future notices to creditors who have either filed a claim or who have been given an extension to file a claim at a later date. Judge Dales suggests that Rule 2002(h) be revised and made applicable to chapter 13, or even to all chapters.

Judge Harris said that the Subcommittee recommends putting Judge Dale's suggestion in the dugout until after the published chapter 13 amendments have been considered. There were no objections to the Subcommittee's recommendation, and the suggestion was placed in the dugout.

5. Report by the Chapter 13 Plan Form Working Group.

Oral report concerning (1) responses to the publication of the chapter 13 plan form and the implementing rules amendments and (2) outreach to the chapter 13 community concerning the plan form and rules.

The Chair recognized the various people attending the meeting who commented on and/or attended meetings regarding the plan form. The Assistant Reporter discussed the plan

form process, and Mr. Kilpatrick explained the developments of an adequate protection order. Mr. Kilpatrick also noted that most of the comments received so far have been positive and many have included constructive suggestions for improvements. The Chair added that he anticipates many comments which should generate a full discussion of the plan form and the chapter 13 process at the spring 2014 meeting.

6. Report by the Mortgage Claim Form Working Group.

Oral report concerning amending Official Form 10A (Mortgage Proof of Claim Attachment) to require inclusion of a loan history.

Ms. Michaux explained that the working group was formed at the spring 2013 meeting. It has already had several conference calls, and the members hope to have a proposal for a detailed loan history to replace Official Form 10A ready to be considered at the spring 2014 meeting. The purpose of a detailed loan history, in contrast to the summary that is now Official Form 10A, Ms. Michaux said, is to provide as a default a clear accounting of how payments have been applied to the loan so that debtors can object to the claim calculation when appropriate.

7. Joint Report by the Subcommittees on Consumer Issues and Forms

- (A) Recommendations concerning (1) Suggestion 13-BK-E by Judge Carol Doyle to amend Rule 3002.1 to clarify that the rule applies to all claims secured by a chapter 13 debtor's principal residence when the plan proposes to maintain mortgage payments postpetition and (2) providing guidance on whether the creditor's obligations under Rule 3002.1 cease to apply if the automatic stay is lifted with respect to the residence.

The Reporter explained that Judge Doyle's suggestion highlights a case law split on whether Rule 3002.1(a) applies only in chapter 13 cases in which an arrearage is being cured under 11 U.S.C. § 1322(b)(5). Among other things, the rule requires a mortgagee to provide certain notices pertaining to payment changes, fees, expenses, and charges, but some courts have ruled that these reporting requirements arise only if the chapter 13 plan is curing an arrearage. Others, including Judge Doyle, have concluded that the reporting requirements apply so long as the plan provides for maintaining current payments on the debtor's mortgage.

The Subcommittees agreed with Judge Doyle that Rule 3002.1(a) should be amended to clarify that it requires compliance with the rule whenever a plan provides for the maintenance of postpetition mortgage payments. If a debtor is trying to remain current on a home mortgage, he or she needs to know if the amount required to be paid has changed, whether or not an arrearage is being cured. The Subcommittees also recommended amending the rule to clarify that it applies regardless of whether the debtor or the trustee is making plan payments. **The Advisory Committee agreed with both recommendations.**

The Subcommittees further agreed that the rule should be amended to clarify that the creditor's reporting requirements cease at some point after a motion to lift the automatic stay is granted with respect to the debtor's principal residence. There was no agreement, however, as to when that point arrives. The views coalesced around two positions: (1) effective date of the order terminating the stay and (2) transfer of title from the debtor.

The Advisory Committee discussed the two alternatives proposed by the Subcommittees. Some members favored termination of the reporting requirements when the stay is lifted because the date is easy to determine and would be uniform throughout national bankruptcy practice. A title transfer date, in contrast, would vary depending on state foreclosure law. Members supporting the title transfer date pointed out, however, that the debtor and creditor often continue to negotiate after the stay is lifted, with the mortgage eventually being reinstated. The Chair said that either proposal would merely be a default provision and that a court could order that reporting requirements continue if that made sense in a particular situation. **After further discussion, and over three dissents, the Committee recommended publishing the "stay termination" alternative as the default date for ending a creditor's Rule 3002.1(a) reporting requirements.** One member also suggested adding language to the Committee Note to encourage courts to consider requests for continued reporting in appropriate circumstances, but no particular language was recommended.

- (B) Oral report concerning Suggestion 11-BK-N by David S. Yen for a rule and form for applications to waive fees other than filing fees under 28 U.S.C. § 1930(f)(2) and (f)(3).

Judge Harris said that the Subcommittee tabled the suggestion until the Judicial Conference approved guidelines for fee waivers under 28 U.S.C. § 1930(b). As reported by Judge Smith at Item 3C above, fee waiver guidelines have now been approved. Judge Harris said that the Subcommittee will review the new guidelines, consider the suggestion, and report back at the spring meeting.

8. Report by the Subcommittee on Forms and the Forms Modernization Project.

- (A) Report on the status of the Forms Modernization Project and preliminary review of filing forms for non-individual debtors, including a chapter 15 petition.

Judge Perris provided an overview of the Forms Modernization Project and the Next Generation of CM/ECF. She said that the code for CM/ECF NextGen is being written now and that testing should begin in four test courts in January 2014. The test courts are scheduled to go live next summer, and the rest of the courts will follow later. She said that it would probably not be until early- to mid-2015 that all courts will be live on the first release of NextGen. The projected rollout is compatible with the release of the modernized bankruptcy forms, she said, because the bulk of the forms will not be ready to go into effect until December 1, 2015, shortly after most courts are expected to be using the first release of NextGen.

Judge Perris said that the individual debtor forms are currently out for public comment and that the Forms Subcommittee and Forms Modernization Project (FMP) will make recommendations for any needed changes and for final approval at the spring meeting. The recommended effective date for the individual debtor forms will be no earlier than December 1, 2015, however, because the new form numbering scheme developed for bankruptcy forms makes it necessary to put the bulk of the new forms into effect at the same time, and the non-individual debtor version of case opening forms will not be published for comment until next year. Mr. Myers briefly described the form numbering scheme and reported that an updated chart showing current and projected form numbers was included in the agenda materials beginning at page 281.

For this meeting, Judge Perris said that the FMP was seeking preliminary feedback on the non-individual debtor instruction booklet, case opening forms for non-individual debtors, B201, B202, B204, B205, B206Sum, B206A/B, B206D, B206E/F, B206G, B206H, B207, an Official Form for opening a chapter 15 case, B401, and the proof of claim form, B410. She said that the forms and their Committee Notes started at page 147 of the agenda materials. Members suggested a number of changes, and Judge Perris explained that the suggestions and any others she received would be evaluated by FMP working groups over the winter in the next round of form revisions.

- (B) Recommendation concerning Suggestion 13-BK-B by Judges Eric L. Frank and Bruce I. Fox to amend the Voluntary Petition to include checkboxes for the documents small business debtors are required to file under § 1116(1) of the Bankruptcy Code.

The Reporter said that the Subcommittee considered the suggestion and agreed that the following language should be added to both versions of the voluntary petition: “If you indicate that the debtor is a small business as defined in 11 U.S.C. § 101(51D), you must append the attachments required under 11 U.S.C. § 1116(a)(1).” **The Advisory Committee agreed with the recommendation.**

- (C) Oral report on the revision of the bankruptcy subpoena forms as a consequence of the amendment of Civil Rule 45 effective December 1, 2013.

Judge Harris explained that pending changes to Civil Rule 45 require revisions to the bankruptcy subpoena forms, which incorporate language directly from the rule. Although Director’s Procedural Forms are not required to be used, Subcommittee members and AO staff revised the bankruptcy subpoena forms to more closely follow the presentation and organization of the civil rule subpoena forms. Form 255 is to be used to compel testimony at a hearing or trial, Form 256 for a deposition, and Form 257 for production or inspection. As is the case currently, Form 254 is to be used as a subpoena for Rule 2004 examinations. Judge Harris said that because the subpoena forms are Director’s Procedural Forms, formal approval by the Advisory Committee is not necessary. He added that the forms are scheduled to go into effect on December 1, 2013, when revised Rule 45 becomes effective.

9. Report by the Subcommittee on Business Issues

- (A) Oral report on the status of the proposed amendments to Rules 7008, 7012, 7016, 9027, and 9033 scheduled to take effect on December 1, 2013, and other amendments proposed in response to the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

The Assistant Reporter said that the *Stern* rules (proposed amendments to Rules 7008, 7012, 7016, 9027, and 9033) have been approved by the Judicial Conference and are on track to become effective December 1, 2014, if approved by the Supreme Court and if Congress does not act to the contrary. He said that the timing was somewhat complicated, however, because after the Advisory Committee and the Standing Committee recommended the proposed amendments for final approval, the Supreme Court granted review of *Executive Benefits Insurance Agency v. Arkison*, No. 12-1200. One question presented in *Arkison* is whether bankruptcy judges are constitutionally authorized, based on the express or implied consent of the parties, to resolve a proceeding otherwise entitled to an Article III forum.

The Chair explained that the proposed *Stern* amendments are premised on the idea that parties can expressly consent to final adjudication by a bankruptcy judge. Because both *Arkison* and the proposed *Stern* amendments raise the issue of consent, he said, the Supreme Court may decide to hold any decision on the *Stern* rules until after *Arkison* is decided. If the Court holds consideration of the *Stern* rules past May 1, 2014, he said, the rules would not go into effect until December 1, 2015, at the earliest.

NOTE: After the meeting, the Advisory Committee and the Standing Committee reconsidered the decision to recommend submitting the *Stern* amendments to the Supreme Court. The rules package was submitted to the Court earlier than usual this year to give the Court the option of handling its Rules Enabling Act work at the beginning of its term. Including the *Stern* amendments in the rules package undermines the goal of presenting a clean package that the Court could consider and potentially resolve early in the term. In addition, concerns were raised that the proposed *Stern* amendments could be perceived as favoring one side of the *Arkison* debate, and that amendments to the rules might be required after the case was decided. Based on the new recommendations of the Advisory Committee and the Standing Committee, the Executive Committee of the Judicial Conference withdrew the proposed *Stern* amendments from the rules package submitted to the Supreme Court.

- (B) Recommendation concerning Suggestion 13-BK-D by David Tilem to add a checkbox for other voting parties to Official Form 14, the ballot for confirmation of a Chapter 11 plan.

The Assistant Reporter said that Mr. Tilem suggested the need for an "other" checkbox on Official Form 14, Ballot for Accepting or Rejecting Plan, to accommodate claims such as lease rejections. The Subcommittee considered the suggestion and concluded that no change was necessary. Official Form 14 is a generic ballot that is designed to incorporate the classes of

claims and interests described in the plan of reorganization. The plan proponent modifies the ballot form as needed so that each class identified in the plan has a ballot. If the plan proposes to separately classify lease rejection damages, for example, the proponent would incorporate that class name into the version of Official Form 14 given to members of the class.

After a short discussion, no member opposed the Subcommittee's recommendation that no further action be taken on the suggestion.

10. Report by the Subcommittee on Privacy, Public Access, and Appeals.

- (A) Recommendation concerning Suggestion 13-BK-A by David W. Ostrander to include the debtor's age on the Statement of Financial Affairs or the Schedules of Assets and Liabilities.

The Assistant Reporter said that the Advisory Committee has historically required debtors to disclose information on publicly available bankruptcy forms only if that information is deemed necessary to the bankruptcy process. For example, the means-test forms require information about whether the debtor is over or under age 65 because that information is necessary in order to apply the IRS national standards for health care costs. The Subcommittee was unable, however, to determine a more general bankruptcy administration need for public disclosure of the debtor's specific age on bankruptcy forms, and therefore recommended that no further action be taken on the suggestion. **No member opposed the recommendation.**

- (B) Recommendations concerning amendments to the bankruptcy appellate rules.

Judge Jordon said that the Subcommittee reviewed a number of previously tabled comments with respect to the restyled Part VIII bankruptcy appellate rules that are on track to become effective December 1, 2014. The Subcommittee concluded that some of the comments should be rejected at this time, and that others should be put in the bullpen or dugout until after the revised Part VIII rules take effect and there has been sufficient experience with them to determine whether any additional amendments will be needed.

The Reporter presented the suggestions and noted the Subcommittee's recommendation as to whether: (1) no change should be made, (2) a proposed amendment should be put in the bullpen for recommended implementation at a later date, or (3) a proposed amendment should be held in the dugout to be considered at a later date.

Rule 8002 (Time for Filing Notices of Appeal)

Comment 12-BK-033—Judge Christopher M. Klein: *Rule 8002 should include a provision like FRAP 4(a)(6), which permits the district court to reopen the time to file an appeal for someone who did not receive notice of entry of the judgment within 21 days after its entry.*

The Reporter said that FRAP 4(a)(6) is not incorporated into the existing appellate rules, and that, in light of the need for finality of a bankruptcy court order or judgment, the Subcommittee recommended against incorporating it into the restyled appellate rules. No committee member opposed the recommendation.

Comment 12-BK-033—Judge Christopher M. Klein: *It would be useful for Rule 8002 to have a provision similar to FRAP 4(a)(7), which addresses when a judgment or order is entered for purposes of Rule 4(a). The provision helps clarify timing issues presented by the separate-document requirement.*

The Subcommittee concluded that the rules specifying when a separate document is required and the impact of the requirement on the date of entry of the judgment are sufficiently confusing that, as suggested by Judge Klein, Rule 8002 would likely be improved by adding a provision similar to FRAP 4(a)(7). A proposed new Rule 8002(a)(5) was set out in the agenda materials beginning at page 324. **The Advisory Committee agreed to recommend the proposed change and placed it in the bullpen.**

Rule 8003 (Appeal as of Right—How Taken; Docketing the Appeal) and Rule 8004 (Appeal by Leave—How Taken; Docketing the Appeal)

Comment 12-BK-036—Mary P. Sharon, Clerk (1st Cir. BAP): *There is an inconsistency between Rule 8003 and Rule 8004. Rule 8003(c) requires the bankruptcy clerk to serve the notice of appeal, whereas Rule 8004(a) places that duty on the appellant.*

The Subcommittee recommends that no change be made to the service provisions of revised Rules 8003 and 8004. The rules are consistent with the parallel FRAP provisions. Because an appellant seeking leave to appeal under Rule 8004 will have to serve its motion on other parties, the Subcommittee concluded that it makes sense to require service of the notice of appeal along with the motion. No member opposed the Subcommittee's recommendation.

Rule 8004 (Appeal by Leave—How Taken; Docketing the Appeal): In response to a comment suggesting that an appellate court be allowed to treat a motion for leave to appeal as a notice of appeal if a notice of appeal is not filed, the Subcommittee raised the following issue for further consideration: Should the requirement that a notice of appeal be filed, in addition to a motion for leave to appeal, be eliminated from revised Rule 8004?

Subcommittee members observed that the requirement that a notice of appeal be filed along with a motion for leave to appeal has been as been a longstanding part of the rule on leave to appeal. No one outside the Subcommittee has questioned the need for a notice in this circumstance, and after careful consideration, the Subcommittee recommended that no change be made to the rule. No Advisory Committee member opposed the recommendation.

Rule 8005 (Election to Have an Appeal Heard by the District Court Instead of the BAP)

Comment 12-BK-033—Judge Christopher M. Klein: *Rule 8005 does not retain the provision of current Rule 8001(e)(2), which provides for the withdrawal of an election with the district court's acquiescence.*

For reasons described in the agenda materials, Subcommittee members recommended no change to revised Rule 8005. No Advisory Committee member opposed the recommendation.

Rule 8006 (Certifying a Direct Appeal to the Court of Appeals)

12-BK-033—Judge Christopher M. Klein: *Rule 8006(c) should provide an opportunity for the bankruptcy court to comment on the proceeding's suitability for direct appeal when a certification is jointly made by all appellants and appellees.*

Subcommittee members agreed that the court of appeals would likely benefit from the court's statement about whether the appeal satisfies one of the grounds for certification. The Subcommittee decided, however, that authorization should not be limited to the bankruptcy court. Because under Rule 8006(b) the matter might be deemed to be pending in the district court or BAP at the time or shortly after the parties file the certification, those courts should also be authorized to file a statement with respect to appeals pending before them. The Subcommittee's recommended amendment to Rule 8006(b) was set forth at page 330 of the agenda materials. **The Advisory Committee approved the proposed revisions to Rule 8006(b) for the bullpen. In addition, the Subcommittee was asked to consider whether a deadline for certifying a direct appeal should be added to the rule.**

Rule 8009 (Record on Appeal; Sealed Documents)

12-BK-005—Judge Robert J. Kressel; 12-BK-015—Judge Barry S. Schermer 12-BK-040—Bankruptcy Clerks Advisory Group: *Designation of the record should not be required.*

Because the recently appointed CM/ECF Subcommittee of the Standing Committee will likely consider this issue, the Subcommittee recommended deferring consideration of the suggestion until after the CM/ECF Subcommittee submits its report. **The Advisory Committee agreed and the suggestion was put in the dugout.**

Rule 8010 (Completing and Transmitting the Record)

12-BK-008—National Conference of Bankruptcy Judges; 12-BK-034—Oregon State Bar Debtor-Creditor Section Local Rules and Forms Committee; 12-BK-040—Bankruptcy Clerks Advisory Group: *Rule 8010(b)(1) should be revised to fix an outside deadline for the clerk's transmission of the record, even if parties are slow to designate the record.*

The suggestion would be moot if the suggestion to revise Rule 8009 to eliminate designation of the record is approved. The Subcommittee therefore recommended that consideration of this suggestion be deferred until after the CM/ECF Subcommittee submits its

report and the Subcommittee takes up the proposed amendment to Rule 8009. **The Advisory Committee agreed, and the suggestion was put in the dugout.**

12-BK-014—Judge Dennis Montali: *In some cases when the appellate court orders paper copies of the record to be delivered, it may be appropriate for the appellee to provide them. Add to the end of the first sentence of Rule 8010(b)(4), “or the appellee where appropriate.”*

The Subcommittee recommended no change because the issue of furnishing paper copies will likely diminish as courts continue to adapt to the use of electronic storage and transmittal of documents. No member of the Advisory Committee objected to the Subcommittee’s recommendation.

Rule 8011 (Filing and Service; Signature)

12-BK-005—Judge Robert J. Kressel; 12-BK-026—Judge S. Martin Teel, Jr.: *Rule 8011(a)(2) should not follow the ill-advised rule of FRAP 25(a)(2)(B) of having different filing rules for briefs and appendices. The filing rules should be the same for those documents as for all others—requiring receipt by the clerk by the deadline.*

The Subcommittee recommended no change. Currently, briefs are timely if mailed on or before the last day for filing. This practice is longstanding and is consistent with FRAP, which is one of the goals of amending the Part VIII rules. Moreover, as electronic filing of briefs becomes more prevalent, the mailing rules become less significant. No Advisory Committee member objected to the recommendation.

Other Issues

The Reporter said that the Subcommittee has retained three other comments on the revised Part VIII rules for further consideration. They concern whether a provision should be added to the rules providing for the issuance of a mandate by the district court and BAP upon the disposition of a bankruptcy appeal, and whether revised Rule 8023 should be amended to clarify the procedure for voluntary dismissal of appeals when (1) the appeal concerns an objection to discharge or (2) the trustee is a party to the appeal. It has been suggested that the requirements of Rules 7041 and 9019 for bankruptcy court review in those situations should also apply to appeals. The Subcommittee will make recommendations to the Advisory Committee regarding those comments at a later meeting.

11. Report by the Subcommittee on Technology and Cross Border Insolvency.

Oral report concerning Suggestion 13-BK-F by Judge Barry Schermer to amend portions of the Bankruptcy Rules that apply to chapter 15 proceedings.

Mr. Baxter said that the Subcommittee concluded that the rules are inconsistent about the requirement of a summons when a chapter 15 petition is filed. In practice, he said, most courts do not issue a summons regardless of whether the case seeks recognition of a foreign main or a foreign non-main proceeding. He said that the Subcommittee is considering several alternatives and will bring a recommendation to the Advisory Committee at the spring meeting.

12. Report by the Subcommittee on Attorney Conduct and Health Care.

Oral report concerning Suggestion 13-BK-C by the American Bankruptcy Institute's Task Force on National Ethics Standards to amend Rule 2014 to specify the relevant connections that must be described in the verified statement accompanying an application to employ professionals.

The Chair acknowledged Professor Rappaport, who authored the suggestion and was at the meeting, and thanked her for her efforts on the suggestion.

Judge Jonker said that ABI's Ethics Task Force suggestion asserts that the Rule 2014 requirement to disclose all of a professional's "connections" to the debtor and other bankruptcy case parties in an employment application is overbroad and leads to voluminous "telephone-book" disclosures of every conceivable connection, thereby making it hard for courts and interested parties to find and evaluate those connections that are actually relevant. The suggestion would require disclosure only of "relevant connections," and it offered a definition of the term "relevant."

Judge Jonker reminded the Advisory Committee that a very similar suggestion was considered approximately ten years ago, but it was eventually withdrawn. He said that the current suggestion seems to make sense, but that the Subcommittee needs more information prior to making a decision. The Assistant Reporter is researching the issue, and there will be an update at the spring 2014 meeting.

Discussion Items

13. Oral report concerning Suggestion 13-BK-G by Gary Streeting to amend Rule 1015(b).

Referred to the Consumer Subcommittee.

14. Oral report concerning Suggestion 13-BK-H by Dan Dooley to amend Rule 2016 to require attorneys and other professionals employed by the estate to submit weekly reports and fee applications.

Referred to the Business Subcommittee.

15. Oral report concerning Suggestion 13-BK-I by Judge Stuart Bernstein to amend Official Forms 9F and 9F(Alt.).

Referred to the Business Subcommittee.

Information Items

16. Oral report on the status of bankruptcy-related legislation.

Mr. Wannamaker reviewed bankruptcy-related legislation that has been introduced in Congress. None of the bills, he said, seemed likely to move forward anytime soon.

17. Bullpen.

Mr. Wannamaker explained that the “bullpen” is a designation for items that have been approved by the Advisory Committee but are held for a time pending submission to the Standing Committee. He said that the bullpen was empty before this meeting, but as a result of Advisory Committee’s actions over the past two days, the following items had been approved to be held in the bullpen for submission to the Standing Committee in the future: (a) proposed revisions to Rule 8002(a)(5) (see Item 10B); and (b) proposed revisions to Rule 8006(b) (see Item 10B).

18. Dugout.

Mr. Wannamaker said that the “dugout” is a newly created designation for suggestions or issues that require further study before the Advisory Committee is asked to make a recommendation. A list of dugout items was included in the agenda materials.

The following items were added to the dugout during the meeting: (a) Recommendation for conforming change to Rule 1001 to track proposed changes to Fed. R. Civ. Pro 1; (b) Suggestion 12-BK-M (see Item 4E); and (c) Comments 12-BK-005, 12-BK-15, and 12-BK-040 regarding designation of the record in bankruptcy appeals (see Item 10B, Rule 8009).

19. Rules Docket.

Mr. Wannamaker asked members to review the Rules Docket and email any proposed changes to him.

20. Future meetings.

The spring 2014 meeting will be held April 22 – 23, in Austin, Texas. The fall 2014 meeting will be held September 29 – 30 in Charleston, South Carolina.

21. New business.
No new business.
22. Adjourn.

Respectfully submitted,

Scott Myers

THIS PAGE INTENTIONALLY BLANK

TAB 4

THIS PAGE INTENTIONALLY BLANK

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

**FROM: Hon. Reena Raggi, Chair
Advisory Committee on Federal Rules of Criminal Procedure**

RE: Report of Advisory Committee on Criminal Rules

DATE: December 20, 2013

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure (“the Committee”) was unable to meet as scheduled on October 18 in Salt Lake City because of the lapse in appropriated funds, and the meeting was not rescheduled. This report discusses briefly four information items:

- (1) a proposal by the Department of Justice to amend Rule 4 to permit service of a summons on a foreign organization that has no agent or principal place of business within the United States;
- (2) a new proposal by the Department of Justice to amend Rule 41 to enlarge the territorial limits for warrants to search electronic storage media and electronically stored information;
- (3) a proposal (parallel to that being proposed by the Advisory Committee on Civil Rules) to amend Rule 45(c) to eliminate the 3-day rule for service by electronic means; and
- (4) proposals to consider amendments to Rules 53, 11, and 32.

II. Information Items

A. Rule 4

The Department of Justice has submitted a proposal to amend Rule 4 to permit effective service of a summons on a foreign organization that has no agent or principal place of business within the United States. The Department recommends that Rule 4 be amended in two key respects:

- (1) to remove the requirement that a copy of the summons be sent to the organization's last known mailing address within the district or principal place of business within the United States; and
- (2) to provide the means to serve a summons upon an organization located outside the United States.

The proposed amendment would ensure organizations that are committing domestic offenses are not able to avoid liability through the simple expedient of declining to maintain an agent, place of business and mailing address within the United States.

A subcommittee met by teleconference throughout the summer and early fall, and it approved a proposed amendment for discussion at the October meeting. Because of the cancellation of that meeting, discussion of the proposed amendment has been deferred to the Committee's April meeting.

B. Rule 41

The Department of Justice has submitted a proposal to amend Rule 41 to enlarge the territorial limits for warrants to search electronic storage media and electronically stored information. The purpose of the proposed amendment is enable law enforcement to investigate and prosecute botnets and crimes involving Internet anonymizing technologies. Rule 41(b) does not directly address the circumstances that arise when officers seek to execute search warrants, via remote access, over modern communications networks such as the Internet.

The proposed amendment is intended to address two increasingly common situations: (1) where the warrant sufficiently describes the computer to be searched but the district within which that computer is located is unknown, and (2) where the investigation requires law enforcement to coordinate searches of numerous computers in numerous districts.

The proposed amendment would authorize a court in a district where activities related to a crime have occurred to issue a warrant to be executed by remote access for electronic storage media and electronically stored information whether located within or outside the district. At present, Rule 41(b) authorizes search warrants for property located outside the judge's district in only four situations: (1) for property in the district that might be removed before execution of the warrant; (2)

for tracking devices installed in the district, which may be monitored outside the district; (3) for investigations of domestic or international terrorism; and (4) for property located in a U.S. territory or a U.S. diplomatic or consular mission. The proposed amendment would add an additional exception to the territorial limitations for electronic storage media and electronically stored information.

This proposal has been referred to a subcommittee, which has met once by teleconference and is expected to report at the April meeting.

C. Rule 45 and Other Proposals Arising from the CM/ECF Committee

Rule 45(c) and Rule 6(d) of the Federal Rules of Civil Procedure contain parallel provisions providing additional time for actions after certain modes of service, identifying those modes by reference to Civil Rule 5(b)(2). The CM/ECF Committee has concluded that it is no longer necessary or desirable to provide additional time when service has been made by electronic means.

Parallel amendments to Rule 45(c) and Rule 6(d) have been drafted, and the Civil Rule amendment will be presented at the January meeting of the Standing Committee. If the Civil Rules proposal is approved, the Committee will move forward with the parallel amendment to Rule 45, taking note of any relevant discussion in the Standing Committee.

It is possible that other proposals from the CM/ECF Committee may be ripe for consideration at the April meeting.

D. Other Proposals

The Advisory Committee has also received two other requests to consider amendments to (1) Rule 53 and (2) Rules 11 and 32.

Acting at the request of Magistrate Judge Clay D. Land, the Judicial Conference Criminal Law Committee referred the question whether there is any need to clarify Rule 53, which prohibits “broadcasting” judicial proceedings in order to clarify the rule’s application to tweets from the courtroom. This proposal has been referred to a subcommittee that has not met.

Professor Gabriel Chin requested that the Advisory Committee consider amending Rules 11 and 32 to make presentence reports available in advance of a guilty plea so that all parties will be aware of the potential sentence. The Administrative Office is researching prior action and consideration of related issues.

THIS PAGE INTENTIONALLY BLANK

TAB 5

THIS PAGE INTENTIONALLY BLANK

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

FROM: Honorable Sidney A. Fitzwater, Chair
Advisory Committee on Evidence Rules

DATE: December 2, 2013

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules (the “Committee”) was scheduled to meet on October 11, 2013 at the University of Maine School of Law, in Portland, Maine. A symposium to consider the intersection of the Evidence Rules and emerging technologies was to have been held in conjunction with the meeting. The meeting and symposium were canceled, however, due to the government shutdown. Both have been rescheduled for April 4, 2014 at the University of Maine School of Law.

II. Action Items

No action items.

III. Information Items

A. Proposed Amendment to Rule 803(10)

The amendment to Rule 803(10) that the Standing Committee approved at its June 2012 meeting took effect on December 1, 2013.

B. Proposed Amendments to Rules 801(d)(1)(B) and 803(6)-(8)

The proposed amendments to Rules 801(d)(1)(B) and 803(6)-(8) that the Standing Committee approved at its June 2013 meeting for transmittal to the Judicial Conference were approved by the Judicial Conference on the consent calendar at its September 2013 meeting and have been transmitted to the Supreme Court for consideration.

C. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

D. "Continuous Study" of the Evidence Rules

The Committee is responsible for engaging in a "continuous study" of the need for any amendments to the Federal Rules of Evidence. The grounds for possible amendments include (1) a split in authority about the meaning of a rule; (2) a disparity between the text of a rule and the way that the Rule is actually being applied in courts; and (3) difficulties in applying a rule, as experienced by courts, practitioners, and academic commentators.

Under this standard, the Reporter has raised the following possible amendments for the Committee's consideration: (1) amending Rule 106 to provide that statements may be used for completion even if they are hearsay; (2) clarifying that Rule 607 does not permit a party to impeach its own witness if the only reason for calling the witness is to present otherwise inadmissible evidence to the jury; (3) clarifying that Rule 803(5) can be used to admit statements made by one person and recorded by another; (4) clarifying the business duty requirement in Rule 803(6); and (5) resolving a dispute in the courts over whether prior testimony in a civil case may be admitted against one who was not a party at the time the testimony was given. The Reporter is also working on other proposals with respect to the hearsay rule (e.g., to abrogate Rule 803(16), the ancient documents exception).

IV. Minutes of the Fall 2013 Meeting

Because the meeting was canceled, there are no draft of the minutes of the Committee's fall 2013 meeting.

THIS PAGE INTENTIONALLY BLANK

TAB 6

THIS PAGE INTENTIONALLY BLANK

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

FROM: Honorable Michael A. Chagares, Chair
Inter-Committee CM/ECF Subcommittee

DATE: December 4, 2013

RE: Draft Report to the Standing Committee

The CM/ECF Subcommittee has worked on several matters to determine how and whether the Advisory Committees can employ an integrated approach to developing amendments that will accommodate the technological advances in case filing that are part of NextGen. This Report discusses the Subcommittee's progress.

1. Electronic Signatures: Proposed Amendment to Bankruptcy Rule 5005

The Subcommittee has previously reported on suggestions it made regarding the proposed amendment to Bankruptcy Rule 5005, covering signatures on documents filed electronically. The Subcommittee approved proposed Rule 5005(a)(3)(A), which provides that the username and password of a filing user will serve as that individual's signature on any electronically filed document. That proposal is consistent with the general practice and is uncontroversial. The Subcommittee suggested changes to proposed Rule 5005(a)(3)(B) to address the concern that once a non-filing user has a signature scanned, there is no assurance that the signature was to the original document. Those changes were incorporated into the version of Rule 5005(a)(3)(B) that was issued for public comment. The Subcommittee will, together with the Bankruptcy Committee, review the public comments on the proposal at the end of the public comment period.

2. Reports by Advisory Committee Reporters on Possible Changes That Might Be Necessary Due to Advances in Electronic Case Filing.

The Reporters to the respective Advisory Committees prepared lengthy and incisive reports on changes that might be considered by the Advisory Committees in light of future developments in electronic case filing. These reports were reviewed by Subcommittee members and will provide a blueprint for consideration by each of the Advisory Committees. The Subcommittee is grateful to the Reporters for their excellent work. The reports are attached to this Report as Appendix A.

3. Abrogation of the Three-Day Rule

The Subcommittee determined that the Three-Day Rule in the Civil, Criminal, Bankruptcy, and Appellate Rules should be abrogated as applied to electronic service. The Subcommittee approved a template to effectuate that change. This template had to be adjusted to accommodate special concerns in the Appellate Rules. The respective Committee Notes to the proposed amendments were prepared through a collective effort by the Reporters and are uniform to the extent possible. The proposed amendments and Committee Notes are being considered by each of the concerned Advisory Committees. The Civil Rules Committee has already approved amending Civil Rule 6(d) to eliminate the extra three days to respond to something served electronically. That proposal is being submitted to the Standing Committee for its consideration at the January meeting. It is expected that the other Advisory Committees will take up the common proposal at their Spring meetings.

4. Civil Rule Requiring Electronic Filing

The Subcommittee has discussed whether the Civil Rules should be amended to provide that a court can require electronic filing subject to certain exceptions. This is a Civil and Criminal Rules matter as Civil Rule 5(d)(3) and Criminal Rule 49(e) both provide that a court “may allow” electronic filing. The Civil Rules Committee’s consideration of a mandatory electronic filing rule is discussed in the minutes submitted by the Civil Rules Committee. The Bankruptcy Rule already allows a court to require electronic filing. *See, e.g.*, Bankruptcy Rule 5005.

The Subcommittee resolved that it would be useful to determine whether local rules generally required electronic filing. Ben Robinson and Laura Erdman of the Administrative Office conducted a review of all the sets of local rules and determined that almost all of the local rules mandate electronic filing subject to certain (varying) exceptions. Their summary report is set forth as Attachment B to this Report. (The data set describing all the pertinent local rules in each district is not included but is available upon request.)

5. Consideration of a Uniform Approach to Amending Rules to Accommodate Electronic Filing and Information.

Professor Capra, the Reporter to the Subcommittee, has prepared for discussion purposes a template that perhaps could be used to provide a “universal fix” for language in the current rules that does not appear to accommodate electronic filing and information. That template is as follows:

Information in Electronic Form and Action by Electronic Means

a) Information in Electronic Form: In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information.

b) Action by Electronic Means: In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States].

It is apparent that much work needs to be done before it can be assured that a template will sufficiently cover all the situations throughout the rules in which electronic action and information will be presented. There will undoubtedly be necessary exceptions throughout the rules. A memorandum by Professors Beale and King, on problems that might arise in adapting the template to the Criminal Rules, is set forth as Attachment C to this Report — as an example of issues that will probably arise in trying to implement a uniform approach to electronic filing and information.

The Subcommittee will continue to consider and discuss whether any kind of universal fix is feasible.

THIS PAGE INTENTIONALLY BLANK

APPENDIX A

THIS PAGE INTENTIONALLY BLANK

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail: dcapra@law.fordham.edu

Memorandum To: CM/ECF Subcommittee
From: Cathie Struve and Dan Capra, Reporters¹
Re: Possible Amendment of Appellate Rules to accommodate CM/ECF
Date: July 1, 2013

This memorandum discusses the Appellate Rules that might be affected by CM/ECF, and provides comments and suggestions on whether any amendment to the Appellate Rules is necessary or advisable.

This memo focuses on eight aspects of appellate practice that could be affected by the shift to CM/ECF. Part I discusses provisions that require court clerks to serve certain documents on parties. Part II discusses provisions relating to electronic filing and service by parties. Part III considers the treatment of the record. Part IV notes a proposal concerning the use of audio recordings in lieu of transcripts. Part V discusses the appendix. Part VI turns to the format requirements for briefs and other papers. Part VII discusses requirements concerning paper copies of filings. Part VIII briefly notes provisions that refer to “original” documents.

1. Rules Requiring Service By the Clerk

A number of provisions in the Appellate Rules require service (or notice) by the district clerk (or Tax Court clerk) or circuit clerk.

¹ The work here is all Cathie Struve’s. Capra just formatted it and added the text of the rules that are being discussed.

a. Rule 3(d): Appeal as of right.²

(d) Serving the Notice of Appeal.

(1) The district clerk must *serve notice of the filing of a notice of appeal by mailing a copy* to each party’s counsel of record — excluding the appellant’s — or, if a party is proceeding pro se, to the party’s last known address. When a defendant in a criminal case appeals, the clerk must also *serve a copy* of the notice of appeal on the defendant, *either by personal service or by mail* addressed to the defendant. The clerk must promptly *send a copy* of the notice of appeal and of the docket entries — and any later docket entries — to the clerk of the court of appeals named in the notice. The district clerk must *note, on each copy*, the date when the notice of appeal was filed.

* * *

(3) The district clerk’s failure to *serve notice* does not affect the validity of the appeal. The clerk must *note on the docket the names of the parties to whom the clerk mails copies, with the date of mailing*. Service is sufficient despite the death of a party or the party’s counsel.

c. Rule 12(c): Docketing the Appeal:³

(c) **Filing the Record, Partial Record, or Certificate.** Upon receiving the record, partial record, or district clerk’s certificate as provided in Rule 11, *the circuit clerk must file it and immediately notify* all parties of the filing date.

² See also Rule 6(b)(1) (Rule 3(d) applies to appeals from bankruptcy appellate panels and, in such appeals, “district court” includes “appellate panel”); Rule 13(a)(1) [proposed new 13(a)(1)(A)] (Tax Court clerk to serve notice of filing of notice of appeal). (N.B.: Pending amendments that are on track to take effect – absent contrary action by Congress – on Dec. 1, 2013, would revise Rule 13. We note in brackets any ways in which the amendments would affect the citations in this memo.)

³ Cf. proposed new Rule 6(b)(2)(D) (“When the district clerk or bankruptcy-appellate-panel clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.”); proposed new Rule 6(c)(2)(D) (similar provision for use in permissive appeals directly from bankruptcy court to court of appeals).

d. Rule 15(c): Review of agency determination

(c) **Service of the Petition or Application.** The circuit clerk *must serve a copy* of the petition for review, or an application or cross-application to enforce an agency order, on each respondent as prescribed by Rule 3(d), unless a different manner of *service* is prescribed by statute. At the time of filing, the petitioner must:

- (1) *serve, or have served, a copy* on each party admitted to participate in the agency proceedings, except for the respondents;
- (2) file with the clerk a list of those so served; and
- (3) give the clerk enough *copies* of the petition or application to *serve* each respondent.

e. Rule 21(b)(2): Writs of Mandamus and Prohibition

(b) Denial; Order Directing Answer; Briefs; Precedence.

- (1) The court may deny the petition without an answer. Otherwise, it must order the respondent, if any, to answer within a fixed time.
- (2) The clerk *must serve the order* to respond on all persons directed to respond.

f. Rule 36(b): Entry of Judgment; Notice

(b) **Notice.** On the date when judgment is entered, *the clerk must serve on all parties a copy* of the opinion — or the judgment, if no opinion was written — and a notice of the date when the judgment was entered.

g. Rule 45(c): Clerk's Duties

(c) **Notice of an Order or Judgment.** Upon the entry of an order or judgment, the circuit clerk *must immediately serve a notice of entry on each party with a copy of any opinion*, and must note the date of service on the docket. Service on a party represented by counsel must be made on counsel.

Professor Struve's Comment on Clerk-Service provisions:⁴

Some observers have suggested that it makes little sense to require the clerk to serve notice of an electronic filing on parties who are participating in CM/ECF. Thus, for example, in 2008 Judge Kravitz drew to the Committee's attention a comment by the Connecticut Bar Association Federal Practice Section's Local Rules Committee ("CBA Local Rules Committee") concerning Appellate Rule 3(d). The CBA Local Rules Committee pointed out that due to the advent of electronic filing, there is a "discrepancy between FRAP 3(d), which indicates that the District Court Clerk's office will handle service of notices of appeals and the reality that it does not serve civil notices of appeals." Professor Steven Gensler relayed to the Committee a suggestion by an attorney, Harvey D. Ellis, Jr., that "FRAP 3(d)(1) could use an amendment to allow a notice of electronic filing to suffice in a district with ECF procedures." And most recently, Judge S. Martin Teel, Jr. – in commenting on the proposed amendments to Rule 6 – stated that "in this day of electronic filing it makes little sense to require the clerk to serve the notice of appeal instead of requiring that the appellant ... file a certificate of service of the notice of appeal."

When the Committee discussed this question in 2008, it seemed prudent to take a wait-and-see approach rather than amending Rule 3(d). At that time, not all the district courts that were on CM/ECF for filing permitted the notice of appeal to be filed electronically. Moreover, the appellate courts' transition to electronic filing was still in process. Now, electronic filings are accepted by most district courts, at least some bankruptcy appellate panels, and all courts of appeals. The Tax Court now requires most counseled parties to file electronically,⁵ but the Tax Court's electronic filing system, eAccess, does not appear to be linked with PACER or the CM/ECF system,⁶ and the Tax Court does not permit notices of appeal to be filed electronically.⁷

⁴ All the comments from Professor Struve are taken from her memo to the Appellate Rules Committee on this subject, dated September 2011, as updated in a short 2012 memo to the Committee.

⁵ See Tax Court Rule 26(a) ("The Court will accept for filing documents submitted, signed, or verified by electronic means that comply with procedures established by the Court."); *id.* Rule 26(b) (generally requiring e-filing for filings by represented parties, but listing exceptions).

⁶ PACER's list of CM/ECF courts (Individual Court PACER Sites, available at <http://www.pacer.gov/psco/cgi-bin/links.pl>, last visited June 24, 2013) does not mention the Tax Court, and the Tax Court's eAccess site does not mention PACER or CM/ECF.

⁷ See United States Tax Court, eFiling Instructions for Practitioners 26.

The prevalence of electronic filing does not mean that notices of appeal will always be filed electronically in the lower court. For one thing, a lower court that generally permits electronic filing may make an exception for notices of appeal. For another, filers who are exempt from electronic filing (e.g., many pro se litigants) will file notices of appeal in paper form. And even when a notice of appeal is filed electronically in the lower court, the lower court's clerk presumably must serve paper copies of the notice of appeal on any litigants who are not on the CM/ECF system.⁸

Thus, any amendment (to the Appellate Rules that require service by a clerk) should take account of the likely persistence of paper filings and paper service by or on certain parties (such as inmates⁹ or other pro se litigants). The provisions might usefully be amended to exempt the relevant clerk from the relevant service requirement as to parties who automatically receive notice of the relevant filing through the CM/ECF system. However, it would not seem to make sense to adopt this approach for Rule 15(c), which concerns notice of the filing of a petition for review of agency action. Unlike appeals from district court or bankruptcy appellate panel judgments, petitions for review of agency action are filed in the court of appeals itself, and one could not assume that the respondents

⁸ Rule 3(d)(1)'s requirement that when a criminal defendant appeals "the clerk must also serve a copy of the notice of appeal on the defendant" is somewhat ambiguous: Does this require service on the attorney for a represented defendant, or on the defendant himself or herself? The 1966 Committee Note to Criminal Rule 37(a)(1) explained this requirement by stating that "The duty imposed on the clerk by the sixth sentence is expanded in the interest of providing a defendant with actual notice that his appeal has been taken and in the interest of orderly procedure generally." This might suggest that the defendant himself or herself is to be notified. On the other hand, when this provision was originally adopted in Criminal Rule 37(a)(1) the Rule also spoke of service of the notice on "all parties other than the appellant," perhaps suggesting that the drafters used "party" to refer to counsel in the case of represented parties. The notification provided by Rule 3(d)(1) may be particularly useful to a defendant who has availed himself or herself of the option – provided by Criminal Rule 32(j)(2) – to ask the clerk to prepare and file a notice of appeal on the defendant's behalf.

To the extent that Rule 3(d)(1) requires a criminal defendant-appellant to be personally served with the notice of appeal – even if represented – this would add another category of appeals in which paper service by the clerk would ordinarily be necessary.

⁹ When an inmate confined in an institution files a notice of appeal under Rule 4(c), that filing will typically (for the foreseeable future) be in paper form. With respect to such inmate filings, Rule 3(d)(2) requires the clerk to alert counsel (and pro se parties) to the *date of docketing* of the notice; this is important because in such instances Rule 4(c) provides that certain periods that would run from the date of the inmate's filing are counted from the date of docketing rather than the date of filing. I am unsure whether parties who participate in CM/ECF would receive notice of the date of docketing through the CM/ECF electronic notification system, but if not, then Rule 3(d)(2)'s requirement would continue to be important even for participants in CM/ECF.

would be registered in CM/ECF as of the date that the circuit clerk would be serving the copy of the petition.¹⁰

Assuming that Rules 3(d), 13(a)(1),¹¹ 21(b)(2), 36(b), and 45(c) are to be amended in this manner, it would make sense to consider whether any amendments are needed in the provisions that currently require litigants to furnish sufficient copies to be used by the clerk to comply with service requirements. *See* Rule 3(a)(1) (“[T]he appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).”); Rule 13(a)(1) [proposed Rule 13(a)(1)(A)] (similar requirement). I see no need for any amendment to Rules 3(a)(1) and 13(a)(1). Those rules currently direct the litigant to provide “enough copies,” and that phrase is flexible: If all parties are CM/ECF participants, then zero copies would be enough copies.

Another requirement that should probably be retained for the moment is Rule 3(d)(1)’s requirement that the district clerk notify the court of appeals of the filing of the notice of appeal and of any later district-court filings that may affect the progress of the appeal (e.g., motions that may suspend the effectiveness of the notice of appeal). I imagine that when CM/ECF is fully operational in all the courts of appeals, one benefit may be that such notifications become automatic. But until then, I would guess that the Rule’s requirement will continue to be important. Like all the other issues discussed here, this is one as to which the guidance of the Clerks will be important.

¹⁰ Admittedly, the respondents will be agencies who are repeat players, so perhaps my assumption will not always hold true; but the likely pattern does seem significantly different in the context of agency review than elsewhere.

¹¹ As noted above, the Tax Court has its own electronic filing system and does not currently permit electronic filing of the notice of appeal. Thus, the desirability and nature of any amendments to Rule 13(a)(1) [proposed Rule 13(a)(1)(A)] would require separate consideration.

2. Rules Relating to Electronic Filing and Service by Parties:

a. Rule 25(a)(2)(D): Authorizing local rule on electronic filing.

(a) (2)(D) Electronic filing. A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.¹²

b. Rule 25(c): Manner of Service

(c) Manner of Service.

(1) Service may be any of the following:

- (A) personal, including delivery to a responsible person at the office of counsel;
- (B) by mail;
- (C) by third-party commercial carrier for delivery within 3 days; or
- (D) *by electronic means, if the party being served consents in writing.*

(2) if authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D).

¹² The last sentence of this rule serves the same purpose as the definitional section of Rule 101(b)(6) of the Evidence Rules. It avoids the need to update paper-based language. For rules referring to writings, see, e.g., Rule 11(f) ("written stipulation filed in the district court"); Rule 17(b)(2) ("parties may stipulate in writing that no record or certified list be filed"); Rule 27(a)(1) ("A motion must be in writing unless the court permits otherwise."); Rule 41(d)(2)(B) (notification to circuit clerk "in writing"); Rules 44(a) and (b) ("written notice to the circuit clerk").

Of course, if the electronic filing provisions are to be lifted from local rules to the national rules, then Rule 25(a)(2)(D) would have to be amended to so provide.

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served.

c. Rule 26(c): The three-day rule.

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

Professor Struve's Comments on Electronic Service Provisions:

The Appellate Rules currently acknowledge the possibility of electronic filing and service. In the context of an overall review of the Rules' treatment of electronic filings, it makes sense to review Rule 25's provisions for electronic service and filing as well as Rule 26(c)'s treatment of the three-day rule.

Rule 25(a)(2)(D) authorizes each circuit to adopt a local rule permitting or requiring electronic filing, subject to the proviso that any electronic filing requirement include reasonable exceptions. Rule 25(a)(2)(D) also helpfully defines an electronically filed paper as a "written paper" for purposes of the Appellate Rules.

Rule 25(c)(1) permits electronic service "if the party being served consents in writing." (I believe that such consent is ordinarily required as a condition of registration in CM/ECF.) Rule 25(c)(2) permits parties to use the court's transmission equipment to make electronic service if authorized by local rule. Rule 25(c)(3) directs parties to serve other parties in "a manner at least as expeditious as the manner used to file the paper with the court," when "reasonable" in light of

relevant factors. Presumably, parties who are filing electronically should serve other parties electronically unless those parties are not registered in CM/ECF.¹³ Rule 25(c)(4) provides that “[s]ervice by electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served.”

Rule 26(c) sets out the three-day rule. The three additional days apply not only to service by mail or commercial carrier, but also to electronic service. Chief Judge Easterbrook has proposed abolishing the three-day rule; he argues that the three-day rule is particularly incongruous as applied to electronic service.¹⁴ Though Chief Judge Easterbrook’s suggestion relates only to the Appellate Rules, the criticism of the three-day rule is relevant, as well, to Civil Rule 6(d), Criminal Rule 45(c), and Bankruptcy Rule 9006(f). For more than a decade, there have been periodic discussions of whether electronic service ought to be included within the three-day rule. The Appellate, Bankruptcy, and Civil Rules Advisory Committees, and the Standing Committee, have discussed the question, as did participants in the time-computation project. Though there has been some support, in those discussions, for excluding electronic service from the three-day rule, ultimately the decision was taken to include electronic service within the three-day rule for the moment.

Some of the reasons given for including electronic service may be somewhat less weighty now than they were a decade ago: Concerns that electronic service may be delayed by technical glitches or that electronically served attachments may arrive in garbled form are perhaps less urgent in districts (or circuits) where electronic service occurs as part of smoothly-running CM/ECF programs. It may also be the case that when CM/ECF is mandatory for counsel, counsel no longer (as a practical matter) has the inclination or, perhaps, ability to decline consent to electronic service; in those districts or circuits, there would be no need to give counsel an incentive to consent to electronic service (or to avoid giving counsel a disincentive to consent to electronic service) by maintaining the three-day rule for electronic service. However, the concern remains that counsel might strategically serve an opponent by electronic means on a Friday night in order to inconvenience the opponent. Thus, though some of the rationales for including electronic service in the three-day rule may have become less persuasive over time, the concern over possible strategic misuse of electronic filing persists.

¹³ Even if a party is not registered in CM/ECF, if the party has consented in writing to electronic service, then service by email may be most appropriate when documents are filed electronically.

¹⁴ Chief Judge Easterbrook favors eliminating the three-day rule entirely, in part because its application interferes with the Rules’ preference for setting time periods in increments of seven days. However, during the Appellate Rules Committee’s spring 2013 meeting, participants noted the possible need for more time by those who respond to pro se filings. For example, in cases involving the federal government, pro se papers tend to reach the Department of Justice belatedly because all mail bound for the DOJ is screened for security reasons. If the three-day rule were eliminated, it was suggested, the DOJ would move more frequently for extensions of time to respond to pro se filings.

3. Rules on Treatment of the Record

a. Rule 5(d)(3): Appeal by Permission – Filing the Record

(d) Grant of Permission; Fees; Cost Bond; *Filing the Record.*

(3) The district clerk must notify the circuit clerk once the petitioner has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The *record must be forwarded and filed in accordance with Rules 11 and 12(c).*

b. Rule 10: The Record on Appeal:

(a) **Composition of the Record on Appeal.** The following items constitute the record on appeal:

- (1) the original papers and exhibits filed in the district court;
- (2) the transcript of proceedings, if any; and
- (3) *a certified copy of the docket entries* prepared by the district clerk.

* * *

(c) **Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable.** If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement *must be included by the district clerk in the record on appeal.*

(d) **Agreed Statement as the Record on Appeal.** In place of the record on appeal as defined in Rule 10(a), the parties may prepare, sign, and submit to the district court a statement of the case showing how the issues presented by the appeal arose and were decided in the district court. The statement must set forth only those facts averred and proved or sought to be proved that are essential to the court's resolution of the issues. If the statement is truthful, it — together with any additions that the district court may consider necessary to a full presentation of the issues on appeal — must be approved by the district court and must then be certified to the court of appeals *as the record on appeal. The district clerk must then send it to the circuit clerk* within the time provided by Rule 11. A copy of the agreed statement may be filed in place of the appendix required by Rule 30.

c. Rule 11: Forwarding the Record:

(a) Appellant's Duty. An appellant filing a notice of appeal must comply with Rule 10(b) and must do whatever else is necessary to enable the clerk to assemble and *forward the record*. If there are multiple appeals from a judgment or order, the clerk must forward a *single record*.

(b) Duties of Reporter and District Clerk.

* * *

(2) District Clerk's Duty to Forward. When the record is complete, the district clerk must *number the documents constituting the record and send them promptly to the circuit clerk* together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the district clerk will not send to the court of appeals *documents of unusual bulk or weight*, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.

(c) Retaining the Record Temporarily in the District Court for Use in Preparing the Appeal. The parties may stipulate, or the district court on motion may order, that the district clerk *retain the record* temporarily for the parties to use in preparing the *papers on appeal*. In that event the district clerk must certify to the circuit clerk that the record on appeal is complete. Upon receipt of the appellee's brief, or earlier if the court orders or the parties agree, the appellant must request the district clerk to *forward the record*.

* * *

(e) Retaining the Record by Court Order.

(1) The court of appeals may, by order or local rule, provide that a *certified copy of the docket entries be forwarded instead of the entire record*. But a party may at any time during the appeal request that designated parts of the *record be forwarded*.

(2) The district court may order the record or some part of it *retained* if the court needs it while the appeal is pending, subject, however, *to call by the court of appeals*.

(3) *If part or all of the record is ordered retained*, the district clerk must send to the court of appeals a copy of the order and the docket entries together with the parts of the original record allowed by the district court and *copies of any parts of the record* designated by the parties.

(f) Retaining Parts of the Record in the District Court by Stipulation of the Parties. The parties may agree by written stipulation filed in the district court that designated *parts of the record be retained in the district court* subject to call by the court of appeals or request by a party. The parts of the record so designated remain a part of the record on appeal.

(g) Record for a Preliminary Motion in the Court of Appeals. If, before the *record is forwarded*, a party makes any of the following motions in the court of appeals:

- for dismissal;
- for release;
- for a stay pending appeal;
- for additional security on the bond on appeal or on a supersedeas bond; or
- for any other intermediate order —

the district clerk must *send the court of appeals any parts of the record* designated by any party.

c. Rule 12(c): Filing the record.

(c) Filing the Record, Partial Record, or Certificate. *Upon receiving the record, partial record, or district clerk's certificate as provided in Rule 11, the circuit clerk must file it and immediately notify all parties of the filing date.*

d. Rule 28(e): Appellate Briefs

(e) References to the Record. References to the parts of *the record* contained in the appendix filed with the appellant's brief must be to the pages of the appendix. If the appendix is prepared after the briefs are filed, a party referring to *the record* must follow one of the methods detailed in Rule 30(c). If the original record is used under Rule 30(f) and is not consecutively paginated, or if the brief refers to an unreproduced part of the record, any reference must be to the page of the original document.

For example:

- Answer p. 7;
- Motion for Judgment p. 2;
- Transcript p. 231.

Only clear abbreviations may be used. A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was

identified, offered, and received or rejected.

General comment by Professor Struve on provisions concerning the record:

One of the most significant changes that CM/ECF may bring to appellate practice is the treatment of the record. If the appellate judges and clerks can access the district court record by means of links in the electronic docket, then the need for a paper record may eventually dissipate.

The proposed amendments to Appellate Rule 6(b)— set forth below — illustrate an approach that could be generalized to the non-bankruptcy context by means of similar amendments to Appellate Rules 11 and 12.¹⁵ However, it seems likely that a different approach to the record would be taken in certain contexts, such as appeals from the Tax Court¹⁶ and petitions for review of agency action.

It would also make sense to review Rule 28(e)'s treatment of references to the record. It could be useful to require references that make it easy to find the relevant document on PACER, for example by referring to the document's docket number. It may also be worthwhile to consider whether to note the possibility of providing hyperlinks to relevant record documents.

¹⁵ Local circuit provisions provide additional models and should also be studied.

¹⁶ Under Rule 13(d)(1) [proposed Rule 13(a)(4)(A)], the provisions in Rules 10, 11, and 12 concerning the record [generally] also apply to appeals from the Tax Court. Unless the Tax Court's electronic filing system becomes linked to CM/ECF, it seems unlikely that a Tax Court record could be transmitted electronically to a court of appeals. Thus, if Rules 11 and 12 are amended to contemplate electronic transmission of the record, it may also be necessary to amend Rule 13 to provide separately for records on appeals from the Tax Court. *Cf.* Sixth Circuit Rule 13 cmt. ("Tax Court appeals will generally be handled the same as district court appeals. However, the Tax Court's electronic records are not easily transferable to the court of appeals. Therefore, as set out in 6 Cir. R. 30, in Tax Court appeals there will be appendices instead of an electronic record on appeal.").

Proposed Amendment to Appellate Rule 6; approved by the Standing Committee, June 2013, for referral to the Judicial Conference.

Rule 6. Appeal in a Bankruptcy Case ~~From a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel~~

* * *

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

* * *

(2) Additional Rules. In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

* * *

(B) The ~~r~~Record on a~~n~~Appeal.

(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule ~~8006~~ 8009 – and serve on the appellee – a statement of the issues to be presented on appeal and a designation of the record to be certified and ~~sent~~ made available to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within 14 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

- the redesignated record as provided above;
- the proceedings in the district court or bankruptcy appellate panel; and
- a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) Forwarding Making the rRecord Available.

(i) When the record is complete, the district clerk or bankruptcy-appellate-panel clerk must number the documents constituting the record and ~~send promptly~~ make it available ~~them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified to the circuit clerk. Unless directed to do so by a party or the circuit clerk~~ If the clerk makes the record available in paper form, the clerk will not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals, unless directed to do so by a party or the circuit clerk. If the exhibits are unusually bulky or heavy exhibits are to be made available in paper form, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble the record and forward the record make it available. When the record is made available in paper form, ~~t~~The court of appeals may provide by rule or order that a certified copy of the docket entries be sent made available in place of the redesignated record; ~~b.~~ But any party may request at any time during the pendency of the appeal that the redesignated record be sent made available.

(D) Filing the rRecord. Upon receiving the record — or a certified copy of the docket entries sent in place of the redesignated record — the circuit clerk must file it and immediately notify all parties of the filing date When the district clerk or bankruptcy-appellate-panel clerk *has made the record available*, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

(c) Direct Review by Permission Under 28 U.S.C. § 158(d)(2).

* * *

(2) Additional Rules. In addition, the following rules apply:

(A) The Record on Appeal. Bankruptcy Rule 8009 governs the record on appeal.

(B) Making the Record Available. Bankruptcy Rule 8010 governs completing the record and making it available.

(C) Stays Pending Appeal. Bankruptcy Rule 8007 applies to stays pending appeal.

(D) Duties of the Circuit Clerk. When the bankruptcy clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

* * *

4. Treatment of the Transcript.

a. Rule 10: Record on Appeal:

(a) **Composition of the Record on Appeal.** The following items constitute the record on appeal:

- (1) the original papers and exhibits filed in the district court;
- (2) the *transcript* of proceedings, if any; and
- (3) a certified copy of the docket entries prepared by the district clerk.

(b) The *Transcript* of Proceedings.

(1) **Appellant's Duty to Order.** Within 14 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following:

(A) order from the reporter a *transcript* of such parts of the proceedings not already on file as the appellant considers necessary, subject to a local rule of the court of appeals and with the following qualifications:

- (i) the order must be *in writing*;
- (ii) if the cost of the *transcript* is to be paid by the United States under the Criminal Justice Act, the order must so state; and
- (iii) the appellant must, within the same period, file a copy of the order with the district clerk; or

(B) file a certificate stating that no *transcript* will be ordered.

(2) **Unsupported Finding or Conclusion.** If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the *record a transcript* of all evidence relevant to that finding or conclusion.

(3) **Partial *Transcript*.** Unless the entire *transcript* is ordered:

(A) the appellant must - within the 14 days provided in Rule 10(b)(1) - file a statement of the issues that the appellant intends to present on the appeal and must serve on the appellee a copy of both the order or certificate and the statement;

(B) if the appellee considers it necessary to have a *transcript* of other parts of the proceedings, the appellee must, within 14 days after the service of the order or certificate and the statement of the issues, file and serve on the appellant a designation of additional parts to be ordered; and

(C) unless within 14 days after service of that designation the appellant has ordered all such parts, and has so notified the appellee, the appellee may within the following 14 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) **Payment.** At the time of ordering, a party must make satisfactory arrangements with the reporter for paying the cost of the *transcript*.

Professor Struve's Comments on references to the transcript:

Digital audio recording has been an approved method of making the record of district court proceedings for more than a decade. Some five years ago, Judge Michael Baylson suggested that the Appellate Rules Committee consider the possibility of allowing the use of digital audio recordings in place of written transcripts for the purposes of the record on appeal. The Committee discussed this proposal at meetings in 2009, 2010, and 2013. Although there are several ways in which the existing procedures under the Appellate Rules would be a somewhat awkward fit in cases where audio files are used instead of the transcript, and although some participants expressed interest in the possible uses of digital recordings in lieu of transcripts, other participants expressed skepticism about the feasibility of such a change in federal appellate practice. At the Committee's spring 2013 meeting, no member favored substituting digital recordings for transcripts, and the Committee voted to remove this suggestion from the Committee's agenda. Accordingly, this memo does not discuss the matter in detail.

5. Treatment of the appendix

Rule 30. Appendix to the Briefs

(a) Appellant's Responsibility.

(1) **Contents of the Appendix.** The appellant must *prepare and file an appendix* to the briefs containing:

- (A) the relevant docket entries in the proceeding below;
- (B) the relevant portions of the pleadings, charge, findings, or opinion;
- (C) the judgment, order, or decision in question; and
- (D) other parts of the record to which the parties wish to direct the court's attention.

(2) **Excluded Material.** Memoranda of law in the district court should not be included in the appendix unless they have independent relevance. Parts of the record may be relied on by the court or the parties even though not included in the appendix.

(3) **Time to File; Number of Copies.** Unless filing is deferred under Rule 30(c), the appellant must file *10 copies of the appendix* with the brief and must serve one copy on counsel for each party separately represented. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

(b) All Parties' Responsibilities.

(1) **Determining the Contents of the Appendix.** The parties are encouraged to agree on the contents of the appendix. In the absence of an agreement, the appellant must, within 14 days after the record is filed, serve on the appellee a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review. The appellee may, within 14 days after receiving the designation, serve on the appellant a designation of additional parts to which it wishes to direct the court's attention. The appellant must include the designated parts in the appendix. The parties must not engage in unnecessary designation of parts of the record, because the entire record is available to the court. This paragraph applies also to a cross-appellant and a cross-appellee.

(2) **Costs of Appendix.** Unless the parties agree otherwise, the appellant must pay the cost of the appendix. If the appellant considers parts of the record designated by the appellee to

be unnecessary, the appellant may advise the appellee, who must then advance the cost of including those parts. The cost of the appendix is a taxable cost. But if any party causes unnecessary parts of the record to be included in the appendix, the court may impose the cost of those parts on that party. Each circuit must, by local rule, provide for sanctions against attorneys who unreasonably and vexatiously increase litigation costs by including unnecessary material in the appendix.

(c) Deferred Appendix.

(1) Deferral Until After Briefs Are Filed. The court may provide by rule for classes of cases or by order in a particular case that preparation of the appendix may be deferred until after the briefs have been filed and that the appendix may be filed 21 days after the appellee's brief is served. Even though the filing of the appendix may be deferred, Rule 30(b) applies; except that a party must designate the parts of the record it wants included in the appendix when it serves its brief, and need not include a statement of the issues presented.

(2) References to the Record.

(A) If the deferred appendix is used, the parties may cite in their briefs the pertinent pages of the record. When the appendix is prepared, the record pages cited in the briefs must be indicated by inserting record page numbers, in brackets, at places in the appendix where those pages of the record appear.

(B) A party who wants to refer directly to *pages of the appendix* may serve and file copies of the brief within the time required by Rule 31(a), containing appropriate references to pertinent pages of the record. In that event, within 14 days after the appendix is filed, the party must serve and file copies of the brief, containing references to the pages of the appendix in place of or in addition to the references to the pertinent pages of the record. Except for the correction of typographical errors, no other changes may be made to the brief.

(d) Format of the Appendix. The appendix must begin with a table of contents identifying the page at which each part begins. The relevant docket entries must follow the table of contents. Other parts of the record must follow chronologically. When pages from the transcript of proceedings are placed in the appendix, the *transcript page numbers* must be shown in brackets immediately before the included pages. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) should be omitted.

(e) Reproduction of Exhibits. Exhibits designated for inclusion in the appendix may be reproduced in a separate volume, or volumes, suitably indexed. Four copies must be filed with the appendix, and one copy must be served on counsel for each separately represented party. If a transcript of a proceeding before an administrative agency, board, commission, or officer was used in a district-court action and has been designated for inclusion in the appendix, the transcript must be

placed in the appendix as an exhibit.

(f) Appeal on the Original Record Without an Appendix. The court may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the original record with any copies of the record, or relevant parts, that the court may order the parties to file.

Comment by Professor Struve on treatment of the appendix:

At present, Rule 30 provides circuits with flexibility to put in place their preferred requirements concerning the appendix. Though those local circuit requirements vary, it seems likely that the general purpose of the appendix is similar across circuits – namely, to collect in one place the most salient portions of the record.

Even if the transition to electronic filing renders it appropriate to transmit the record in electronic form, my intuition is that some courts will continue to want the parties to distill that record into an appendix.¹⁷ An appendix – even if filed electronically – provides conveniences that an electronic record would not. To access the electronic record, a judge or clerk would need internet access. An electronic copy of the appendix, by contrast, could be read even without internet access; and the appendix would also serve to highlight the parties’ view of the most important portions of the record.¹⁸ Moreover, some courts may prefer to require a paper appendix, because judges and law clerks may find that paper rather than electronic copies of the appendix better lend themselves to skimming, highlighting, and the like. If a paper copy of the appendix is not filed, the work of preparing a hard copy would be shifted from a law firm paralegal to the clerk’s office or chambers staff, and the cost of printing and binding would be shifted from private parties to taxpayers.

It is thus unclear to me whether the transition to electronic filing warrants amendments to Rule 30. However, it is possible that a study of local circuit practices would reveal aspects of the Rule that could be altered in response to electronic filing.

¹⁷ *But see* Sixth Circuit Rule 30(a) (“An appendix is required only in [certain specified cases], unless the court directs otherwise. In other cases, an appendix is unnecessary and must not be filed. The court will have the district court record available.”).

¹⁸ Admittedly, there are other ways to highlight those portions. *See, e.g.*, Sixth Circuit Rule 30(g)(1) (“To facilitate the court’s reference to the electronic record, each party must include in its principal brief a designation of documents.”).

6. Rules Regarding Format of Briefs and Other Papers

a. Rule 27(d): Motions

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

(1) Format.

(A) Reproduction. A motion, response, or reply may be reproduced by any process that yields a clear black image on light paper. *The paper must be opaque and unglazed. Only one side of the paper may be used.*

(B) Cover. A cover is not required but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. *If a cover is used, it must be white.*

(C) Binding. The document must be *bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.*

(D) Paper size, line spacing, and margins. The document must be on 8½ by 11 inch *paper*. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(E) Typeface and type styles. The document must comply with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6).

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

(3) Number of Copies. *An original and 3 copies* must be filed unless the court requires a different number by local rule or by order in a particular case.

b. Rule 28.1(d): Cross-appeals

(d) *Cover.* Except for filings by unrepresented parties, *the cover of the appellant's principal brief must be blue; the appellee's principal and response brief, red; the appellant's response and reply brief, yellow; the appellee's reply brief, gray; an intervenor's or amicus curiae's brief, green; and any supplemental brief, tan.* The front cover of a brief must contain the information required by Rule 32(a)(2).

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

(a) Form of a Brief.

(1) *Reproduction.*

(A) A brief may be *reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.*

(B) Text must be *reproduced with a clarity* that equals or exceeds the output of a laser printer.

(C) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; a *glossy finish is acceptable if the original is glossy.*

(2) *Cover.* Except for filings by unrepresented parties, *the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; any reply brief, gray; and any supplemental brief tan. * * **

(3) *Binding.* *The brief must be bound in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open.*

(4) *Paper Size, Line Spacing, and Margins.* The brief must be on 8½ by 11 inch *paper.* The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear

there.

* * *

(b) Form of an Appendix. An appendix must comply with Rule 32(a)(1), (2), (3), and (4), with the following exceptions:

(1) The *cover of a separately bound* appendix must be white.

(2) An appendix may include a legible photocopy of any document found in the record or of a printed judicial or agency decision.

(3) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8½ by 11 inches, and need not lie reasonably flat when opened.

(c) Form of Other Papers.

(2) Other Papers. Any other *paper*, including a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) A *cover* is not necessary if the caption and signature page of the *paper* together contain the information required by Rule 32(a)(2). If a *cover is used, it must be white*.

* * *

(d) Signature. Every brief, motion, or *other paper* filed with the court must be signed by the party filing the *paper* or, if the party is represented, by one of the party's attorneys.

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

Comment by Professor Struve on rules regarding format:

Some of the Appellate Rules' detailed instructions concerning the format of briefs and other papers may be unnecessary for electronic filings. Requirements that seem unnecessary include those concerning the following:

- Opaque and unglazed paper. *See* Rule 27(d)(1)(A); Rule 32(a)(1)(A).
- Single-sided printing. *See* Rule 27(d)(1)(A); Rule 32(a)(1)(A).¹⁹
- Color of covers. *See* Rule 27(d)(1)(B); Rule 28.1(d); Rule 32(a)(2); Rule 32(b)(1); Rule 32(c)(2)(A).
- Binding. *See* Rule 27(d)(1)(C); Rule 32(a)(3); Rule 32(b)(3).
- Paper size. *See* Rule 27(d)(1)(D); Rule 32(a)(4).
- Glossy reproductions of photographs. *See* Rule 32(a)(1)(C).

Although these requirements seem beside the point with respect to electronic filings, it is not clear that there is an urgent need to amend the rules to acknowledge these requirements' inapplicability to electronic filings. It is difficult to imagine a clerk's office rejecting an electronically filed paper (filed in conformance with local CM/ECF rules) for failure to comply with any of the requirements in the bullet point list above.²⁰ Moreover, the Rules will need to continue to account for pro se filers.

¹⁹ The Appellate Rules Committee recently discussed whether to amend the Rules to permit double-sided printing. After discussion, the Committee voted at its spring 2013 meeting not to proceed further with this idea; it also voted to remove from its agenda a proposal to amend the Rules to permit 1.5-spacing instead of double-spacing.

²⁰ Rule 32(e) provides that “[b]y local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.”

7. Rules on Required number of copies

a. Rule 5(c): Appeal by Permission

(c) Form of Papers; Number of Copies. * * * *An original and 3 copies* must be filed unless the court requires a different number by local rule or by order in a particular case.

b. Rule 21(d): Writs of Mandamus and Prohibition

(d) Form of Papers; Number of Copies. * * * *An original and 3 copies* must be filed unless the court requires a different number by local rule or by order in a particular case.

c. Rule 26.1(c): Corporate Disclosure Statement

(c) Number of Copies. If the Rule 26.1 statement is filed before the principal brief, or if a supplemental statement is filed, the party must file *an original and 3 copies* unless the court requires a different number by local rule or by order in a particular case.

d. Rule 27(d)(3): Motions

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

* * *

(3) Number of Copies. *An original and 3 copies* must be filed unless the court requires a different number by local rule or by order in a particular case.

e. Rule 31 (b): Serving and Filing Briefs

(b) Number of Copies. *Twenty-five copies of each brief* must be filed with the clerk and *2 copies* must be served on each unrepresented party and on counsel for each separately represented party. An unrepresented party proceeding in forma pauperis must file *4 legible copies* with the clerk, and

one copy must be served on each unrepresented party and on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of *a different number*.

f. Rule 35(d): En Banc Determination

(d) Number of Copies. The *number of copies to be filed must be prescribed by local* rule and may be altered by order in a particular case.

g. Rule 40(b): Petition for Panel Rehearing

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

Comment by Professor Struve Concerning Rules on Number of Copies

As set forth above, several provisions in the Appellate Rules require a litigant to provide a certain number of copies of a filing, presumably for the internal use of the court.²¹ Rule 25(e) provides generally that “[w]hen these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.”

As judges become accustomed to using electronic copies of briefs and other papers, courts may decide to adopt local rules lowering the number of required paper copies. But that choice depends on the preferences of a particular circuit’s judges. Under the Appellate Rules, each circuit is currently free to specify that it requires a different number of paper copies, or no paper copies. It does not seem to me that any change in the Appellate Rules on this topic is warranted at this time.

²¹ I omit from this discussion Rules 3(a)(1) and 13(a)(1), which require the provision of copies to be served on other litigants and which are discussed in Part 1.

8. References to “Original” Documents

Rule 10(a): The Record on Appeal

(a) Composition of the Record on Appeal. The following items constitute the record on appeal:

- (1) the *original papers* and exhibits filed in the district court;
- (2) the transcript of proceedings, if any; and
- (3) a certified copy of the docket entries prepared by the district clerk.

Rule 24(c): Proceeding *in forma pauperis*

(c) Leave to Use *Original Record*. A party allowed to proceed on appeal in forma pauperis may request that the appeal be heard on the *original record* without reproducing any part.

Rule 30(f): Appendix to the Briefs

(f) Appeal on the *Original Record Without an Appendix.* The court may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the *original record* with any copies of the record, or relevant parts, that the court may order the parties to file.

Rule 45(d): Clerk’s Duties

(d) Custody of Records and Papers. The circuit clerk has custody of the court's records and papers. Unless the court orders or instructs otherwise, the clerk must not permit an original record or paper to be taken from the clerk's office. Upon disposition of the case, *original papers* constituting the record on appeal or review must be returned to the court or agency from which they were received. The clerk must preserve a copy of any brief, appendix, or other paper that has been filed.

See also Rules 5(c), 21(d), 26.1(c), and 27(d)(3), all discussed in Section 7 because they refer to number of copies. All of these rules also refer to an original to be filed with the copies.

Comment by Professor Struve on Rules Referring to Original Documents

When applied to a case in which all papers were electronically filed, the reference to “originals” may seem anachronistic. A few of those references may be worth updating in connection with other amendments relating to electronic filing.²² In particular, if Rules 11 and 12 are amended to provide for electronic transmission of the record, it might make sense to amend Rule 10(a) to provide that the record includes the original filings or electronic versions thereof. And provisions that contemplate the appeal being heard on the “original record” might be amended to provide, as an alternative, that the appeal can be heard on the basis of the electronic record. *See, e.g.,* Rules 24(c) and Rule 30(f), above.

9. Conclusion

Not all of the topics discussed in this memo merit Rule amendments. In some instances, a practice may not yet be sufficiently widespread to warrant treatment in the Rules. In other instances, the existing Rules may be flexible enough to permit new practices relating to electronic service and filing. In drafting any amendments to the Rules, it will be important to provide the capacity to accommodate future technological advances.

²² Other instances seem harmless, as where a rule provides for the use of “originals or copies.” *See* Rule 8(a)(2)(B)(ii) (required contents of motion for stay include originals or copies of affidavits); Rule 18(a)(2)(B) (similar requirement regarding motion for stay pending review of agency determination). And in some instances the reference to originals continues to make sense. For example, on review of an agency determination Rule 17(b)(1) requires the agency to file “the original or a certified copy of the entire record or parts designated by the parties.” And where multiple appeals are taken from a Tax Court decision, Rule 13(d)(2) [proposed Rule 13(a)(4)(B)] allocates the “original record” to the “court named in the first notice of appeal filed.”

MEMORANDUM

TO: CM/ECF SUBCOMMITTEE

FROM: ELIZABETH GIBSON, REPORTER TO ADVISORY COMMITTEE ON
BANKRUPTCY RULES

SUBJECT: AMENDMENT OF BANKRUPTCY RULES TO ACCOMMODATE CM/ECF

DATE: JULY 1, 2013

This memorandum identifies Bankruptcy Rules that refer to the use of paper documents or the physical transmission of documents to or by courts or among parties and do not refer to electronic transmission as an alternative. These rules would be the ones most affected by a decision to amend the various sets of rules to reflect the use of electronic filing and transmission of documents by means of CM/ECF.

The Bankruptcy Rules contain numerous references to filing; service; creating or transmitting a record; entry of an order or judgment; and providing notice, all of which are affected by CM/ECF. Where the rules do not specify the method of carrying out those actions, however, I have not included them in this memorandum because the rules, as written, are compatible with CM/ECF.

Part VIII of the Bankruptcy Rules (Bankruptcy Appeals), as recently revised, would create a presumption that documents are transmitted electronically. The revision project therefore was intended to accommodate CM/ECF. The revised rules were approved by the Standing Committee in June, and if promulgated by the Supreme Court next spring, will go into effect on December 1, 2014. I have therefore not included the current version of those rules in my search. Any references to 8000 rules in this memorandum are to the pending revised rules.

Finally, as members of the Subcommittee are aware, the Standing Committee has approved for publication this summer an amendment to Bankruptcy Rule 5005(a)(2) to provide for the use of electronic signatures of persons who are not registered with the CM/ECF system. This Subcommittee has already provided input on the proposed amendment, and therefore I have not included that provision of Rule 5005 among the rules listed in the memorandum.

A. Rules with references to “paper” documents

Comment: For most of the rules listed below, the word “document” could be substituted for “paper” in order to accommodate the use of CM/ECF. I have emphasized other language in a few of the rules that suggests the existence of a tangible document—language that is incompatible with electronic documents.

1. Rule 1007(k)

“[T]he court may order the trustee, a petitioning creditor, committee, or other party to prepare and file any of these **papers** within a time fixed by the court.”

2. Rule 1008

Title: “Verification of Petitions and Accompanying **Papers**”

3. Rule 2002(j)

“(4) if the **papers** in the case disclose a debt to the United States . . . ; (5) if the filed **papers** disclose a stock interest of the United States”

4. Rule 2018(e)

“The court may enter orders governing the service of notice and **papers** on entities permitted to intervene or be heard pursuant to this rule.”

5. Rule 5001(a)

“The courts shall be deemed always open for the purpose of filing any pleading or other proper **paper**”

6. Rule 5003(d)

“On request, the clerk shall make a search of any index and **papers in the clerk’s custody**”

7. Rule 5005

Title: “Filing and Transmittal of **Papers**”

(a)(1) “The lists, schedules, statements, proofs of claim or interest, . . . and other **papers** required to be filed by these rules . . . shall be filed with the clerk in the district where the case under the Code is pending. The judge of that court may permit the **papers to be filed with the judge**, in which event the **filing date shall be noted thereon** The clerk shall not refuse to accept for filing any petition or other **paper** presented for the purpose of filing solely because it is not presented in proper form”

(b)(1) “The complaints, motions, applications, objections and other **papers** required to be transmitted to the United States trustee by these rules shall be mailed or delivered to an office of the United States trustee”

(b)(2) “The entity, other than the clerk, transmitting a **paper** to the United States trustee shall promptly file as proof of such transmittal a verified statement identifying the **paper** and stating the date on which it was transmitted to the United States trustee.”

(b)(3) “Nothing in these rules shall require the clerk to transmit any **paper** to the United States trustee if the United States trustee requests in writing that the **paper** not be transmitted.”

(c) “A **paper** intended to be filed with the clerk but erroneously delivered . . . shall, after the date of its receipt has been **noted thereon**, be transmitted forthwith to the clerk of the bankruptcy court. A **paper** intended to be transmitted to the United States trustee but erroneously delivered . . . shall, after the date of its receipt has been **noted thereon**, be transmitted forthwith to the United States trustee. In the interest of justice, the court may order that a **paper** erroneously delivered shall be deemed filed with the clerk or transmitted to the United States trustee as of the date of its original delivery.”

8. Rule 5006

Title: “Certification of Copies of **Papers**”

“The clerk shall issue a certified copy of the record of any proceeding in a case under the Code or of any **paper** filed with the clerk on payment of any prescribed fee.”

9. Rule 7005

Title: “Service and Filing of Petitions and Other **Papers**”

10. Rule 8015

Title: “Form and Length of Briefs; Form of Appendices and Other **Papers**”

11. Rule 9004

- (a) “All petitions, pleadings, schedules and other **papers** shall be clearly legible.”
- (b) “Each **paper** filed shall contain a caption setting forth the name of the court, the title of the case, the bankruptcy docket number, and a brief designation of the character of the **paper**.”

12. Rule 9011

Title: “Signing of **Papers**; Representations to the Court; Sanctions; Verification and Copies of **Papers**”

- (a) “Signing of **papers**. Every petition, pleading, written motion, and other **paper**, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all **papers**. Each **paper** shall state the signer's address and telephone number, if any. An unsigned **paper** shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.”
- (b) “By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other **paper**, an attorney or unrepresented party is certifying”
- (c)(1)(A) “The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged **paper**, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected”
- (e) “Except as otherwise specifically provided by these rules, **papers** filed in a case under the Code need not be verified.”
- (f) “Copies of signed or verified **papers**. When these rules require copies of a signed or verified **paper**, it shall suffice if the original is signed or verified and the copies are conformed to the original.”

13. Rule 9014(b)

“Any **paper** served after the motion shall be served in the manner provided by Rule 5(b) F. R. Civ. P.”

14. Rule 9018

“[T]he court may make any order which justice requires . . . (2) to protect any entity against scandalous or defamatory matter contained in any **paper** filed in a case under the Code”

15. Rule 9034

Title: “Transmittal of Pleadings, Motion **Papers**, Objections, and Other **Papers** to the United States Trustee”

“[A]ny entity that files a pleading, motion, objection, or similar **paper** relating to any of the following matters shall transmit a copy thereof to the United States trustee within the time required by these rules for service of the **paper**:

...
(k) any other matter in which the United States trustee requests copies of filed **papers** or the court orders copies transmitted to the United States trustee.”

B. Rules with references to “writing”

Comment: The use of the term “writing” (either “in writing” or “the writing”) is not necessarily incompatible with electronic documents, but the term might be interpreted by some as referring to tangible documents. An efficient way to eliminate any ambiguity would be to follow the approach of Evidence Rule 101(b)(6) by adding to the Bankruptcy Rules a definition of “writing” that includes electronic documents. I have attempted to list below only the rules that refer to “writing” in a context that could be affected by CM/ECF. I have therefore excluded references to writings made prior to or outside of bankruptcy. I have also not included Rule 7004(h), a rule provision that was enacted by Congress and would therefore have to be amended by statute.

1. Rule 2003(b)(3)

“In a chapter 7 liquidation case, a creditor is entitled to vote at a meeting if, at or before the meeting, the creditor has filed a proof of claim or a **writing** setting forth facts evidencing a right to vote A creditor of a partnership may file a proof of claim or **writing** evidencing a right to vote for the trustee for the estate of a general partner notwithstanding that a trustee for the estate of the partnership has previously qualified.”

2. Rule 2008

“A trustee that has filed a blanket bond pursuant to Rule 2010 and has been selected as trustee in a chapter 7, chapter 12, or chapter 13 case that does not notify the court and the United States trustee in **writing** of rejection of the office within seven days after receipt of

notice of selection shall be deemed to have accepted the office. Any other person selected as trustee shall notify the court and the United States trustee in **writing** of acceptance of the office within seven days after receipt of notice of selection or shall be deemed to have rejected the office.”

3. Rule 3001

(c)(1) “Claim Based on a Writing. Except for a claim governed by paragraph (3) of this subdivision, when a claim, or an interest in property of the debtor securing the claim, is based on a writing, a copy of the **writing** shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.”

4. Rule 3007(a)

“An objection to the allowance of a claim shall be in **writing** and filed.”

5. Rule 3014

“The election shall be in **writing** and signed unless made at the hearing on the disclosure statement.”

6. Rule 3017(a)

“The plan and the disclosure statement shall be mailed with the notice of the hearing only to the debtor, any trustee or committee appointed under the Code, the Securities and Exchange Commission and any party in interest who requests in **writing** a copy of the statement or plan.”

7. Rule 3018(c)

“An acceptance or rejection shall be in **writing**, identify the plan or plans accepted or rejected, be signed by the creditor or equity security holder or an authorized agent, and conform to the appropriate Official Form.”

8. Rule 3019(a)

“If the court finds . . . that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted

in **writing** the modification, it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan.”

9. Rule 4001(a)(2)

“Relief from a stay under § 362(a) or a request to prohibit or condition the use, sale, or lease of property pursuant to § 363(e) may be granted without prior notice only if . . . (B) the movant’s attorney certifies to the court in **writing** the efforts, if any, which have been made to give notice and the reasons why notice should not be required.”

10. Rule 4002(a)

“In general. In addition to performing other duties prescribed by the Code and rules, the debtor shall:

...

(3) inform the trustee immediately in **writing** as to the location of real property in which the debtor has an interest and the name and address of every person holding money or property subject to the debtor’s withdrawal or order if a schedule of property has not yet been filed pursuant to Rule 1007”

11. Rule 5005(b)(3)

“Nothing in these rules shall require the clerk to transmit any paper to the United States trustee if the United States trustee requests in **writing** that the paper not be transmitted.”

12. Rule 7004(b)(9)

“Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or to such other address as the debtor may designate in a filed **writing**.”

13. Rule 9036

“Whenever the clerk or some other person as directed by the court is required to send notice by mail and the entity entitled to receive the notice requests in **writing** that, instead of notice by mail, all or part of the information required to be contained in the notice be sent by a specified type of electronic transmission, the court may direct the clerk or other person to send the information by such electronic transmission.”

C. Rules with references to “copies” of documents

Comment: Many Bankruptcy Rules refer to providing a copy or copies of documents, a concept that applies to tangible, not electronic, documents. Because the number of rules in this category is so large, I have listed the specific provisions below without quoting them. To accommodate CM/ECF, in many rules “copy of” could be deleted or “document” could be substituted for “copy.”

1. **Rule 1002(b)**
2. **Rule 1003(a)**
3. **Rule 1004**
4. **Rule 1007(b)(1)(E), (b)(2), (i), (l)**
5. **Rule 1009(d)**
6. **Rule 1010(a)**
7. **Rule 1017(f)(3)**
8. **Rule 1019(5)(D)**
9. **Rule 2002(i), (j)**
10. **Rule 2003(c), (d)(2)**
11. **Rule 2006(e)(1)**
12. **Rule 2007.1(b)(3)(B)**
13. **Rule 2013(b)**
14. **Rule 2014(a)**
15. **Rule 2015(e)**
16. **Rule 2015.1(a)**
17. **Rule 2015.3(b)**
18. **Rule 2016(a)**
19. **Rule 2019(c)(4)**

20. **Rule 3001(c)(1), (c)(3)(B), (e)(5)**
21. **Rule 3007(a)**
22. **Rule 3015(d), (e), (g)**
23. **Rule 3017(a), (f)(2)**
24. **Rule 3019(b)**
25. **Rule 3020(b)(1)**
26. **Rule 4001(a)(2), (c)(1)(A), (d)(1)(A)**
27. **Rule 4002(b)(2), (b)(3), (b)(4)**
28. **Rule 4003(b)(4)**
29. **Rule 4004(f), (g)**
30. **Rule 5003(c)**
31. **Rule 5006 (including title)**
32. **Rule 5007(a), (b)**
33. **Rule 5012**
34. **Rule 6004(f)(1)**
35. **Rule 7004(b)(1)-(10), (c) [Note: this rule refers to service of copies of the summons and complaint, and it is unlikely that CM/ECF affects it.]**
36. **Rule 7007.1(a)**
37. **Rule 8003(c)(1)**
38. **Rule 8004(b)(1)(E)**
39. **Rule 8006(f)(2)(E)**
40. **Rule 8009(d)**
41. **Rule 8013(a)(2)(C)(iii), (g)**
42. **Rule 8024(b)**

- 43. **Rule 9011 title, (f)**
- 44. **Rule 9022(a), (b)**
- 45. **Rule 9027(a)(1), (b), (e)(2), (e)(3), (g), (h)**
- 46. **Rule 9033(a), (b)**
- 47. **Rule 9034**
- 48. **Rule 9037(e)**

D. Rules with references to “mail”

Comment: I have probably been overinclusive in listing rules in this category. I believe that CM/ECF allows provision of notice and service of documents after the summons and complaint to be made electronically on registered users of the system. Some of the rules listed may require parties to mail documents in contexts that are not affected by CM/ECF, but in cases of uncertainty, I included them.

1. Rule 2002

(a) “[T]he clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 21 days' notice by **mail**”

(b) “[T]he clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 28 days' notice by **mail**”

(f) “[T]he clerk, or some other person as the court may direct, shall give the debtor, all creditors, and indenture trustees notice by **mail**”

(h) “[T]he court may direct that all notices required by subdivision (a) of this rule be **mailed** only to the debtor, the trustee, all indenture trustees, creditors that hold claims for which proofs of claim have been filed, and creditors, if any, that are still permitted to file claims [T]he court may order that notices required by subdivision (a)(2), (3) and (6) of this rule be transmitted to the United States trustee and be **mailed** only to the committees elected under § 705 or appointed under § 1102 of the Code or to their authorized agents and to the creditors and equity security holders who serve on the trustee or debtor in possession and file a request that all notices be **mailed** to them.”

(o) “In a voluntary case commenced by an individual debtor whose debts are primarily consumer debts, the clerk or some other person as the court may direct shall give the trustee and all creditors notice by **mail** of the order for relief within 21 days from the date thereof.”

(q)(1) “The clerk, or some other person as the court may direct, shall forthwith give the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under § 1519 of the Code, all parties to litigation pending in the United States in which the debtor is a party at the time of the filing of the petition, and such other entities as the court may direct, at least 21 days' notice by **mail** of the hearing on the petition for recognition of a foreign proceeding.”

(q)(2) Similar to (q)(1) but concerns notice of the court's intention to communicate with a foreign court or foreign representative.

2. **Rule 2003(d)(2)**

“No later than the date on which the report is filed, the United States trustee shall **mail** a copy of the report to any party in interest that has made a request to receive a copy of the report.”

3. **Rule 2007.1(b)(3)(B)**

“Not later than the date on which the report of the disputed election is filed, the United States trustee shall **mail** a copy of the report and each verified statement to any party in interest that has made a request to convene a meeting under § 1104(b) or to receive a copy of the report, and to any committee appointed under § 1102 of the Code.”

4. **Rule 2015(e)**

“In a chapter 11 case the court may direct that copies or summaries of annual reports and copies or summaries of other reports shall be **mailed** to the creditors, equity security holders, and indenture trustees.”

5. **Rule 3001**

(e)(2) and (e)(4) “The clerk shall immediately notify the alleged transferor by **mail** of the filing of the evidence of transfer and that objection thereto, if any, must be filed within 21 days of the **mailing** of the notice or within any additional time allowed by the court.”

(e)(3) “If either the transferor or the transferee files a proof of claim, the clerk shall immediately notify the other by **mail** of the right to join in the filed claim.”

(e)(5) “A copy of an objection filed pursuant to paragraph (2) or (4) or a motion filed pursuant to paragraph (3) or (4) of this subdivision together with a notice of a hearing shall

be **mailed** or otherwise delivered to the transferor or transferee, whichever is appropriate, at least 30 days prior to the hearing.”

6. Rule 3002

(c)(5) “If notice of insufficient assets to pay a dividend was given to creditors under Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall give at least 90 days' notice by **mail** to creditors of that fact and of the date by which proofs of claim must be filed.”

(c)(6) “If notice of the time to file a proof of claim has been **mailed** to a creditor at a foreign address, on motion filed by the creditor before or after the expiration of the time, the court may extend the time by not more than 60 days if the court finds that the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim.”

7. Rule 3007(a)

“An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be **mailed** or otherwise delivered to the claimant, the debtor or debtor in possession, and the trustee at least 30 days prior to the hearing.”

8. Rule 3015

(d) “The plan or a summary of the plan shall be included with each notice of the hearing on confirmation **mailed** pursuant to Rule 2002.”

(g) “The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 21 days' notice by **mail** of the time fixed for filing objections”

9. Rule 3017

(a) “The plan and the disclosure statement shall be **mailed** with the notice of the hearing only to the debtor, any trustee or committee appointed under the Code, the Securities and Exchange Commission and any party in interest who requests in writing a copy of the statement or plan.”

(d) “[N]otice of the time fixed for filing objections and the hearing on confirmation shall be **mailed** to all creditors and equity security holders in accordance with Rule 2002(b), and a form of ballot conforming to the appropriate Official Form shall be **mailed** to creditors and

equity security holders entitled to vote on the plan. . . . If the court orders that the disclosure statement and the plan or a summary of the plan shall not be **mailed** to any unimpaired class, notice that the class is designated in the plan as unimpaired and notice of the name and address of the person from whom the plan or summary of the plan and disclosure statement may be obtained upon request and at the plan proponent's expense, shall be **mailed** to members of the unimpaired class together with the notice of the time fixed for filing objections to and the hearing on confirmation.”

10. Rule 3019(b)

“The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 21 days' notice by **mail** of the time fixed to file objections”

11. Rule 3020(c)(2)

“Notice of entry of the order of confirmation shall be **mailed** promptly to the debtor, the trustee, creditors, equity security holders, other parties in interest”

12. Rule 4001(d)(2)

“Notice of the motion and the time within which objections may be filed and served on the debtor in possession or trustee shall be **mailed** to the parties on whom service is required by paragraph (1) of this subdivision and to such other entities as the court may direct.”

13. Rule 4003

(b)(2) “The trustee shall deliver or **mail** the objection to the debtor and the debtor's attorney, and to any person filing the list of exempt property and that person's attorney.”

(b)(4) “A copy of any objection shall be delivered or **mailed** to the trustee, the debtor and the debtor's attorney, and the person filing the list and that person's attorney.”

14. Rule 4004(g)

“The clerk shall promptly **mail** a copy of the final order of discharge to those specified in subdivision (a) of this rule.”

15. Rule 5003(e)

Title: “Register of **mailing** addresses of federal and state governmental units and certain taxing authorities.” The provision includes several references to mailing addresses.

16. Rule 5005(b)(1)

“The complaints, motions, applications, objections and other papers required to be transmitted to the United States trustee by these rules shall be **mailed** or delivered to an office of the United States trustee, or to another place designated by the United States trustee, in the district where the case under the Code is pending.”

17. Rule 6004(d)

“An objection to any such sale may be filed and served by a party in interest within 14 days of the **mailing** of the notice, or within the time fixed by the court.”

18. Rule 6007(a)

“A party in interest may file and serve an objection within 14 days of the **mailing** of the notice, or within the time fixed by the court.”

19. Rule 6011(b)

Title: “Notice by mail under § 351(1)(B)”

“Any notice under this subdivision shall be **mailed** to the patient and any family member or other contact person whose name and address have been given to the trustee or the debtor for the purpose of providing information regarding the patient's health care, to the Attorney General of the State where the health care facility is located, and to any insurance company known to have provided health care insurance to the patient.”

20. Rule 7004

This rule includes numerous provisions for service of the summons and complaint by mail. These provisions are probably not affected by CM/ECF.

21. Rule 9027(e)(3)

“Any party who files a statement pursuant to this paragraph shall **mail** a copy to every other party to the removed claim or cause of action.”

22. Rule 9033(a)

“The clerk shall serve forthwith copies on all parties by **mail** and note the date of **mailing** on the docket.”

23. Rule 9036

“Whenever the clerk or some other person as directed by the court is required to send notice by **mail** and the entity entitled to receive the notice requests in writing that, instead of notice by **mail**, all or part of the information required to be contained in the notice be sent by a specified type of electronic transmission, the court may direct the clerk or other person to send the information by such electronic transmission.”

E. Rules with references to “deliver”

Comment: “Deliver” suggests the physical transmission of a document, which is not required with CM/ECF. Whatever broad term might be adopted for referring in the rules to getting a document from one person or place to another—such as “transmit” or “send”—could be substituted for “deliver” when the reference is to documents rather than property.

1. Rule 3001(e)(5)

“A copy of an objection filed pursuant to paragraph (2) or (4) or a motion filed pursuant to paragraph (3) or (4) of this subdivision together with a notice of a hearing shall be mailed or otherwise **delivered** to the transferor or transferee, whichever is appropriate, at least 30 days prior to the hearing.”

2. Rule 3007(a)

“An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be mailed or otherwise **delivered** to the claimant, the debtor or debtor in possession, and the trustee at least 30 days prior to the hearing.”

3. Rule 4003

(b)(2) “The trustee shall **deliver** or mail the objection to the debtor and the debtor's attorney, and to any person filing the list of exempt property and that person's attorney.”

(b)(4) “A copy of any objection shall be **delivered** or mailed to the trustee, the debtor and the debtor's attorney, and the person filing the list and that person's attorney.”

4. Rule 5005

(b)(1) “The complaints, motions, applications, objections and other papers required to be transmitted to the United States trustee by these rules shall be mailed or **delivered** to an office of the United States trustee, or to another place designated by the United States trustee, in the district where the case under the Code is pending.”

(c) “A paper intended to be filed with the clerk but erroneously **delivered** to the United States trustee, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, the clerk of the bankruptcy appellate panel, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the clerk of the bankruptcy court. A paper intended to be transmitted to the United States trustee but erroneously **delivered** to the clerk, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, the clerk of the bankruptcy appellate panel, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the United States trustee. In the interest of justice, the court may order that a paper erroneously **delivered** shall be deemed filed with the clerk or transmitted to the United States trustee as of the date of its original **delivery**.”

5. Rule 7004

(a)(1) “Personal service under Rule 4(e)-(j) F.R.Civ.P. may be made by any person at least 18 years of age who is not a party, and the summons may be **delivered** by the clerk to any such person.”

(e) “Service made under Rule 4(e), (g), (h)(1), (i), or (j)(2) F.R.Civ.P. shall be by **delivery** of the summons and complaint within 14 days after the summons is issued. If service is by any authorized form of mail, the summons and complaint shall be deposited in the mail within 14 days after the summons is issued. If a summons is not timely **delivered** or mailed, another summons shall be issued and served. This subdivision does not apply to service in a foreign country.” [This provision is probably not affected by CM/ECF.]

F. A Final Issue

Revised Rule 8009 will continue the current bankruptcy practice of requiring parties to an appeal to designate the portions of the bankruptcy court record that are to be included in the record on appeal to the district court or bankruptcy appellate panel. The Advisory Committee received several comments in response to publication of the rule that

proposed the adoption of the practice currently being followed in some bankruptcy appellate panels and at least one court of appeals of not requiring designation of the record or even creation of a record on appeal. With CM/ECF, appellate judges can access the lower court docket electronically, and the parties to the appeal can refer the appellate court to specific parts of the trial court record by docket number. The Bankruptcy Rules Committee designated the issue as one for future consideration. It may be an issue that this Subcommittee will want to consider.

Civil Rules E-Technology Issues

These notes describe a number of issues that should be considered in a thorough review of the ways in which the Civil Rules might be amended to reflect advances in electronic communication. Some of the issues, perhaps many of them, will prove not yet ripe for present action. They will be roughly grouped along a scale from those that obviously deserve consideration now to those that seem too complex or uncertain to be taken up and resolved in a relatively short time frame. They build on suggestions, lists, and improvements made by Laura Briggs, Richard Marcus, and Solomon Oliver.

The "Obvious Issues," "CM/ECF Issues," and "Other CACM Issues" are matters that clearly deserve present attention. Present attention need not lead to imminent action – many of these issues may better be put off into the future.

The "Bold Possibilities" that follow probably are not ripe, particularly if the subcommittee aims to complete its work within a year. Concerns with the security of e-systems need be reckoned with, but little more is said on that score. The final and largest block illustrates words that appear throughout the rules and that may or may not encompass electronic forms of action. As noted there, it would be unwise to attempt to address each of these words individually. And it may prove difficult to attempt some overarching authorization for doing by electronic means whatever can be done by paper. Some exceptions would have to be made, most obviously for parties who do not have electronic means of communication. The day will come when physical paper seems the dream of antiquarians, but we are not there yet.

OBVIOUS ISSUES

Comprehensive "Definitional" Approach: Rather than change many rules separately, it may be possible to adopt a rule that authorizes reliance on electronic systems to do whatever may be done with paper.

In the Civil Rules, a new Rule 5(a) might be as good a location as any:

(a) Electronic filing and transmission. Electronic filing or transmission satisfies a rule [that provides] for delivering, entering, filing, issuing, producing, sending, or serving if [it][the filing or transmission]

- (1) satisfies the requirements of form applied to a physical writing; and
- (2) is transmitted by authorized means.

One obvious question is the long but likely incomplete list of acts that can be done by electronic means. Is there a better way? And of course there is the question whether we want to do this. For one example, if we are not prepared to authorize service of the summons and complaint by electronic means – and likely we are not prepared to do that – an exception will have to be added.

Rule 4(a)(1), (2); (b): These suggestions come from Laura Briggs. The idea is that the clerk and attorneys can save time if the clerk can sign and seal a summons electronically. This happens now, but may not comport with the rule text:

Rule 4. Summons

(a) Contents; Amendments.

(1) *Contents*. A summons must:

(F) be signed by the clerk, either physically or electronically; and

(G) bear the court's seal, either physically or electronically.¹ * * *

(b) Issuance. On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. When issued on paper, a ~~A~~ summons – or a copy of a summons that is addressed to multiple defendants – must be issued for each defendant to be served [with a paper summons].

This form assumes that paper service is required. It is implicit that the plaintiff may present the summons to the clerk electronically, and that the clerk may sign, seal, and return the electronic version of the summons to the plaintiff. The plaintiff then prints out the summons. But if the plaintiff brings paper to the clerk, the clerk must issue a paper summons for each defendant to be served. At least some courts are already signing and sealing by electronic means.

Rule 5(b)(2)(E), (3): E-service of papers after the summons and complaint now requires consent "in writing" of the person served. Should consent be required at all? Is the writing element satisfied if a local e-filing rule reaches? So for (3), should we continue to rely on local rules to authorize use of the court's facilities for e-service?

Most courts obtain the written consent on the CM/ECF system on the CM/ECF registration form, or some variation of the form, when service will be made through the CM/ECF system. "The form must be reviewed for completeness (including wet signature), and the attorney information manually entered into CM/ECF (after we call for assistance deciphering handwriting). Then courts must deal with the issue of retention of the registration form." In ND Ohio – and apparently others – consent is required as a condition of the

¹ Of course drafting variations are possible: "be signed physically or electronically by the clerk"; "bear the court's physical or electronic seal."

attorney admission process. If coerced consent is the norm, and has not caused any apparent problems, it makes sense to discard a general requirement of consent.

If consent is not required for most cases, it will be necessary to identify cases in which e-service is not allowed. Rule 11(a) requires that every pleading, written motion, and other paper must be signed; the signature must include an e-mail address. A party who does not have an e-mail address presumably does not have to supply one. An exception could be made for serving a party who does not have an e-mail address. But it may be that some people have e-mail addresses but no readily available means of checking for e-mail. Prisoners and homeless people are likely examples. Some exceptions seem inevitable:

5. Serving and Filing Pleadings and Other Papers * * *

(b) Service: How Made. * * *

(2) *Service in General.* A paper is served under this rule by: * * *

(E) sending it by electronic means, ~~—if the person consented in writing—~~ in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served, but a party may elect to refuse to be served by electronic means by filing the refusal [at the time of the party's first appearance in the action];

A different approach would be to require consent for e-service on a pro se party. That seems common. But it seems likely that many pro se litigants are regular users of the internet. It might suffice to rely on clerks' offices to provide notice of the right to opt out to any pro se plaintiff.

It may be unwise to limit the opportunity to refuse e-service by insisting that the refusal be made at the first appearance or some other early time. A party may find good reasons for opting out only after some experience with the case.

Rule 5(d): "Paper" Generally: Rule 5(d) repeatedly refers to filing a "paper." 5(d)(3) concludes: "A paper filed electronically in compliance with a local rule is a written paper for purposes of these rules." At a minimum, we should strike "in compliance with a local rule" if we move to a uniform national practice, see the next item. If we continue to rely on local rules, there might be some advantage in substituting "document" for "paper," to reduce the dissonance. Remember Rule 34 seems to treat electronically stored information as something distinct from a document, an irritant that is noted in the "vocabulary" section below without hope of winning support for an improvement.

Rule 5(d)(3): Again, should we continue to rely on local rules for e-filing, on technical standards established by the Judicial Conference, and local determination of what the "reasonable exceptions" are?

Laura Briggs notes that as a practical matter, most courts require parties to file electronically, with an exception for pro se parties. This is necessary "to cope with dwindling resources." Here too, it seems inevitable that exceptions will be necessary. It might suffice to except pro se parties and to allow other exceptions only for compelling reasons. Or present local rules could be studied as the source of inspiration. Or it would be possible to continue to rely on local exemptions - Briggs advises that "it would be impossible to draft a national rule that could cover all possible situations."

(d) Filing. * * *

(3) *Electronic Filing, Signing, or Verification.* ~~A court may, by local rule, allow papers to be filed~~ All filings must be made, signed, or verified by electronic means unless the [filing] party is unrepresented or the court [clerk?] finds good cause to permit physical filing that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed.

Rule 5.2(b): Is it time to rethink the exemptions from the redaction requirement? If there is an e-record for an administrative or agency proceeding, or a state-court proceeding, why not require redaction? Laura Briggs thinks it is not yet time to reconsider for reasons quoted in the margin.² Judge Solomon agrees.

It may be better not to reconsider the limits on remote access in social security appeals and immigration cases, Rule 5.2(c). But this was sensitive. If e-filings are made and redacted, remote

² "I hope we do not rethink the exemptions from the redaction requirement. Redaction of a large administrative record could be quite burdensome. Also, effective redaction requires mastery of Adobe's redaction tool or knowledge of how to "flatten" documents so that annotations (such as black boxes placed over words) are not movable (thus allowing access to the 'redacted' material). I think that filing attorneys are 'not there yet' from a technological perspective. In addition, it seems that parties rarely take the time to fully redact (or redact at all). In Southern Indiana, it is the Clerk's Office staff who find names of minors (and financial account numbers) appearing in filings. While it may not be a Clerk's Office burden to check for redaction, it is a societal obligation which is taken seriously."

access may be less dangerous. Here too, Laura Briggs thinks it may be better not to reconsider. It is asking for trouble to expect parties to know when to redact, and how to do it effectively. But if we come to a time when administrative records are filed electronically and are effectively redacted, nonparty remote access may become sensible.

Rule 6(a)(4)(A): Indiana alone: Laura Briggs suggests a small change in the definition of the "last day's" end: (A) for electronic filing, at midnight in the ~~court's~~ court office in which the matter is pending * * * time zone of the court office in which the matter is pending * * *." The point is that S.D.Ind. is in two time zones. She is frequently asked whether time is measured by court's time zone or the filer's time zone. "I don't know that we have a problem with lawyers filing at midnight central time for a division in the eastern time zone," so perhaps it is not an issue worth addressing. [Until some zealous advocate decides to make a point that a central midnight filing is late by eastern time...]

Rule 6(d): The question of additional time after service by various means has been put off for a few years, anticipating that a broader e-action project would be launched. The time has come. Because other sets of rules confront the same questions, this note is brief. One common issue is that adding three days reduces the simplicity of counting by weeks when time periods are set at 7, 14, or 21 days. After considerable debate, the three extra days in Rule 6(d) were provided for e-service from concerns that electronic transmission was not always as instantaneous as it seems, and that completed transmission did not ensure that recipients could access the message - attachments were a particular source of difficulty. Technology may have alleviated those concerns. On the other hand, Judge Solomon notes that the present rule "has allowed for a simplified application of the rule and has not raised any practical problems that I am aware of in our court." It facilitates correction of glitches arising from mistake or technical problems. And it averts the need for short motions for extensions of time.

Deleting the three extra days for e-mail would not mean deleting them for postal mail. The questions whether to retain the three extra days for service by leaving with the court clerk or by means consented to in writing seem debatable.

It is possible that glitches in e-service are more common in civil actions than under other sets of rules. The value of uniformity among the sets of rules, however, suggests that only good reasons would justify holding out against a change recommended for the other rules.

Rule 6(c) may suggest a converse question. It provides for service "at least 14 days before the time specified," or "at least 7 days before the hearing." This seems to provide an incentive to serve by postal mail, reducing the time available to the other parties. Should the time periods distinguish between e-service and other modes?

Rule 7.1: Rule 7.1 requires a nongovernmental corporate party to "file 2 copies of a disclosure statement." Memory suggests that the purpose of requiring two copies was to have one for the judge. (Appellate Rule 26.1 was amended in 1994 to require 3 copies if the statement is filed before the principal brief; the Committee Note observed that there is no need for copies otherwise because the statement is included in each copy of the brief.) Notice to the judge is now accomplished by the EF system, or should be. This suggests an amendment:

Rule 7.1 Disclosure Statement

(a) Who Must File; Contents. A nongovernmental corporate party must file ~~2 copies of~~ a disclosure statement * * *.

Rule 11(a): "Paper" appears repeatedly throughout Rule 11; as with Rule 5, it may be tempting to substitute "document." But going down this road opens endless opportunities for failing to achieve a truly uniform vocabulary throughout the rules.

Rule 11(a) could be a good location for a general electronic signature provision, whether in competition with Rule 5(d)(3) or as a replacement. Rule 11 requires that a "pleading, written motion, and other paper" be signed. Instead of focusing on filing, as Rule 5(d)(3) does, Rule 11 would provide a more general requirement. A simple version would be:

"(a) Signature. Every pleading, written motion, and other paper [document?] must be signed — physically or electronically — by at least * * *."

That simple version does not cover signatures of other sorts. A party might verify a pleading. Affidavits or declarations are routinely filed. The proposed Bankruptcy Rule would require notarization of these signatures. It is not clear how notarization would be accomplished. To the extent that the purpose is to ensure that the signature on the document really was affixed to the document, it may be necessary to accomplish notarization as part of the e-filing process, or else to have the notary retain the notarized original and participate in the e-filing process. Putting aside that concern, Laura Briggs notes that compliance with a notarization requirement can be a nuisance for attorneys, and also will become a nuisance for the court in dealing with documents that do not comply with the requirement. Judge Solomon agrees that "notorization of signatures is a very unattractive option."

An alternative may be to provide that the physical or electronic signature of the person filing the document certifies the genuineness of any other signature on the filed documents.

It may be that this problem is better held in abeyance pending public comments on the proposed Bankruptcy Rule.

Rule 33: Rule 33 now calls for written interrogatories, to "be answered separately and fully in writing under oath." The answers and objections, moreover, must be signed. It has been several years

since outside suggestions have been made that Rule 33 should provide for submitting interrogatories in e-form, with provision for providing answers by filling in the same e-file. Are we there yet? Some doubts have been expressed. Perhaps it is enough for now to rely on the inventiveness of litigants – explicit or tacit consent to e-exchanges should be acceptable.

Rule 71.1(c)(5): Rule 71.1(c)(5) requires the plaintiff in an eminent domain action to give at least one copy of the complaint to the clerk for the defendants' use, "and additional copies at the request of the clerk or a defendant." Rule 71.1(d) requires the plaintiff to deliver to the clerk "joint or several notices directed to the named defendants." Additional notices must be delivered when the plaintiff adds defendants. (d)(3) calls for personal service of the notice, without a copy of the complaint, on each defendant (with exceptions). Rule 71.1(f) directs that notice of filing an amended pleading, but not the pleading, be served. At least one additional copy of the amendment must be filed with the clerk, with more at the request of the clerk, in parallel with the requirement of copies in 71.1(c)(5). All of these copies seem an unnecessary nuisance if the complaint is e-filed and the complaint and amended pleadings are not served anyway. We should find out, presumably from the Department of Justice, whether it is enough to carry forward the requirement that the notice and answer be served. All parties would have access to the court file to get the complaint and amended pleadings. (It also might be enlightening to see whether it would make better sense to require that service of notice under Rule 71(d) be supplemented by at least an e-mail link to the complaint on file with the court.)

Rule 72(b)(1):

* * * The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must promptly ~~mail~~ serve a copy ~~to~~ on each party.

Self-explanatory. This is existing practice.

Rule 79(a)(2), (3): Rule 79(a)(2) and (3) refer to docketing requirements for papers. If we do not manage a generic resolution of this problem, here too "documents" might be substituted, still subject to the uneasiness generated by the Rule 34 distinction between documents and electronically stored information.

Rule 79(b):

(b) Civil Judgments and Orders. The clerk must keep a copy of every final judgment and appealable order; of every order affecting title to or a lien on real or personal property; and of any other order that the court directs to be kept. The clerk must keep these, either physically or electronically, in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the

United States.

The purpose of this suggestion seems plain. But why is it not enough to ask the Director to approve electronic form and win approval of the Judicial Conference?

Rule 79(c):

(c) Indexes; Calendars. Under the court's direction, the clerk must:

- (1) keep indexes of the docket and of the judgments ~~and orders~~ described in Rule 79(b);

The basic question is whether the clerk should be directed to keep an index of orders, or whether an index of judgments should suffice. The argument is that orders can be found electronically within a case, and a quick search can be made for all judgments issued within a particular date range. This might be a bit tricky. Rule 79(b), quoted above, requires the clerk to keep a copy of every "appealable order," every order affecting title or a lien on property, and any other order the court directs to be kept. Rule 79(a)(2)(C) directs that all orders be marked with the file number and entered chronologically on the docket. Just to make matters more complicated, Rule 54(a) provides that "'Judgment'" as used in these rules includes * * * any order from which an appeal lies." Those orders still would be covered by the proposed Rule 79(c)(1), and the clerk still would be left to guess which orders may be appealable. One common example of uncertainty would be the collateral-order appealability of an order denying a motion for summary judgment on official-immunity grounds.

CM/ECF ISSUES

At a minimum, this will require coordination with CACM. We already have two questions at least. Should a Notice of Electronic Filing do duty as a proof of service? And the now-familiar question of dealing with the "wet" signature on filing that reflects a paper original (what about filing something that never had more than an e-signature: is it necessary to print it out, sign it, and then convert back to e-form for filing? Rule 5(d)(3) can be read to dispense with the need for any physical embodiment.)

OTHER CACM ISSUES

CACM and the rules committees have been asked to consider the possibility that a district judge could use videoconferencing to preside at a bench trial physically occurring in a courtroom in another district. For the Civil Rules, this question implicates at least Rule 43(a) and Rule 77(b). Rule 43(a) allows testimony "in open court by contemporaneous transmission from a different location," but only "[f]or good cause in compelling circumstances and with appropriate safeguards." Rule 77(d) provides that "no hearing - other than one ex parte - may be conducted outside the

district unless all the affected parties consent."

BOLD POSSIBILITIES

Rule 4 Service of Summons and Complaint: Has the time come to explore e-service of the summons and complaint? How would the reliability of e-service compare to the present alternatives to actual in-hand service? One problem may be the reliability of addresses, if indeed it is easier to change an e-address than a postal address. Another may be that e-mail service addressed to an entity stands a greater chance of being lost in the bureaucratic maze. Proof of service also may be a practical problem; short of accepting the lack of a "nondeliverable" message or an automatic notice of receipt, each of which leave substantial doubts, what could be done to prove actual receipt-service?

One timid approach is to hope that some state take the plunge. Rule 4(e)(1), for example, authorizes service on an individual "following state law for serving a summons." Other parts of Rule 4 also invoke state law methods of service.

A request to waive service may be "sent by first-class mail or other reliable means." Rule 4(d)(1)(G). This is not service, but it could be an interesting beginning. But it may be useful to clarify that e-mail is a reliable means. Other requirements are that the request be "in writing" - Rule 5(d)(3) allows an e-filing to be a writing, but it depends on filing. The request must be accompanied by a copy of the complaint, two copies of a waiver form, "and a prepaid means for returning the form": even if the e-file is a copy, how do you prepay a means of returning that incurs no marginal cost?

Group Actions: If not for in personam actions among individual entities, should some form of group notice be provided for group actions or in rem proceedings? The obvious possibilities do not seem available now, but it may be possible to start laying foundations. Supplemental Rule G provides for publishing notice of civil forfeiture proceedings "on an official internet government forfeiture site." See G(4)(a)(iii)(B), (4)(a)(iv)(C), (5)(a)(ii)(B). Something similar might be desirable for class actions, or even for opt-in group actions under the Fair Labor Standards Act and Age Discrimination in Employment Act. If not that, why not allow internet publication in lieu of newspaper publication, whether when borrowing from state law or when newspaper publication is now provided in a Civil Rule? See Rule 71.1(d)(3)(B).

SECURITY AND AUTHENTICITY

How far should we be concerned with the vulnerability of e-files to unauthorized access? Taking account not only of the security of the court's system, but also of all the outside systems that interact with the court system and also interact with each other outside the court system?

default judgment.

"certifies in writing," Rule 65(b) (1) (B).

To: The CM/ECF Subcommittee

From: Professors Sara Sun Beale and Nancy King

Re: Possible Amendments to Federal Rules of Criminal Procedure to accommodate CM/ECF

Date: July 5, 2013

This memo discusses the Criminal Rules that might be affected by CM/ECF (and technology more generally), and it provides comments and suggestions on whether any amendment is necessary or advisable. However, our analysis at this stage is necessarily preliminary and general because of the uncertainty about how CM/ECF may change. Because of the large number of rules that might conceivably be affected, we provide the full text only for selected rules, giving a brief description of others.

In the sections that follow, we discuss:

- I. Rules referring to “recording,” “the record,” actions and events that must occur “on the record,” handing of or access to recordings, etc.
- II. Rules requiring that a document or record be signed
- III. Rules requiring writing
- IV. Rules governing filing
- V. Rules requiring sending and return of files or grand jury material to another district
- VI. Rules requiring mailing
- VII. Rules requiring the entry of information on documents, and the entry of orders
- VIII. Rules requiring the preservation records or testimony
- IX. Rules governing service

This memo does not discuss the Rules Governing Actions Under Sections 2254 and 2255, which pose distinctive issues.

I. Rules referring to “recording,” “the record,” actions and events that must occur “on the record,” handing of or access to recordings, etc.

The Criminal Rules contain a myriad of references to “the record,” to “recording,” to events or actions that must occur or be made “on the record,” to the making and handling of recordings. Because of the large number of rules involved, we have grouped the rules, describe each briefly (rather than providing the relevant text), and provide comments about the various categories of record-related rules.

A. Rules referring to “recording” or a “recording device” or “recorded statement”

Rule 4.1. authorizes a number of different options for recording the testimony taken during an application for warrant by electronic means, including recording the conversation by an “electronic recording device,” but all recordings must be transcribed, certified, and filed.

Rule 5.1(g) requires that the preliminary hearing be recorded “by a court reporter or by a suitable recording device”; a copy of both the recording of the preliminary hearing and the transcript “may” be provided to any party upon request for the fee specified by the Judicial Conference.

Rule 6(e) states that grand jury proceedings (except deliberations and voting) “must be recorded by a court reporter or by a suitable recording device,” and that the government will ordinarily retain control of “the recording, the reporter’s notes, and any transcript prepared from those notes.”

Rules 11(g) and 12(f) requires plea and motion hearing proceedings to be recorded by a court reporter or a “suitable recording device” and says nothing about a transcript.

Rule 26(f) defines statement, includes “recorded recital” of statement contained in any “recording” or transcription of “recording.”

Rule 32.1 requires preliminary hearings in revocations to be recorded by reporter or suitable device as well and says nothing about transcripts.

Rule 41(d)(2) requires testimony in support of a warrant application to be recorded by reporter or suitable device, and requires the judge to file the transcript or recording with the clerk.

Rule 58(e) states proceedings under Rule 58 must be recorded by “a court reporter or a suitable recording device.”

Rule 58(g)(2)(C) defines the record for an appeal from a magistrate judge’s order as “the original papers and exhibits in the case; any transcript, tape, or other recording of the proceedings; and a certified copy of the docket entries.” It also requires that “a copy of the record or proceedings” must be made available to a defendant who establishes his inability to pay.

Reporters’ Comments

If audio or video recordings are ever accepted in place of written transcripts (see discussion in Professor Struve’s CM/ECF report on the Appellate Rules), the Criminal Rules that reference transcripts of recordings may warrant a second look. Also, to the extent recordings are conditioned upon payment of a fee, if technology changes allow linking the recordings to the file, the cost of providing a “copy” of the recording could be eliminated for those with access. Those without access to CM/ECF or equipment to play an electronic recording (pro se defendants and petitioners) would presumably require a written transcript. Rule 58(g)(2)(C) so provides in the particular situation of an appeal from magistrate’s order.

B. Rules referencing actions or events or statements that must be made or appear in “the record”

Rule 6(b) and (c) state that the foreperson or another designated juror must record how many qualified grand jurors concurred in an indictment in the record.

Rule 11(c)(5) states that if the court rejects certain plea agreements it must provide certain advice to the defendant “on the record and in open court (or, for good cause, in camera).” Rule 11(g) requires the proceedings in which the defendant enters a plea to be “recorded by a court reporter or by a suitable recording device,” and states that “the record” must include the plea colloquy.

Rule 12(d) requires the court to state factual findings “on the record” when deciding pretrial motions.

Rule 26(c) requires the court to “preserve the entire statement” if redacted, “under seal, as part of the record.”

Rule 26(e) requires the court to strike testimony “from the record.”

Rule 32(c) requires the submission of a presentence report unless the court finds “information in the record” sufficient to meaningfully exercise sentencing authority and “explains its finding on the record.”

Rule 32.2(d) bars transfer of property interest without defendant’s consent “on the record” or in writing.

Rule 58(b)(3)(A) allows magistrates to take a plea only if defendant consents “either in writing or on the record.”

Rule 59(b)(1) requires magistrate judge to “enter on the record” an oral or written order in nondispositive matters, make “[a] record” of any evidentiary proceedings, and “enter on the record” any recommendation and proposed findings.

Rule 60(a)(2) requires a court to state reason for excluding a crime victim “on the record.”

Reporters’ Comments

If CM/ECF changes how items are made part of the record – by filing or ensuring that it is part of a recording or transcript of a proceeding – all of these rules, or at least the practice under these rules, may be affected. If a change in CM/ECF affects how items are placed under seal or how items are removed from the record, these rules may have to be addressed as well. More information is needed about any changes in CM/ECF to determine whether any rules changes would be desirable.

C. Rules addressing access to or handling of “the record” or “recording”

Rule 6(d) and (e) refer to the “operator of a recording device” as an authorized person in a grand jury session, and require “all proceedings” to be “recorded by a court reporter or by a suitable recording device.”

Rule 6(c) states that “the record” of number of jurors concurring in every indictment may not be made public without court order.

Rule 6(e) notes that unless the court orders otherwise, the government must retain the recording, notes, and any transcript of grand jury proceedings, and that the person who operates a recording device or transcribes recorded testimony is bound to secrecy. It also requires all “records” “relating to grand jury proceedings” to be kept under seal.

Rule 16(a)(3) exempts grand jury’s recorded proceedings from discovery, except as noted.

Rule 26.2(c) states that if a witness’s prior testimony is redacted before being produced, the court must “preserve the entire statement with the excised portion indicated, under seal, as part of the record.”

Rule 25(a) requires a judge to certify “familiarity with the trial record” before substituting in a jury trial.

Rule 36 allows court to “correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission.”

Rule 49.1(d) allows filing under seal without redaction and provides for later unsealing or filing of a redacted version “for the public record” and Rule 49.1(f) requires court to retain unredacted copies “as part of the record.”

Rule 55 requires the clerk to “keep records of criminal proceedings” and enter in “the records” every order or judgment and date of entry.

Reporters’ Comments

There are many records in criminal cases that are filed under seal or to which access is limited. Grand jury records and presentence reports are always secret. Plea agreements are also unavailable electronically on PACER in many districts, in part because of concerns about retaliation against cooperators. There will be an ongoing need to limit access to some documents that are part of the public record, even as the court’s own record itself becomes digitized.

Rule 49.1 seems to be the only Criminal Rule that refers to the “public record” separately from “the record.”

D. Rules referencing records or recordings or transcripts to be produced by parties

Rule 15 states that a court may order a deponent to produce a “record, or recording” at a deposition. It says nothing about what is done with the material so produced.

Rule 16(a) requires the government to disclose records, recorded statements, and recorded testimony to the defendant.

Rule 49(a) says a party must serve every other party the “designation of the record on appeal.”

Rule 59 says “the objecting party” must arrange for “transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient.”

Reporters’ Comment

We are uncertain whether proposed changes in CM/ECF will change the way discovery is conducted. Is it envisioned that the material that is produced will be electronically stored?

II. Rules requiring that a document or record be signed

Thirteen Criminal Rules require that one or more documents or records be signed or make some reference to signatures or signing. The most important of these rules is Rule 49(e), which provides for local rules permitting the use of electronic signatures, and thus provides a basis for the application of local rules to the specific Criminal Rules requiring signing and signatures. It provides:

Rule 49. Serving and Filing Papers

* * * * *

(e) Electronic Service and Filing. A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed. A paper filed electronically in compliance with a local rule is written or in writing under these rules.

The remaining rules requiring signatures are summarized below, grouped according to whose signature is required: the judge, the clerk, the attorney for the government, the defendant (and his counsel), a detained material witness, or the grand jury foreperson. We provide a brief description of the rules falling within these categories. Because the categories do generally raise distinctive issues, our comments refer to all.

A. Rules requiring the judge's signature on a warrant, summons, the judgment, or a contempt order

Rule 4(b)(1)(D) requires a warrant to be signed by a judge, and (b)(2)(B)(iii) requires that a judge who considers both materials by reliable electronic means and other testimony or exhibits to sign any other record and verify its accuracy.

Rule 4.1(b)(2)(6) requires the judge issuing a warrant or summons to sign the original documents or direct the applicant to sign the judge's name on the duplicate original.

Rule 32(k) requires the judge to sign the judgment.

Rule 42(b) requires the judge to sign a contempt order.

B. Rules requiring the clerk's signature

Rule 9(b)(1) requires the clerk to sign an arrest warrant or summons.

Rule 17(c) requires the clerk to sign and seal blank subpoenas provided to the parties.¹

C. Rules requiring the signature of the defendant and defendant's counsel where the defendant is waiving a right

Rule 10(b)(2) requires both the defendant and defense counsel to sign a waiver of the defendant's presence at arraignment.

Rule 17.1 provides that the government may use a statement made at a pretrial conference only if the statement was in writing and signed by the defendant and defendant's attorney.

Rule 26.2(f) defines a statement for purposes of that rule, inter alia, as a written statement the defendant makes or signs.

D. Other rules requiring a signature

Three other rules require the signature on particular documents of the grand jury foreperson, an attorney for the government, or a detained material witness:

Rule 6(c) requires the foreperson or deputy foreperson to sign all indictments.

Rule 7(c) requires an attorney for the government to sign the indictment or information.

Rule 15 requires a detained material witness who has been deposed at the witness's request to sign a transcript of the deposition under oath before the witness is discharged.

¹Rule 17(c) requires the clerk to "issue a blank subpoena—signed and sealed—to the party requesting it." We interpret this to mean that the clerk must sign the subpoena.

Reporters' Comments

Digital records, electronic filings, and digital signatures are now ubiquitous, and the rules need to take account of that fact. Concerns of that nature prompted the current proposal to amend the Bankruptcy Rule 5005(3)(B) to provide for electronic signatures by persons other than registered users of the court's electronic filing system.

The Criminal Rules now have in place a general mechanism to accommodate electronic signatures. Rule 49 allows local rules to provide for electronic signatures, and when local rules provide for electronic signatures Rule 49(e) allows the substitution of an electronic signature that complies with the local rules. To the extent it is desirable to allow for electronic signatures on routine court documents, Rule 49.1 provides at least a stop gap basis for authorization pursuant to local rules.

We have not collected or evaluated the local rules providing for electronic signatures, and we believe that such a study would be a necessary first step for any attempt to modify the Criminal Rules that currently govern signing. The discussion concerning proposed Bankruptcy Rule 5005(3)(B) would also provide useful information if the Advisory Committee were to consider amending the Criminal Rules to deal more specifically with electronic signatures. If the Advisory Committee were to do so, we expect it would draw distinctions between the electronic signatures by judges and other registered users of the court's electronic filing system and third parties such as the defendant, a detained material witness, and the grand jury's foreperson.

We discuss in the next section of this memo the more general question whether it would be useful to amend the language of Rule 49.1 (modeled on Civil Rule 5(d)(3)), which presently refers to the filing of "paper[s]" as the norm and allows for electronic filing of papers only pursuant to the authority of local rules.

III. Rules requiring writing

Twenty-eight Criminal Rules require a writing or refer to written materials. The writing requirement in these rules serves a variety of purposes. Rules 3 and 7(c) – which define a complaint and indictment as "a written statement of the essential facts constituting the offense charged" – by implication require that any charge be in writing to be treated as an official complaint, indictment, or information. The other rules discussed in this section generally require that a filing, motion, request, consent, notice, approval, evaluation, summary, statement of reasons, disclosure, or waiver be "written" or made or provided "in writing."

All are subject to Rule 49, which allows electronic filings made in accordance with local rules to be treated as if they were made in writing. It provides (emphasis added):

Rule 49. Serving and Filing Papers

* * * * *

(e) **Electronic Service and Filing.** A court may, by local rule,

allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed. **A paper filed electronically in compliance with a local rule is written or in writing under these rules.**

Because of the large number of rules that require a writing or refer to written materials, we have attempted to group the rules for purposes of discussion (though admittedly there is some overlap and some rules are difficult to characterize). We discuss below rules governing (a) motions, (b) requests or notifications to be made by the parties, (c) disclosures by the parties, (d) judgments and judicial orders, findings, and statements of reasons, (e) consents, approvals, and stipulations, (f) other miscellaneous rules.

A. Rules governing motions

Rule 47 requires motions to be made in writing unless otherwise permitted by the court (and includes general rules for the time of filing). It provides (emphasis added):

Rule 47. Motions and Supporting Affidavits

(b) Form and Content of a Motion. A motion—except when made during a trial or hearing—must be in writing, unless the court permits the party to make the motion by other means. A motion must state the grounds on which it is based and the relief or order sought. A motion may be supported by affidavit.

(c) Timing of a Motion. A party must serve a written motion—other than one that the court may hear ex parte—and any hearing notice at least 7 days before the hearing date, unless a rule or court order sets a different period. For good cause, the court may set a different period upon ex parte application .

In addition, Rule 15(a)(2) provides that a detained material witness may file a written motion requesting to be deposed. The reference to a “written” motion appears to be superfluous in light of Rule 47(b).

B. Rules governing other requests or notification by the parties

Many Criminal Rules do not refer to “motions,” but they require one or both parties to make a formal request or provide required forms of notification in writing.

Rule 12.1(a) allows the attorney for the government to request in writing notification of any intended alibi defense and then requires the defendant to respond in writing.

Rule 12.2(a) and (b) require a defendant intending to assert an insanity defense or introduce expert evidence of a mental disease or defect to notify the attorney for the government in writing.

Rule 12.3(a) and (b) require a defendant asserting a public-authority defense to notify the attorney for the government and requires the attorney for the government to respond in writing.

Rule 15(b)(1) requires a party seeking to take a deposition to provide the other party with “reasonable written notice.”

Rule 16(d) provides that the court may permit a party to show good cause for a protective order restricting discovery by a “written statement” to be inspected ex parte.

Rule 26.1 provides that a party intending to raise an issue of foreign law must provide all parties with “reasonable written notice.”

Rule 30 provides that a party may request “in writing” that the court give an instruction to the jury.

Rule 32(f) provides that the parties may “state in writing” any objections to the presentence report.

Rule 59(b)(2) provides that a party may file “specific written objections” to a magistrate judge’s proposed findings and recommendations.

C. Rules governing disclosures by the parties

Several Criminal Rules governing discovery require the parties to make disclosures of various kinds in writing.

As noted above, Rule 12.1(a) allows the government to make a written request for notification of an intended alibi defense. Rule 12.1(b)(1) mandates reciprocal disclosure “in writing” by the attorney for the government to a defendant who has served notice of an alibi defense, and Rule 12.1(c) mandates a continuing duty to disclose “in writing.”

Rule 12.3(a)(4) provides that the attorney for the government may “request in writing” disclosure of witnesses intended to establish a public-authority defense, and requires reciprocal written witness disclosures by the government and the defense; (b)(1) imposes a continuing duty to disclose “in writing.”

Rule 16(a)(1)(B) requires the government to disclose the defendant’s “written or recorded statement” and the portion of any “written record” containing the substance of an oral statement.

Rule 16(a)(1)(G) and (b)(1)(c) require the government and the defense to provide a “written summary” of certain testimony the government or defense intends to introduce.

D. Rules governing judgments, orders, findings, and statements of reasons

The following Criminal Rules require that the court's orders, judgments, and other judicial statements or findings be "written" or "made in writing."

Rule 4.1(b)(2)(A) requires a judge acting under the rule to "acknowledge the attestation in writing" if the applicant for a warrant or summons does no more than attest to the contents of a written affidavit submitted by telephone or other reliable electronic means. If the judge considers additional testimony or exhibits, (b)(1)(B) requires the judge to "sign any other written record, certify its accuracy, and file it."

Rule 6(e)(3) requires the transferring court to provide a "written evaluation of the need for continued grand jury secrecy" when transferring a petition for the release of grand jury materials.

Rule 23(c) requires the court to state its specific findings of fact in open court or a written decision or opinion.

Rule 32(i)(1)(B) provides that the court must provide the parties with a "written summary of" (or summarize in camera) any information excluded from the presentence report upon which the court intends to rely.

Rule 40(c) states the court may modify a previous release or detention order issued in another district but must state the reasons for do so "in writing."

Rule 59(a) allows a magistrate judge to enter a written or oral order in a nondispositive matter referred by the district court.

E. Rules governing consent, approval, reservation of rights, or stipulations

Many Criminal Rules require that a party (usually the defendant) who waives a right or consents a certain procedure do so in writing, and other rules require that approvals, stipulations and the like be in writing. These rules provide a record of the waiver, consent, or other action, and may also draw the party's attention to the importance of the decision being made.

Rule 10(b) provides that a defendant who has signed a written waiver of appearance, affirmed receipt of the indictment or information, and is pleading not guilty need not be present if the court accepts the waiver.

Rule 11(a) allows entry of a conditional guilty or nolo plea (with the consent of the court and government) "reserving in writing" appellate review of a specified pretrial motion.

Rule 15(c)(1) provides that a defendant may "waive[] in writing" the right to be present at a deposition.

Rule 17.1 provides that the government may not use any statement by the defendant or counsel made at a pretrial conference unless the statement is "in writing and signed by the defendant and

the defendant's attorney." In this context, the provision of a written statement operates to waive the general rule preventing admission.

Rule 20(a) provides that a prosecution may be transferred to another district if the defendant states "in writing" a wish to plead guilty, consents "in writing" to disposition in the transferee district, and the U.S. Attorneys in both districts "approve the transfer in writing."

Rule 20(d) provides for transfer of a case involving a juvenile when, inter alia, the juvenile consents to the transfer "in writing" and the U.S. Attorneys in both districts "approve the transfer in writing."

Rule 23(b) allows the parties to "stipulate in writing" their agreement to proceed with fewer than 12 jurors.

Rule 32(e) provides that unless "the defendant has consented in writing" a presentence report may not be submitted to the court or otherwise disclosed before the defendant has been found guilty or pleaded guilty or nolo contendere.

Rule 32.2 provides for a stay of forfeiture pending appeal and prevents transfer to a third party until the appeal becomes final "unless the defendant consents in writing or on the record."

Rule 43(b)(2) provides that in certain low level misdemeanor cases the defendant need not be present if he or she gives "written consent" and the court agrees to permit arraignment, plea, trial, and sentencing to occur by video teleconferencing or in the defendant's absence.

Rule 58(b)(5) allows a plea to be taken before a magistrate judge if the defendant consents "either in writing or on the record" to be tried before a magistrate judge and specifically waives trial before a district judge.

Rule 58(b)(2)(a) allows waiver of venue if the defendant "state[s] in writing a desire to plead guilty or nolo contendere," to waive venue, and to consent to the court's disposing of the case in the district.

F. Other rules requiring writing or governing the use of written documents²

Rule 6(f) requires that when 12 grand jurors do not concur in a pending complaint or information the foreperson must "promptly and in writing report the lack of concurrence to the magistrate judge."

Rule 32.1(b)(2) requires that the court to hold a hearing on the revocation of supervised release and provide the person "written notice of the alleged violation" as well as disclosure of the evidence against the person.

²Additionally, Rule 41(d)(2)(B) provides that under some circumstances the judge "may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony."

Rule 32.2(b)(1)(B) provides that the court may base a forfeiture determination on the record “including any written plea agreement.”

Reporters’ Comments

In general, the Criminal Rules seem to require that information be in “writing” or be “written” in order to provide initial clarity and to create a record. Additionally, the requirement of a writing signals to the parties the importance of a decision or action. Although the pervasive inclusion of writing requirements reflect the assumption that paper filings are the norm, these requirements are subject to Rule 49, which treats electronic filings to be treated as “written or in writing” under the Criminal Rules if they are authorized by local rules.³ Thus in districts with local rules authorizing electronic filings, most or all of the “written” submissions could be made electronically.

The current rules raise two main questions.

First, are the local rules governing electronic filing operating in a satisfactory fashion? For example, are there problems in certain districts, or with certain kinds of filings? Has a consensus best practice emerged, making it time for a uniform rule? We are agnostic on these issues. We have made no study of the relevant local rules and their operation. We think such a study would require the assistance of the Federal Judicial Center and/or the Administrative Office, and it would be important to involve clerks of court, magistrate judges, the Department of Justice, Federal Defenders, and others who deal with the rules on a day to day basis. Moreover, it would be beneficial to consider whether such a study should consider local rules governing civil as well as criminal cases. Discussions in the CM/ECF Subcommittee may be helpful in determining whether such a study is warranted at the present time.

The second question raised by the current structure – reflected in Rule 49 as well as the other rules noted above -- is whether it is time to reconsider the assumption that paper filings are the norm, and that electronic filings should be permitted only when authorized by local rules. Since Rule 49 was based on and tracks Civil Rule 5(d)(3), such a determination should certainly consider civil as well as criminal practice, though there are significant differences that might ultimately dictate different results. It seems likely that eventually paper filings will be the exception rather than the rule, but we are not certain that whatever changes may be made in the CM/ECF system signal that the time is ripe for a change of this magnitude. Again, we look forward to a discussion of these issues in the CM/ECF Subcommittee.

IV. Rules governing filing

³Rule 49 authorizes only “papers” to be filed electronically pursuant a valid local rule, and the Criminal Rules do not generally refer to “papers.” In this context, however, the term “papers” is understood to be a generic term encompassing a wide variety of writings such as those encompassed by the Criminal Rules discussed above: notices, discovery disclosures, consents, requests, etc.

Twenty-four Criminal Rules make reference to filing. Most reference the duty, need, or option to file. These rules govern filings by the clerk,⁴ by the judge,⁵ by the government,⁶ by the defendant,⁷ by either party,⁸ by the grand jury foreperson,⁹ by a third party claimants in forfeiture proceedings,¹⁰ by

⁴Rule 32(j)(2) (requires clerk to prepare and file a notice of appeal on defendant's behalf if so requested).

⁵The following rules refer to filing by the judge: Rule 4.1(b)(2) (judge must file transcription of notes of testimony, exhibits, modified original warrant, etc. considered during application for warrant); Rule 41(d)(2)(C) (same); Rule 42(b) (summary contempt orders must "be filed with the clerk").

⁶The following rules refer to filing by the government: Rule 5(a) (complaint must be promptly filed in district where offense committed after warrantless arrest); Rule 5.1(a) (magistrate judge must hold a preliminary hearing unless government files an indictment or information); Rule 6(e) (attorney for government must file under seal a notice of certain disclosures); Rule 7(f) (court may direct government to file a bill of particulars); Rule 12(g) (if court grants motion to dismiss, it may order defendant to be detained until new indictment or information has been filed); Rule 12.4(a)(2) (government must file statement identifying organizational victim upon the defendant's initial appearance).

⁷The following rules refer to filing by the defendant: Rule 12.2(a) (requires defendant to notify government if he intends to assert insanity defense or introduce expert evidence on a mental condition and to file copy of notice "with the clerk"); Rule 12.3(a) (requires defendant to notify government of intent to rely on public authority defense and to file copy of the notice "with the clerk"; also requires notice to be filed under seal if defendant identifies intelligence agency as alleged source of authority); Rule 12.4(a)(1) (requires nongovernmental corporate party to file statement that identifies any parent corporation and any publicly held corporation that owns 10% of its stock); Rule 20(a) & (d) (requires adult and juvenile defendants seeking transfer to file in "the transferee district" a statement waiving proceedings in original district); Rule 33 (requires motion for new trial to be filed at certain times).

⁸The following rules implicitly or explicitly refer to filings by either party: Rule 15(e) (requires filing of deposition in same matter as in civil action); Rule 32.2(b)(2)(C) (governing appeals from forfeiture order by either party); Rule 49(d) (requires parties to file "with the court a copy of any paper the party is required to serve"); Rule 49(e) (court may allow papers to be filed by electronic means); Rule 49.1(b) (governs required privacy protections for "filings," requiring redactions, providing for exemptions from redaction requirements, filing under seal without redaction, filing of redacted version, protective orders including orders limiting remote access, filing of reference list, and waiver by filing of person's own information without redaction); Rule 58(g)(2) (party appealing from magistrate's order must file notice "with the clerk"); Rule 59(a) & (b) (party objecting to magistrate judge's order on nondispositive matter or findings and recommendations on dispositive matter must "file" objections).

⁹Rule 6(c) states the foreperson "will" record the number of jurors concurring in each indictment and "will" file the record with the clerk.

¹⁰Rule 32.2 contains multiple references to claims filed by third party in forfeiture proceedings, including requirement in Rule 32.2(c) that the court conduct an ancillary proceeding if a third party files a petition asserting interest in property sought to be forfeited.

persons seeking the return of seized property,¹¹ and by anyone (including the defendant) seeking disclosure of grand jury materials.¹² Additionally, although the rules on filing do not refer to victims, victims are also affected by rules concerning the filing of motions. Rule 60 recognizes that victims have various rights, Rule 60(b)(1) references motions to assert a victim's rights, and Rule 60(b)(2) provides that a victim or a victim's lawful representative may assert those rights.

A few Criminal Rules describe or refer to a relationship between documents or items that have been filed:

Rule 4(a) references "affidavits filed with the complaint."

Rule 5(d)(1)(A) references "affidavits filed with the complaint"

Rule 49.1(b)(9) exempts from redaction an affidavit filed "in support of any charging document."

Rule 49.1(g) states that a filing containing redacted information may be filed "together with" a reference list.

Reporters' Comments

In general, the Criminal Rules direct that certain filings be made or reference documents that have been filed, but they do not specify how filing is to be accomplished and make no reference to the mechanics of the CM/ECF system. However, all of these people who file under the Criminal Rules – including not only the clerk and the judge, but also the government, persons seeking grand jury disclosure, third parties claiming a right to property the government is seeking to forfeit, and the grand jury foreperson – must have access to system to "file" these things. Is it contemplated that CM/ECF will make any changes that would affect the various groups? Are there any problems with access now? For example, the Advisory Committee was informed that victims in some courts had problems filing motions asserting their rights because the system did not accommodate such filings; the Committee was later advised changes had been made to address the problem. Also, some criminal filings are to be non-public. The grand jury foreperson's filing under Rule 6(c) "may not be made be public" without judicial authorization, under Rule 12.3 certain filings regarding the defense of public authority must be filed under seal, and Rule 49.1 makes provision for sealed filings. We do not know whether the changes being contemplated would affect how such filings would work.

In our view, the rules that refer to the relationship between documents and items that are filed raise questions. These rules assume that there is a way to determine when a document is filed "with" or "in support of" another document. We don't know how that works now, and we wonder whether it might change. For example, if related paper documents are now stapled together, what is the analogous mechanism for electronic filing?

¹¹Rule 41(g) requires a person aggrieved by unlawful search and seizure to file motion for return of property to be filed in district where the property was seized.

¹²Rule 6(e)(3)(F) provides that anyone seeking disclosure of grand jury matter must file a petition in district where grand jury convened.

We also note that the language used to describe filings varies. For example, some rules refer to filing “with the clerk”¹³ or “with the court.” Indeed, the caption of Rule 49.1 (the rule governing privacy protections) refers to “Filings Made With the Court,” and the rule uses the terms “filing,” “court filing,” and “a document filed with the court.” Civil Rule 5.2, which parallels Rule 49.1, also refers to “filing with the court” and “filing made with the court.” We don’t know what is adding by a reference to the court or to the clerk. In this context, are there filings not made with the clerk and the court? Is there anything about the move toward electronic filing that makes it less desirable to refer to filing with the clerk or with the court?

Finally, we note that Rules 20 and 21 – which govern transfers for plea and sentence, or for trial – use the term “file” in a different context, referring to sending “the file, or a certified copy” to the transferee district clerk. We are not certain why these rules refer to the file rather than the “record” as other rules do. (We note that Rule 58(g)(2) defines the “record” for purposes of an appeal from the decision of a magistrate judge, and do not use the term “file.”) As noted in the next section of this memo, another feature of Rules 20 and 21 also suggests that it may be appropriate to consider revisions to both rules.

V. Rules requiring sending and return of files or grand jury material to another district

Rules 20 and 21 require “send[ing]” the file of a case to another district. Rule 20 requires the clerk of court to send the case file (or a certified copy) to the clerk of another district and requires the return of the “papers” under certain circumstances. Rule 21 similarly requires the clerk to send “the file” in a case involving a juvenile. Rule 6 requires the clerk “to send” grand jury material to another district under certain circumstances.

Rule 20, which governs transfer for plea and sentence, provides (emphasis added):

(b) Clerk’s Duties. After receiving the defendant’s statement and the required approvals, **the clerk where the indictment, information, or complaint is pending must send the file, or a certified copy, to the clerk in the transferee district.**

(c) Effect of a Not Guilty Plea. If the defendant pleads not guilty after the case has been transferred under Rule 20(a), **the clerk must return the papers to the court where the prosecution began, and that court must restore the proceeding to its docket.** The defendant’s statement that the defendant wished to plead guilty or nolo contendere is not, in any civil or criminal proceeding, admissible against the defendant.

¹³E.g., Rule 12.2(a) (copy of notice regarding insanity defense must be “filed with the clerk”), and Rule 42(b) (judge’s summary contempt order must be “filed with the clerk”).

(d) Juveniles.

* * * * *

(2) Clerk's Duties. After receiving the juvenile's written consent and the required approvals, the clerk where the indictment, information, or complaint is pending or where the alleged offense occurred must send the file, or a certified copy, to the clerk in the transferee district.

Rule 21(c), which governs transfer for trial, also requires "the file" (or a certified copy) be "sent" to the district in which trial will be held. It provides (emphasis added):

(c) Proceedings on Transfer. When the court orders a transfer, the clerk must send to the transferee district the file, or a certified copy, and any bail taken. The prosecution will then continue in the transferee district.

And finally, Rule 6, which governs the grand jury, provides in pertinent part (emphasis added):

(e) Recording and Disclosing the Proceedings.

* * * * *

(3) Exceptions.

(G) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. **If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy.** The transferee court must afford those persons identified in Rule 6(e)(3)(F) a reasonable opportunity to appear and be heard.

Reporters' Comments

Although we are not certain exactly how the technology will work, it seems likely that there are – or soon will be – more efficient options than sending a case file or certified copy to another district. Accordingly, study of those options would be appropriate. Rule 6 poses somewhat different issues because it does not require an entire case file to be sent, and it deals with grand jury materials, which are afforded a high degree of secrecy.

One option would be to amend Rules 20 and 21 to adopt a variant of the language in the proposed amendment to Appellate Rule 6, which refers to "making the record available." That language

would accommodate both providing electronic access and physical delivery of the file (or a certified copy) to the receiving district. However, adoption of the “make available” language in Rule 20(b) would raise a question about Rule 20(c), which currently provides for restoring the proceeding to the sending court’s docket if the case is returned. If electronic access is provided, would the case be removed from the court’s docket? The time may be ripe for an evaluation of Rules 20 and 21 considering both the requirement of “sending” the case and the question whether to retain the references to the “file” and the “papers” discussed in the previous section of this memo.

It may also be appropriate to consider amending Rule 6 to provide that the district court would “make available” grand jury materials to the court to which a petition to disclose is being transferred. However, before making such a change it would be desirable to determine whether that would be consistent with the general principle of grand jury secrecy.

VI. Rules requiring mailing

Four rules – Rules 4, 41, 46, and 58 – require the mailing of a summons, warrant for a tracking device, motion to enforce bail forfeiture, and notice to appear in a misdemeanor or petty offense case. In each case, the rule provides that the mailing is to be made to the recipient’s “last known address.”

Reporters’ Comments

Although technology is increasingly replacing the use of the mails, three (or perhaps all four) of these rules govern situations in which there may be no means of electronic communication and mailing remains the best alternative.

Rule 4(c)(3) governs the service of a summons on an individual or organization. The purpose of the summons is to initiate the case, and at this stage there will often be no mechanism to accomplish electronic service (even in the case of a defendant who will be represented by counsel who may be later be served electronically). Where personal service cannot be made, Rule 4(c)(3) requires service by mail is required in addition to another form of service. In the case of an individual, Rule 4(c)(3)(B)(ii) governs cases in which service is not made in person, but by leaving a copy with a third party at the defendant’s residence. In such cases, Rule 4(c)(3)(B)(ii) requires that service also be made by mailing to the defendant’s last known address. Similarly, in the case of a corporation, Rule 4(c)(3)(C) requires service both by delivery to an agent of the corporation and by a mailing to the organization’s last known address within the district or its principal place of business. In the absence of effective means of accomplishing electronic service, the mailing provisions continue to provide the only means of service for many defendants. We note that the Advisory Committee is presently considering a proposal by the Department of Justice to amend Rule 4 to revise the provisions on service on corporations to enable effective service on foreign corporations that have no known address within the district or principal place of business in the U.S. This proposal would affect the mailing requirement.

Rule 41(f)(2)(C) requires that after the use of a tracking device has ended, the officer who executed the warrant must serve the warrant on the person whose property was tracked. As under Rule 4(c)(3)(B)(ii), where service is not made in person, but by leaving a copy with a third party at the

defendant's residence, the officer must also mail the warrant to the defendant's last known address. As with Rule 4, the mailing provisions continue to provide the only means of service for many defendants.

Rule 58(d) provides that in certain petty offense and misdemeanor cases the court may allow the defendant to pay a lump sum in lieu of appearance and end the case. Subdivision (d)(2) states that if a defendant in such a case has neither paid the fixed sum, requested a hearing, nor appeared in response to the citation or violation notice, the clerk or the magistrate judge "may" issue a notice giving the defendant an additional opportunity to pay the fixed sum. In such a case, the clerk is required to mail the notice of this additional opportunity to the defendant's last known address. Because this rule applies in cases in which the defendant has not appeared or responded by other means to the citation or violation notice, there are no obvious alternatives to mailing.

Rule 46(f)(3)(B) & (C), which govern bail forfeiture, stand on a somewhat different footing and it is possible that electronic service may be (or soon be) plausible. The Rule provides that a bail surety consents to the court's jurisdiction and irrevocably appoints the clerk as its agent for receipt of service for any filings. The rule also provides for the service of a motion to enforce the surety's liability to be made upon the clerk, with the proviso that the clerk must promptly mail a copy to the surety at its last known address. Since the surety has consented to the court's jurisdiction, as electronic communication becomes increasingly ubiquitous it may become possible to require the surety to provide the court with an electronic address. Electronic service of the motion provided for in Rule 46(f)(3)(C) would be more efficient for the clerk, and at some point it may also be more likely to reach the surety than a mailing to the surety's last known address. It may be useful for the Committee to study this issue.

VII. Rules requiring the entry of information on documents, and the entry of orders

A large number of Criminal Rules refer to the entry of the judgment or various orders,¹⁴ but other rules refer to the entry of information on documents related to the issuance of complaints, warrants, and summonses. Although the rules regarding the entry of orders or the judgment seem to pose no distinctive questions for purposes of the CM/ECF Subcommittee, the rules regarding the entry of information on documents related to the issuance of complaints, warrants, or summonses may be affected by technological changes. The most elaborate provisions appear in Rule 4.1, which provides (emphasis added):

Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means.

(B) Procedures.

¹⁴E.g., Rule 16(d)(2) (court may enter any other order for failure to comply with discovery obligations); Rule 17(c) (requiring court to give notice to victims before entering an order for subpoena for victim's confidential information); Rule 29(a) & (c)(2) (court must enter a judgment of acquittal at close of government's case if evidence is insufficient to sustain a conviction and may enter a judgment of acquittal if jury fails to return a verdict); Rule 32(k) (judge must sign and clerk must enter the judgment).

(4) *Preparing an Original Complaint, Warrant, or Summons.*

If the applicant reads the contents of the proposed duplicate original, the judge must enter those contents into an original complaint, warrant, or summons. If the applicant transmits the contents by reliable electronic means, the transmission received by the judge may serve as the original.

* * * * *

(6) *Issuance.* To issue the warrant or summons, **the judge must:**

- (A) sign the original documents;
- (B) **enter the date and time of issuance on the warrant or summons;** and
- (C) transmit the warrant or summons by reliable electronic means to the applicant **or direct the applicant to sign the judge’s name and enter the date and time on the duplicate original.**

Rule 41 also contains some parallel provisions (emphasis added):

Rule 41. Search and Seizure.

* * * * *

(f) *Executing and Returning the Warrant.*

(1) *Warrant to Search for and Seize a Person or Property.*

- (A) *Noting the Time.* The officer executing the warrant must **enter on it the exact date and time it was executed.**

* * * * *

(2) *Warrant for a Tracking Device.*

- (A) *Noting the Time.* The officer executing a tracking-device warrant must **enter on it the exact date and time** the device was installed and the period during which it was used.

Reporters’ Comments

The rules do not specify how information is to be “entered.” In the past, this was likely done in handwriting on the documents. As the technology changes, we expect that the form in which a judge or an officer executing a warrant “enters” information will change as well. Although we have had no indication that issues have arisen under these rules that should be addressed by an amendment, this seems to be an issue worth watching.

VIII. Rules requiring the preservation records or testimony

Rules 16 and 26.2 explicitly impose an obligation to “preserve” certain materials that are not disclosed during pretrial discovery or after a witness has testified.

In the context of pretrial discovery, Rule 16(d) requires the preservation of an statement seeking a protective order limiting discovery. It provides (emphasis added):

Rule 16. Discovery and Inspection

(d) Regulating Discovery.

(1) Protective and Modifying Orders. At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. **The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party’s statement under seal.**

Rule 16 does not permit pretrial discovery of prior statements by witnesses, but Rule 26.2 provides for the production of the relevant portion of a witness’s prior statements after the witness testifies at the trial or other proceedings governed by the rule. Like Rule 16, Rule 26.2(c) imposes an obligation to preserve material that was not produced. It provides (emphasis added):

Rule 26.2. Producing a Witness’s Statement.

(c) Producing a Redacted Statement. If the party who called the witness claims that the statement contains information that is privileged or does not relate to the subject matter of the witness’s testimony, the court must inspect the statement in camera. **After excising any privileged or unrelated portions, the court must order delivery of the redacted statement to the moving party. If the defendant objects to an excision, the court must preserve the entire statement with the excised portion indicated, under seal, as part of the record.**

Reporters’ Comments

The rules requiring the preservation of particular testimony not disclosed to the opposing party or a written statement examined ex parte make no reference to the technology needed to meet this requirement. Thus they are consistent with any modifications in the CM/ECF system. We include them here, however, because the requirements for preservation so starkly highlight the need for electronic systems of information storage and retrieval to provide not merely short term, but also long term access to the courts’ records.

IX. Rules governing service

Many Criminal Rules require a variety of documents to be served on the parties and others (e.g., victims, sureties for bail, and claimants to property being forfeited). All are subject to Rule 49, which provides (emphasis added):

Rule 49. Serving and Filing Papers

(a) When Required. A party must **serve** on every other party any written motion (other than one to be heard *ex parte*), written notice, designation of the record on appeal, or similar paper.

(b) How Made. Service must be made in the manner provided for a civil action. When these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party, unless the court orders otherwise.

(c) Notice of a Court Order. When the court issues an order on any post-arraignment motion, the clerk must provide notice in a manner provided for in a civil action. Except as Federal Rule of Appellate Procedure 4(b) provides otherwise, the clerk's failure to give notice does not affect the time to appeal, or relieve—or authorize the court to relieve—a party's failure to appeal within the allowed time.

(d) Filing. A party must file with the court a copy of any paper the party is required to serve. A paper must be filed in a manner provided for in a civil action.

(e) Electronic Service and Filing. A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed. A paper filed electronically in compliance with a local rule is written or in writing under these rules.

In addition, Rule 4(c) contains more specific provisions regarding service:

Rule 4. Arrest Warrant or Summons on a Complaint

(c) Execution or Service, and Return.

* * * * *

(3) Manner.

* * * * *

(B) A summons is served on an individual defendant:

- (I) by delivering a copy to the defendant personally;
- or
- (ii) by leaving a copy at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location and by mailing a copy to the defendant's last known address.

(C) A summons is served on an organization by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. A copy must also be mailed to the organization's last known address within the district or to its principal place of business elsewhere in the United States.

Reporters' Comments

Since Rule 49 provides that service in criminal cases generally follows the Civil Rules, changes in CM/ECF that would affect service in civil cases would affect criminal cases as well. However, Rule 4 does provide distinctive procedures for serving a summons on individual and corporate defendants. As noted above, the requirement of mailing to the last known address may be affected by changes in technology, and the mailing requirement in cases involving corporate defendants outside the U.S. is presently under study by the Criminal Rules Committee.

The more general issues raised by permitting electronic service only when and to the extent permitted by local rules are discussed above.

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail: dcapra@law.fordham.edu

Memorandum To: CM/ECF Subcommittee
From: Daniel Capra, Reporter
Re: Amendment of Evidence Rules to accommodate CM/ECF
Date: July 1, 2013

This memorandum discusses the Evidence Rules that might be affected by CM/ECF, and provides comments and suggestions on whether any amendment to the Evidence Rules is necessary or advisable.

The list of possibly affected rules is small, for two reasons:

1) CM/ECF, including Next Gen, does not appear to be intended to impact the introduction of evidence at trial. Therefore any rule governing admissibility or inadmissibility of evidence is unlikely to require an amendment. I checked with CACM staffers and they could not think of anything in CM/ECF that was directly designed to have an evidentiary impact, other than electronic signatures — and the Evidence Rules Committee has already determined that a rule permitting the use of electronic signatures requires no change to the Federal Rules of Evidence. The CACM staffers did caution that there are thousands of changes that will be implemented in the Next Gen CM/ECF system, and some of them may have evidentiary implications, but they couldn't think of anything specific. So while there may be issues down the line when Next Gen is implemented, it seems inadvisable to try to pre-think some evidentiary implication that is not apparent at this point.

2) As to admission of electronic evidence, the Restyling accommodates its use throughout the Evidence Rules by way of definition. FRE 101(b)(6) provides that “a reference to any kind of written material or any other medium includes electronically stored information.” Thus there should be no concern, for example, that a reference in the hearsay exceptions to “periodicals” (see FRE 803(18)) or “publications” (see FRE 803 (17)), or “records” (see Rule 803(6)) would fail to accommodate electronic versions.

With these two very important provisos in mind, what is set forth below are the Evidence Rules that might somehow be affected by CM/ECF. The list is, by intent, overly inclusive.

1. Rules with references to matters “on the record” or “for the record”

a. Rule 103. Rulings on Evidence

(a) **Preserving a Claim of Error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, *on the record*:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) **Not Needing to Renew an Objection or Offer of Proof.** Once the court rules definitively *on the record* — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

b. Rule 410 (b): Pleas, Plea Discussions, and Related Statements

(b) **Exceptions.** The court may admit a statement described in Rule 410(a)(3) or (4):

* * *

(2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, *on the record*, and with counsel present.

c. Rule 612(b): Writing Used to Refresh Memory

(b) **Adverse Party's Options; Deleting Unrelated Matter.** Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be *preserved for*

the record.

Comment on references to “the record”: The references to “on the record” and “for the record” are not about admitting evidence but are rather about making a record, and accordingly there could be some CM/ECF effect as to the mode of judicial recordkeeping.¹ But there is nothing to indicate that a simple reference to “the record” would not cover records that are prepared and kept pursuant to CM/ECF. For example, the rules do not say, or even imply, that the record must be in hardcopy or kept in a certain way. Moreover, to the extent the references to “on the record” might be thought to refer to a written record, any issue of technological advancement would seem to be covered by the aforementioned Rule 101(b)(6) — *any* reference to written material includes electronically stored information. So it would not seem that an amendment to any of the above rules is necessary.

It should be noted that an amendment to Rule 410(b)(2) would be particularly inadvisable, because the reference to “on the record” in that Rule covers state as well as Federal proceedings.

¹ Of course, rules governing evidentiary admission of records and writings abound — see, e.g., Rules 803(6) (business records), 803(8) (public records). But these references are not discussed here because they have all been updated to accommodate electronic information by the definitional provision in Rule 101(6).

2. Rules Requiring Notice

a. Rule 404(b)(2)

(2) Permitted Uses; Notice in a Criminal Case.

This evidence may be admissible for another purpose, such as proving motive, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) *provide reasonable notice* of the general nature or any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

c. Rules 413(b) and 414(b) (identical):

(b) **Disclosure to the Defendant.** If the prosecutor intends to offer this evidence, the prosecutor *must disclose it* to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

d. Rule 415(b):

(b) **Disclosure to the Opponent.** If a party intends to offer this evidence, the party *must disclose it* to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.

e. Rule 609(b): Impeachment with old convictions

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

- (1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and
- (2) the proponent gives an adverse party *reasonable written notice* of the intent to use it so that the party has a fair opportunity to contest its use.

f. Rule 807(b): Residual exception to the hearsay rule

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party *reasonable notice* of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Comment on notice provisions: A notice provision is not about the presentation of evidence but rather about providing notice, and NextGen will have an effect on how notice is provided to parties in an action. But this does not mean that all of these rules need to be amended. The rules generally say nothing about the *manner* of notice; they only require notice to be provided. It is apparent that these Evidence Rules defer to other rules and procedures outside the FRE to determine the mechanics of how notice is to be provided. This makes sense, as the FRE is generally about admissibility, and not about how to file, plead, etc.

The possible exception is Rule 609(b), which refers to *written* notice. It is true that this is a specification of the manner of notice and thus needs to accommodate the technological changes wrought by CM/ECF. Yet there is a strong argument that the accommodation has already been made in Rule 101(b)(6). Rule 609(b) refers to a writing, and under Rule 101(b)(6), “a reference to any kind

of written material . . . includes electronically stored information.” The definition is not limited to terminology about admissibility of evidence. The Rule refers to any reference to written material anywhere in the Evidence Rules. Thus it is questionable whether it is necessary to amend Rule 609(b) to accommodate CM/ECF. It should be noted, though, that if an amendment is advisable, it is an easy one to make: simply delete the word “written.”

3. References to Court Orders

a. Rule 502(d): Court order protecting against waiver of privilege

- (d) **Controlling Effect of a Court Order.** A federal court may *order* that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding.
-

b. Rule 612(b) and (c): Writing Used to Refresh Memory

(b) **Adverse Party's Options; Deleting Unrelated Matter.** Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and *order* that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.²

(c) **Failure to Produce or Deliver the Writing.** If a writing is not produced or is not delivered as ordered, the court *may issue any appropriate order*. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial.

c. Rule 615: Sequestration of witnesses

Rule 615. Excluding Witnesses

At a party's request, the *court must order* witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. * * *

² The reference to the preparation of a “record” in Rule 612(a) is discussed above in section 1.

d. Rule 705: Disclosure of expert's basis

Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion

Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

e. Rule 706: Court-appointed experts

Rule 706. Court-Appointed Expert Witnesses

(a) **Appointment Process.** On a party's motion or on its own, *the court may order* the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

f. Rule 1006: Summaries

Rule 1006. Summaries to Prove Content

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And *the court may order* the proponent to produce them in court.

Comment on References to Court Orders: Entry of court orders is surely affected by CM/ECF,

but that would not appear to necessitate an amendment to every — or any — Evidence Rule that refers to a court order. The Evidence Rules references are concerned with the court making an order, but not with the mechanics of entry of an order. Nothing in the Evidence Rules mandates entry of an order that would be inconsistent with a change in technology. (And if it did that reference would be updated in any event by the previously discussed definition in Rule 101(b)(6)).

4. References to Judgments

a. Hearsay exception for judgments of conviction.

(22) **Judgment of a Previous Conviction.** Evidence of a *final judgment* of conviction if:

- (A) the *judgment* was entered after a trial or guilty plea, but not a nolo contendere plea;
- (B) the conviction was for a crime punishable by death or by imprisonment for more than a year;
- (C) the evidence is admitted to prove any fact essential to the judgment; and
- (D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

b. Hearsay exception for certain judgments

(23) **Judgments Involving Personal, Family, or General History, or a Boundary.** A *judgment* that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

- (A) was essential to the *judgment*; and
 - (B) could be proved by evidence of reputation.
-

Comment on rules referring to judgments: Entry of a judgment is affected by CM/ECF. But the above rules are not concerned with entry of a judgment. They are concerned with *admissibility* of a judgment however it might be entered. As to the form of the judgment for admissibility, the FRE, as previously discussed, already embraces evidence in electronic form. Thus there would appear to be no need to amend these provisions.

5. References to Motions, Filing, Service

b. Rule 412(c)

(c) Procedure to Determine Admissibility

- (1) **Motion.** If a party intends to offer evidence under Rule 412(b), the party must:
- (A) **file a motion** that specifically describes the evidence and states the purpose for which it is to be offered;
 - (B) do so at least 14 days before trial unless the court, for good cause, sets a different time;
 - (C) **serve the motion** on all parties;
 - (D) notify the victim or, when appropriate, the victim's guardian or representative.³

* * *

Rule 706: Court-appointed experts

Rule 706. Court-Appointed Expert Witnesses

(a) **Appointment Process.** *On a party's motion or on its own*, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) **Expert's Role.** The court must inform the expert of the expert's duties. The court may do so *in writing and have a copy filed with the clerk* or may do so orally at a conference in which the

³ Note that Rule 412(c)(1)(D) requires the party seeking to introduce sexual conduct evidence to *notify* the victim or representative. But even if all of the other notice provisions need to be changed to accommodate CM/ECF, this provision should not be changed. The notification referred to must be flexible because the victim will not always be a party.

parties have an opportunity to participate.

Comment on Rules Referring to Motions, Filing and Service:

Electronic case filing and case management affects the mechanics of making a motion, filing, and service — as opposed to the introduction of evidence. But the mere references to motions, filings and/or service in the above rules would not seem to raise any conflict with CM/ECF. The *manner* of filing and service is generally not specified — there is no implication or suggestion that service must be in person or by mail, or that a motion must be filed in hardcopy — and so, as it was before CM/ECF, the mechanics for complying with the Rule’s requirements are generally left to provisions outside the Rules of Evidence.

There is one proviso — the reference in Rule 706(b), which provides that the court may inform the expert of her duties in writing and have a copy filed with the clerk, does deal with the manner of entry as opposed to the admissibility of evidence. The use of the term “writing” is likely not problematic because of the aforementioned definitional Rule 101(b)(6). But the use of the term “copy filed with the clerk” does seem outmoded in light of CM/ECF. The problem, if any, is not earth-shaking — Rule 706 is a little-used rule and the procedure provided is optional in any event. But it might be something that the Evidence Rules Committee would wish to consider as part of a technology package to be submitted with the other Advisory Committees.

6. References to Physical Presence in court for testimony

Rule 804. Exceptions to the Rule Against Hearsay - When the Declarant Is Unavailable as a Witness

- (a) **Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:

* * *

(4) *cannot be present* or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's *attendance*, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's *attendance or testimony*, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

Comment on references to physical presence: Clearly it is possible under CM/ECF for a witness to testify at trial without being physically present. Of course this has been the case for a long time. On first glance, it would appear that Rule 804(a) appears to define availability in terms of physical presence and so might end up admitting some hearsay on the grounds of unavailability even though the declarant could actually be able to testify remotely. The question, then, is whether the definition of unavailability should refer to inability to produce the witness not only physically but also remotely.

That question is already answered in the Rule insofar as absence is the asserted ground of unavailability. Rule 804(a)(5)(B) says a witness is not unavailable if his *attendance or testimony* can be produced. Thus, a witness who is available to testify remotely is *not* absent, for purposes of admitting the unavailability-based hearsay exceptions in Rules 804(b)(2)-(4). Procurement of physical attendance *is* required before prior testimony under Rule 804(b)(1) is admitted — see Rule 804(a)(5)(A) — but that is because the proponent in those circumstances is seeking to offer out-of-court *testimony* and it wouldn't make any sense to preclude that testimony if the alternative was only

another piece of out-of-court testimony.⁴

What about if a witness — who has made a hearsay statement that would be admissible under Rule 804(b) — is in the hospital, and would be able to testify remotely but cannot be moved to physically testify at the trial? That witness apparently would not be unavailable under Rule 804(a)(4) because he “cannot be present *or* testify at the trial.” That is, the term “testify at the trial”, fairly read, includes the possibility of remote testimony — a reading that is supported by the fact that testimony “at the trial” is an expressed alternative to physical presence. Thus there appears to be no need to amend Rule 804(a)(4) to accommodate the possibility of remote testimony.

All this discussion of remote testimony has been in the context of whether a hearsay declarant is unavailable when it is possible for the declarant to testify remotely. The broader question is whether the remote testimony should be freely admitted as a substitute for testimony made physically in court. That is a controversial question and it is not directly addressed by the Evidence Rules. Rule 801(c) defines hearsay as a statement made “other than while testifying at the trial or hearing.” A witness who is testifying remotely in real-time during a trial would be testifying “at” the trial. Thus, Rule 801 does not automatically exclude real-time trial testimony simply because it is coming from a remote location (as opposed to a canned videotaped deposition, which is not testimony made at trial). Courts have cited Rule 611(a) — allowing the trial court discretion in controlling the mode of examining witnesses — and Fed. R. Civ. P. 43(a) as authority for allowing remote testimony as a substitute for physical presence of the witness at trial, at least in cases where good cause is shown. *See, e.g., Parkhurst v. Belt*, 567 F.3d 995 (8th Cir. 2009) (no error in permitting child-witness to testify by closed circuit).

Nonetheless, studies indicate that live testimony has a stronger impact than testimony that is presented from a remote location. *See Traylor v. Husqvarna Motor*, 988 F.2d 729 (7th Cir. 1993) (reviewing studies). And in criminal cases there are of course Confrontation Clause concerns in using remote testimony as a substitute for live in-court testimony. *See generally Maryland v. Craig*, 497 U.S. 836 (1990) (requiring a specific showing of witness trauma before closed-circuit testimony was permitted). The most that can be said is that the question of evidentiary use of remote testimony in lieu of live in-court testimony is a complex one that would require significant study — probably by a joint effort of Evidence, Criminal, Civil and Bankruptcy.

⁴ As to Rule 804(b)(6), the forfeiture exception, it is conditioned on an inability to procure physical presence, but the chance that an intimidated (or dead) witness is willing to testify remotely but not in person seems a slim one — though perhaps the scenario is plausible enough that the Evidence Rule Committee should take the following question under advisement: whether to move the reference about Rule 804(b)(6) from Rule 804(a)(5)(A) to Rule 804(a)(5)(B).

Conclusion

My initial review indicates that there is very little in the Evidence Rules that requires an amendment to accommodate changes wrought by CM/ECF. But further review will certainly be required as Next Gen rolls out. It should also be noted that the Evidence Rules Committee is holding a symposium in October about the effect of technology on the Federal Rules of Evidence, and it may well be that the participants in that symposium will find other Evidence Rules that warrant amendment to accommodate technology.

APPENDIX B

THIS PAGE INTENTIONALLY BLANK

MEMORANDUM

TO: Professor Daniel Capra, Reporter, Advisory Committee on Evidence Rules

FROM: Laura Erdman, J.D. Candidate, Washington and Lee University School of Law

RE: Analysis of Local Rules Regarding Electronic Filing

DATE: November 6, 2013

CC: Professor Edward Cooper, Reporter, Advisory Committee on Civil Rules
Mr. Benjamin Robinson

Upon referral from the Rules Committees, I reviewed the local rules of the 94 district courts and a sample of 11 bankruptcy courts to collect information about how electronic filing rules are operating at the local level. In addition to the summary of my findings below, I am providing the spreadsheet that contains the entire data set. The data has important interpretive limitations, which are discussed below under “Notes on Research Methodology and Data Interpretation.”

Summary of Findings – U.S. District Courts:

All but two of the federal districts have a local rule on e-filing; two districts—Alabama Southern and Guam—discuss e-filing in a standing order and procedure guide, respectively. Eighty-five “mandatory” districts require e-filing generally but except certain categories of filers, cases, and documents. Nine “permissive” districts permit e-filing but do not require it broadly. There is significant variation within mandatory districts in the excepted categories and the local rules’ specificity in describing these categories. Further, the mandatory districts vary in their treatment of excepted categories; some require conventional filing while others simply provide the option to use conventional means. E-filing local rule language is generally inconsistent. Many districts use general language in the local rule and provide details in a separate “Administrative Procedures for Electronic Filing” document. Some mandate e-filing in the local rule but describe exceptions in the procedures document.

Summary of Findings – U.S. Bankruptcy Courts:

All of the 11 bankruptcy courts sampled have a local rule related to e-filing. Nine courts require e-filing. One court permits but does not require e-filing. One court (New York Eastern) requires e-filing in one division but not in another. All of the bankruptcy courts require attorneys to register as filing users but except pro se filers. Seven courts require pro se filers to use conventional means; four courts permit pro se debtors to e-file). Similar to the district courts, local rule language varied greatly.

Additional Findings – U.S. District Courts

Attorneys are Typically Required to File Electronically. Most districts require e-filing by all CM/ECF “Filing Users” and most require all attorneys to register as Filing Users.

Local Rule Language. Most electronic filing local rules use general language; details are typically provided in separate e-filing administrative procedures documents. Some local rules simply state that the court will accept e-filed documents, even if the procedural guide states that e-filing is mandatory. *See, e.g.*, D. Md. Loc. R. 102 (“Electronic filing of documents is permitted in accordance with the policies and procedures established by the Court.”). Others specifically mandate e-filing. *See, e.g.*, E.D. Tex. Loc. R. CV-5 (“Except as expressly provided or in exceptional circumstances preventing a Filing User from filing electronically, all documents filed with the court shall be electronically filed in compliance with the following procedures . . .”).

Exemptions for Pro Se Litigants. Eighty-four of 85 mandatory districts exempt pro se litigants from e-filing:

- 36 districts permit nonprisoner pro se litigants to request the court’s permission to e-file
- 48 districts do not permit nonprisoner pro se litigants to e-file
- 1 district (Texas Northern) requires pro se litigants to conventionally file the complaint but then e-file thereafter
- 59 districts explicitly bar pro se prisoners from e-filing
 - 2 districts (Kansas & Illinois Central) allow pro se prisoners to e-file through a special program/partnership.

Exemptions for Attorneys or Categories not Specifically Exempted. While all courts reserve the right to deviate from e-filing rules when justice so requires, at least sixty-seven courts specifically mention that litigants can request an exemption from the e-filing requirement for a specific case or document, often requiring proof of hardship or a showing of other good cause. Alaska and the Virgin Islands specifically provide that attorneys without access to the Internet or lacking an e-mail address can gain a longer-term exemption.

Civil Complaints. Thirty-eight districts have a special rule regarding the filing of civil complaints, either permitting or requiring conventional filing. Of these districts, at least 12 require paper filing.

Other Common Exemptions. Courts exempt many other categories of documents. Districts vary in their specificity regarding these documents, with some explicitly stating whether conventional filing is required or permitted and others simply stating the category is exempt from e-filing. Further, category labels are inconsistent (e.g., Social Security “records,” “transcripts,” or “cases”). The following are frequently excepted categories:

- Sealed cases or documents to be filed under seal (46 districts)
- Criminal case initiating documents (37 districts)
- Administrative records, state court proceeding records, including Social Security transcripts (35 districts)
- Habeas petitions and records related to proceedings (24 districts)
- Exhibits and other documents in which e-filing is not possible (22 districts)
- Criminal documents, other than case-initiating (e.g., warrants, documents signed by the defendant, CJA-related documents) (20 districts)
- Documents filed for in camera review (14 districts)
- Magistrate consents (11 districts)

- Ex parte submissions (9 districts)
- Grand jury-related documents (8 districts)
- Qui Tam complaints (7 districts)
- Miscellaneous cases (5 districts)
- Handwritten documents (paper required) (5 districts)

Notes on Research Methodology and Data Interpretation

When studying the U.S. District Courts, I looked first at the local rules promulgated by the district. Frequently, the Local Rules referenced an administrative procedures guide or procedural guide specific to electronic filing. If neither of these sources offered insight into the district's e-filing policy or procedure, I reviewed standing orders. If a district used different local rules documents for civil and criminal cases, I reviewed only the civil rules, as I assumed that to be the Committee's primary interest. Likewise, if a district used separate e-filing procedures for criminal and civil matters, I reviewed only the civil procedures document. If a "combined" local rules or procedural document referenced criminal matters, I noted it to the extent possible. Therefore, though my comments above and the attached data refer to criminal documents and procedures in some instances, the data should not be considered complete or form the basis of any conclusion regarding criminal case e-filing trends.

You will note that many columns do not have an entry for every district. I entered a data point only if a particular subject was specifically mentioned. Because of the civil/criminal separation in some court rules noted above, a blank space could represent either a lack of comment by the court or a lack of research on that data point (i.e., the appropriate document was not reviewed).

In general, data on exemptions other than civil complaints and pro se filers should be considered incomplete, as well as indications of conventional filing "required" versus "permitted." Courts were sometimes ambiguous as to the treatment of exempted documents and did not consistently describe their positions on all exempted categories listed in the spreadsheet. In addition, given the scope of my research, especially in the early stages, I did not capture data on some of the less common categories or did not record it with specificity. The spreadsheet is most useful for displaying the range of e-filing policies employed by the districts. It is of less utility to one seeking to develop affirmative conclusions about the prevalence of exemptions for specific categories. If the Committees are interested in such data, however, I would be happy to perform this additional research.

THIS PAGE INTENTIONALLY BLANK

APPENDIX C

THIS PAGE INTENTIONALLY BLANK

To: Dan Capra
From: Sara Beale and Nancy King
Re: CM/ECF
Date: November 10, 2013

You have circulated the following draft of a potential “universal fix” that each Committee could adopt to accommodate electronic information and electronic action, and have asked the various Reporters to respond. The draft rule reads:

Rule ____. **Information in Electronic Form and Action by Electronic Means**

- a) Information in Electronic Form:** In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information.
- b) Action by Electronic Means:** In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States].

In general, we appreciate the advantages of replacing procedures and policies that vary by local rule with uniform standards for electronic information and action. The particular draft above, however, raises several issues for the Criminal rules as well as the Rules Governing 2254 and 2255 cases, issues that we summarize but do not resolve in this memo. At this point, we have not had a chance to consult our committee about the idea of a universal rule. And although we completed a very rough inventory of the use of words like “sending” “writing” “file” etc. earlier this year for the CM/ECF Committee, we have so far examined only the Criminal Rules and not the 2254 or 2255 Rules. We expect that if a draft of a universal fix were to be considered by the Criminal Rules Committee (or a subcommittee), members would identify additional issues not listed here.

A general concern: incarcerated individuals.

One significant concern raised by both sections of the draft new rule relates to the ability of *incarcerated* criminal defendants and petitioners in 2254 and 2255 actions to create, save, access, receive or send electronically stored information. In their email responses to the proposed universal fix other Committee Reporters have suggested that a carve-out for *unrepresented* parties may be needed, but the problem for incarcerated parties in the cases governed by our Rules is not limited to those who are representing themselves pro se. Incarcerated parties, in both state and federal corrections facilities, often have no access to email or computers. Criminal Rule 49(b) anticipates a court may order copies of documents be served directly upon a party even when represented. Filing and response deadlines in these cases make

prompt receipt crucial, the most reliable delivery form is important. Also, a significant proportion of petitioners and defendants in these cases are not able to read,¹ and we suspect they rely on being able to ask fellow prisoners to read to them the hard copies of documents they receive. Additionally, transfers of prisoners from facility to facility are common, and a person incarcerated in a facility that has electronic access one day may find himself somewhere the does not the next. Any rule permitting a court or government to substitute electronic interaction for sending paper copies must anticipate problems such as these and resolve how to respond to them. (We expect these concerns would also apply to appeals in these cases as well.)

Concerns relating to Subsection (b) permitting “electronic means” to substitute for filing or sending.

“Reliable” Electronic Means. The Criminal Rules contain multiple provisions that recognize the option for electronic transmission, but, unlike the draft universal fix, the Criminal Rules limit the transmission of documents electronically to “reliable electronic means.” E.g., 4(b)(2); 4(c)(4), 4.1 (passim), 5, 9, 32.1(a)(5)(B)(1); 41(b)(3); (f)(1)(D); 41(f)(2)(B). All of these rules could be affected by subsection (b) of the drafted uniform rule because under them “action” “can be completed by . . . filing or sending paper.” If phrases in our rules such as “transmit the contents” “returning warrant” and “producing copies” fall within the meaning of “filing or sending paper” in the proposed uniform rule, and that rule does not include the word “reliable,” then the new uniform rule could be inconsistent with a fairly recent, deliberate decision to allow such actions only “reliable” electronic means. In formulating that standard, “reliable” was included so that that courts in applying the rule would have to determine if and when holograms, dropbox, texts, tweets, instagrams, facebook postings, laser beams and technology we cannot anticipate might be too unreliable to suffice. Reliability includes many different concepts – accuracy in transmission, security from deliberate tampering or inadvertent deletion or modification, likelihood of delivery, etc. Many options for addressing this potential inconsistency exist, including: 1) exempt specific criminal rules provisions from the new rule (e.g., revise the new rule to read except as provided to except as provide in Criminal Rules ___); 2) hope the “unless otherwise provided language” would covers this discrepancy, and flag it in the Committee note; 3) add the word “reliable” to the uniform rule; or 4) do not add the new rule to the Criminal Rules.

Rules involving terms other than “filing or sending.” It is not clear whether Rules using terms of conveyance other than “filing or sending” would fall within the uniform rule’s reach. Our rules use mailing; entering; serving, and returning, for example. If all of these fall within “sending”, then careful consideration on the effect of permitting electronic transmission would be required. Here are some preliminary issues:

- Rules discussing service. Service of process, governed by Rules 4 and 49, raises distinctive and important concerns about notice and formality. The Committee is presently debating a proposal related to the scope service under Rule 4, these are not easy issues. Criminal Rule 49(b) now adopts the methods of service provided in the

¹ “[S]even out of ten inmates fall in the lowest two out of five levels of literacy . . . Many, ... have learning disabilities and mental impairments.” *Halbert v. Michigan*, 545 U.S. 605, 621 (2005).

- Civil Rules, but it is not clear whether further expanding electronic service under the Civil Rules would be ideal policy for the Criminal Rules. This may mean decoupling the Criminal Rules from the Civil Rules, or otherwise opting out of the uniform rule.
- Rules discussing delivery or mailing. Four rules – Rules 4, 41, 46, and 58 -- require the mailing of a summons, warrant for a tracking device, motion to enforce bail forfeiture, and notice to appear in a misdemeanor or petty offense case. In each case, the rule provides that the mailing is to be made to the recipient’s “last known address.” If the verb “send” in the proposed rule includes “mailing” the propriety of allowing something short of traditional post in these situations should be carefully evaluated, especially because not all of the targeted recipients are parties to the case.
 - Rules referencing return. In Rule 6(f) there is specific language limiting the use of anything other than in-court delivery of a hard copy of the indictment. So this would have to be clearly exempted, if not addressed by the “otherwise provided” language in the new proposed rule.

Rules referencing “filing.” Various Criminal Rules provide that something is to be filed by the clerk, the judge, the government, the defendant, the grand jury foreperson, third party claimants in forfeiture proceedings, persons seeking the return of seized property, victims, and anyone (including the defendant) seeking disclosure of grand jury materials. The new rule as drafted is permissive, allowing and not requiring electronic transmission, but would there be instances where dispensing with paper would create difficulty?

Concerns related to subsection (a) of the proposed rule: “a reference to information in written form includes electronically stored information.” Many of the Criminal Rules contain references to writing:

- *Jencks act meaning.* Rule 16(a)(1)(B) uses written statement and written record but the meaning is keyed to Jencks use of the language “written.” Would the new proposed meaning of the word “written” be inconsistent with this?
- *New warrant and complaint rules.* Rule 4.1 requires judge to sign and acknowledge the attestation in writing. We do not know if these actions can or should be accomplished electronically. They may require a hard copy.
- *Physical signatures and the purposes they serve.* Many of the Criminal Rules require written waivers or signed consent, often by the defendant himself, for reasons that may or may not be advanced if electronic documents and signatures are substituted. Signing a hard copy is more formalized, and it may avoid other problems. The heightened formality and paternalistic protection of a signed hard copy may be warranted in the criminal context, even if accomplishing the signature electronically provides cheaper or more efficient evidentiary proof.
- *Access by jurors to electronic devices.* Because jurors and grand jurors are required to do things “in writing” under the Criminal Rules, allowing this to be done electronically may raise special concerns: aren’t many courts forbidding jurors access to electronic devices?
- *Formal criminal charges triggering the loss of liberty.* Written criminal charges are arguably qualitatively different than any other writing. An allegation of a criminal violation before trial or before revocation may have to be provided to the accused in

hard copy. (Would the Ten Commandments have had the same impact if they had not been chiseled in stone?)

Again, this is not an exhaustive list of issues. But we hope this preliminary summary explains our view that any rule intended to permit the substitution of ESI for hard copies and the substitution of electronic transmission for other forms of relaying, delivering, and conveying information under the Criminal Rules will require careful and extended consideration of issues that may be unique to criminal proceedings.

TAB 7

THIS PAGE INTENTIONALLY BLANK

TAB 7A

THIS PAGE INTENTIONALLY BLANK

46 U. Mich. J.L. Reform 495

University of Michigan Journal of Law Reform
Winter, 2013

Symposium Honoring Professor Edward Cooper

**THEY WERE MEANT FOR EACH OTHER: PROFESSOR EDWARD COOPER AND THE
RULES ENABLING ACT**

The Honorable Mark R. Kravitz^{a1} Dean David F. Levi^{aa1} The Honorable Lee H. Rosenthal^{aaa1}
The Honorable Anthony J. Scirica^{aaaa1}

Copyright (c) 2013 University of Michigan Journal of Law Reform; The Honorable Mark R. Kravitz; Dean David F. Levi; The Honorable Lee H. Rosenthal; The Honorable Anthony J. Scirica

Introduction

In June 1935, the United States Supreme Court appointed a small committee of distinguished lawyers and academics to write the Federal Rules of Civil Procedure, the first set of rules promulgated under the Rules Enabling Act of 1934. The Committee was charged with assisting the Supreme Court in its responsibility for the preparation of a unified system of general rules for cases in equity and actions at law in the District Courts of the United States and in the Supreme Court of the District of Columbia, so as to secure one form of civil action and procedure for both classes of cases, while maintaining inviolate the right of trial by jury in accordance with the Seventh Amendment of the Constitution of the United States and without altering substantive rights.¹

The primary drafting responsibility fell on the Committee's "Reporter," then the Dean of Yale Law School, Charles E. Clark. Although he later became a judge on the Second Circuit Court of *496 Appeals, the Committee he served included no judges.² That, of course, has changed: today, the Judicial Conference Rules Committees³ include what some view as a disproportionately large number of judges in relation to their practitioner and academic members. But one thing has remained constant. "Reporter" is an inadequate description for the vital role that person plays in the Rules Committees. "Reporter" may also be too modest a title given the stature and contributions of the civil-procedure scholars who have filled that position. To take one's place in this lineup has to be daunting. But in the twenty years since he became Reporter to the Civil Rules Advisory Committee, Professor Edward Cooper has met and exceeded the challenge, over and over. This issue of the University of Michigan Journal of Law Reform attempts to describe how Ed Cooper and the Rules Enabling Act have been such a productive combination.

This Symposium brings together important participants in the rulemaking process, all of whom share a keen admiration for Ed Cooper the scholar, the person, and the Reporter. Professor Arthur Miller and Professor Paul Carrington provide different perspectives from the two proceduralists who were Ed Cooper's immediate predecessors.⁴ Professor Miller's essay includes his personal reflections on his own tenure as Reporter, the evolution of the Advisory Committee's work as the rulemaking process has become more public, and his work with Ed Cooper on the Federal Practice and Procedure treatise. Professor Carrington's essay expresses disquiet about how case law in some areas has moved away from what he celebrates as the "progressive aim of our Rules of Civil Procedure."

Several of the contributors focus on class actions and on how Ed Cooper helped guide the Civil Rules Committee in deciding what aspects of class-action practice could be improved by amending Rule 23 and what aspects were best addressed in other ways. Professor Mary Kay Kane, who was a member of the Standing Committee during Professor Cooper's tenure as Reporter to the Civil Rules *497 Committee, writes on the Committees' work on Rule 23 and on "restyling" the Civil Rules in 2007 to clarify and simplify them, but without changing their substantive meaning.⁵ Professor Richard Marcus, who has served as Associate Reporter to the Civil Rules Committee since 1996, writes on some proposed amendments, including to Rule 23, which did not go forward despite, or perhaps because of, years of work and study under the Rules Enabling Act process.⁶ Professor Linda Mullenix writes about the Rule 23 rulemaking work to examine how the Civil Rules Committee adapted to operating in an expanded level of public openness and the growing "synergy" between the Committee and case-law developments in proposing amended rules.⁷ Judge Patrick Higginbotham, the second chair Ed Cooper served under as Reporter, further describes the class-action work, particularly the interlocutory appeal amendment and Professor Cooper's careful "crafting" and "drafting" that were essential to its enactment.⁸ These articles remind us that Professor Cooper's arrival as the new Committee Reporter and the Committee's launch into the difficult and contentious issues of class-action practice coincided.

The essays bring home the breadth, variety, and importance of the issues the Civil Rules Committee and Professor Cooper have worked through in the past twenty years. Professor Thomas D. Rowe, Jr., a Committee member in the mid-1990s, writes about the proposed amendment to Rule 48 that would have required the seating of twelve-member juries in federal civil trials, an amendment that both the Civil Rules and Standing Committees approved by wide margins but the Judicial Conference rejected.⁹ Judge Paul Niemeyer, who was the second chair Ed Cooper worked with as Reporter, examines the proposal for a "simplified" set of Civil Rules, primarily for small money-damage actions. Judge Niemeyer suggests that examining this proposal fifteen years after Professor Cooper's last draft could be useful in the current efforts to control discovery costs and burdens.¹⁰ Professor Catherine Struve focuses on Professor Cooper's contributions to the law and scholarship of appellate *498 jurisdiction and procedure by looking at work on rules that affected both the Civil and Appellate Rules and required a coordinated approach, including amending all the provisions in the federal Rules of Appellate, Civil, Criminal, and Bankruptcy Procedure that specify how to compute time.¹¹ Professor Stephen Burbank, who has actively followed and participated in the Rules Committees' work for many

years, writes about the importance to that work of “thinking small” by engaging in “technical reasoning” and paying close attention to even the smallest details.¹² Professor Steven Gensler, who served as a member of the Civil Rules Committee in the early 2000s, focuses on Judge Charles E. Clark, the first Reporter, and his vision of the Rules and rulemaking, and looks at the Committee’s recent work on amending Rule 56 to see how that vision has traveled from the first to the present Reporter.¹³ Finally, two of the longest-serving participants in federal rulemaking, Professor Daniel Coquillette, Reporter to the Standing Committee since 1986, and Professor Geoffrey Hazard, member and then consultant to that committee since 1994, have contributed very different pieces. Professor Hazard places the overall enterprise in context, celebrating the achievement of the rules while soberly reminding us of the risks presented by the “politicization of civil procedure” and the importance of the Reporters’ competence in meeting those risks.¹⁴ And Professor Coquillette finds parallels between a great law reformer and rulemaker in the 1600s, Francis Bacon, and the Rules Committee Reporters.¹⁵

This introduction to the essays in this Symposium illuminates Professor Ed Cooper’s years as Reporter to the Civil Rules Committee by first briefly describing those who preceded him in the position and his own background. We then describe some of Ed Cooper’s many contributions to the Civil Rules Committee, the Federal Rules, rulemaking, and civil procedure by examining the present state of the Rules Committees’ work under the Rules Enabling Act. We conclude that after almost eighty years of experience under that Act, it is working well in large part because of the sound leadership provided by Ed Cooper over his twenty years as Reporter. It was during these years that the Committee developed an approach to rulemaking that was at once transparent and empirical, with multiple opportunities for participation by members of the public, the bench, the academy, and the bar; with many informal opportunities for consultation with members of Congress and the Executive Branch; and with an understanding by the Committee of its role in relation to the courts, Congress, and the Executive.

Two episodes of recent rulemaking and related activity are described as examples of how well the Rules Enabling Act is working, in large part because of the very flexibility and discretion the Act has provided since 1934. One of those episodes occurred when Judge Anthony Scirica chaired the Standing Committee and then-Judge David Levi chaired the Civil Rules Committee. The other occurred when Judge Lee Rosenthal and Judge Mark Kravitz were the chairs of the Standing and Civil Rules Committees, respectively. Both episodes provide a basis for optimism about the future. And they make clear Ed Cooper’s continued steady role in supporting and cultivating the robust good health of the rulemaking process and the institutional values it protects.

I. The Reporters Who Came Before

Those who preceded Ed Cooper as Reporter to the Civil Rules Committee were, simply, the giants of the procedural world. The first Reporter, Charles E. Clark, set the bar high.¹⁶ As Professor Steven Gensler describes in his contribution to this issue, Dean Clark was principally responsible for drafting the Federal Rules of Civil Procedure enacted in 1938 and wrote important articles explaining and making the case for the Rules.¹⁷ In 1942, then-Judge *500

Clark served as Reporter to the redesignated Advisory Committee and worked on amendments proposed in 1946, 1951, and 1955.¹⁸ Clark served in this role until 1956, when the Supreme Court disbanded the Advisory Committee on the Rules for Civil Procedure.¹⁹ The Committee was reconstituted in 1960 as part of the Judicial Conference,²⁰ and Benjamin Kaplan, then a professor at Harvard Law School and later a justice on the Massachusetts Supreme Court, became its Reporter.²¹ Professor Kaplan's work as Reporter from 1960 to 1966 included the revision of Rule 23 that created the class action as we know it today. Albert M. Sacks, then the dean and a professor at the Harvard Law School, served as Reporter from 1966 to 1970, followed by Bernard Ward, a professor at the University of Texas Law School, who served until 1978.²² Dean Sacks was the Reporter during what Professor Richard Marcus described as the "high-water mark" of liberal discovery, during which the discovery rules were made even more expansive.²³ Professor Ward, by contrast, served as Reporter during the development of the rules that *501 became effective in 1980, narrowing some of the discovery provisions.²⁴ Professor Arthur Miller, also on the Harvard faculty, served from 1978 to 1985. Professor Miller's work included changes to Rule 16²⁵ and Rule 26²⁶ that instituted the case-management tools and the proportionality limits on discovery that are important to the current rulemaking work on electronic discovery.²⁷ He was succeeded by Paul Carrington, a professor and dean of the Duke Law School, who served as Reporter from 1985 to 1992. Professor Carrington's tenure as Reporter was marked by the passage of the Civil Justice Reform Act,²⁸ which further complicated the relationship between national rules that are intended to be consistent across federal district courts and local procedures for individual districts that the statute encouraged.²⁹

In October 1992, Ed Cooper became the Reporter to the Civil Rules Committee. Like his predecessors, Professor Cooper was supremely qualified by education, experience, and, above all, an abiding passion for the law and procedure, to assume the Reporter responsibilities. Ed Cooper received his undergraduate degree from Dartmouth College and his LLB from Harvard Law School. *502 He clerked for Judge Clifford O'Sullivan on the United States Court of Appeals for the Sixth Circuit from 1964 to 1965 and spent two years in private practice in Detroit, simultaneously beginning his academic career as an adjunct professor at Wayne State University Law School. He took up full-time teaching at the University of Minnesota Law School in 1967 and in 1972 joined the faculty of the University of Michigan Law School, where his own father had been a professor.³⁰

As a scholar, Ed Cooper's contributions have been all the more noteworthy in light of the amount of writing and other work required of him as Reporter to the Civil Rules Committee. His scholarly work includes twenty years of reports for the agenda books for the twice-yearly meetings of the Civil Rules Committee and for the twice-yearly meetings of the Standing Committee on the Rules of Practice and Procedure. It includes twenty years of thorough and thoughtful pieces accompanying the publication of proposed rules and rule amendments for comment. It includes analyses accompanying the proposals when they are transmitted to the Standing Committee, then the Judicial Conference, the Supreme Court, and finally to Congress. This body of work covers a huge range of issues and draws upon Ed's deep learning in the field of civil procedure and federal practice more generally.

This body of work is preceded and surrounded by an even larger number of analytical documents that Reporter Cooper generates with seemingly impossible speed and fluency. These documents serve many purposes, including conference calls, small and large conferences, subcommittee meetings and drafting sessions, and innumerable other exchanges that are part and parcel of the Advisory Committee's work.

Ed Cooper has also authored treatises, including the volumes of Federal Practice and Procedure and its annual supplements that are among the most important resources for lawyers and judges on difficult and important areas of procedure in practice, especially preclusion, justiciability, and appeals (including appeals timing).³¹ He *503 has written significant articles on topics including extraordinary writs, mass torts, discovery, and pleading.³² He has been a critical voice in the American Law Institute, serving as a member of the Council and as an adviser on restatements and principles projects on torts, judgments, transnational procedure, aggregate litigation, and international intellectual property. He served as Reporter for the Uniform Transfer of Litigation Act. In addition to serving the Rules Committees, the American Law Institute, and the world of procedure, Ed Cooper has provided years of service to the University of Michigan Law School. That service includes working as Associate Dean for Academic Affairs for over a decade, beginning in 1981. In short, when Professor Cooper became the Reporter to the Civil Rules Committee in 1992, he brought decades of dedicated teaching and proven scholarship, a deep knowledge of the legal academy, and wide experience with judges and lawyers. He brought a record as distinguished as any preceding him and extraordinarily thorough preparation to the role and tasks of Reporter.

II. The Rules Enabling Act Process and the Reporter's Role

Much has been written about the history of civil rulemaking and the changes that have occurred under the Rules Enabling Act.³³ Some of those changes are briefly reviewed here, with a look at how the Committees' and the Reporters' roles have evolved in carrying out the work under the Act.

The task of the first Reporter to the Committee was, of course, different than it has been since. The task then was to draft an entire body of civil rules, from pleading through discovery, pretrial motions, and trial, that would not only merge law and equity but would also replace dynamic conformity between state and federal procedural rules with consistent rules across the nation's federal district *504 courts. Professor Steven Gensler's contribution to this issue describes Charles Clark's vision of the new Federal Rules of Civil Procedure and of the central role the Reporter played in their creation and after.³⁴

In 1942, the Supreme Court charged the Committee with the ongoing responsibility "to advise the Court with respect to proposed amendments or additions to the Rules of Civil Procedure."³⁵ The Supreme Court needed better institutional support for its rulemaking work. In the 1950s, the Rules Enabling process was changed by legislation designed and endorsed by the Supreme Court to provide a secure source of advice and assistance in rulemaking. The 1958 amendments made the Judicial Conference responsible for the "continuous study of the operation and effect" of the

Federal Rules, including the Criminal Rules, which had been enacted in 1946.³⁶ Advisory committees were created to “carry on a continuous study of the operation and effect of rules of practice and procedure” and propose changes “to the Judicial Conference through a standing Committee on Rules of Practice and Procedure.”³⁷ The Advisory Committees’ overarching task was to “promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay.”³⁸ The Reporters’ role moved from creating an integrated, complete set of new--indeed, revolutionary--rules toward, today, analyzing problems in the practice of law and whether they are amenable to improvement by changing existing rules or adding new rules, writing drafts of proposed rules and accompanying notes, writing documents raising or answering questions and explaining what might be or has been done, and transmitting the results to those tasked with the next stage of review.³⁹ The Reporters continued to be law professors and the appointments continued *505 to be made by the Chief Justice of the United States.⁴⁰ The tradition of long service in the Reporters’ terms was established.⁴¹ That tradition began when Committee members also served extended terms, but even after members were presumptively limited to two three-year terms, the Reporters continued to serve for extended periods, reflecting the greater need for institutional memory and experience in that role.

A study of rulemaking by the Federal Judicial Center (FJC), the education and research agency for the federal courts, summarized how the Reporters’ work was intended to proceed under the 1958 Act:

[T]he original intention and early practice [was] that [the] reporters [would] engage in continuing comprehensive study of the rules and of their operation in both federal and state courts, particularly those states that made adaptations to local needs. Such constant study was expected to uncover any restrictive glosses placed on the rules, and any need for additional rules. The reporters were to submit periodic reports on all matters, as well as analyses of filed comments and tentative drafts of [R]ules.⁴²

It is an understatement to observe that “such a program of periodic reports based on continuing study” by the hard-working Reporter did not prove “achievable.”⁴³ Instead, the Reporter was fully occupied by tasks that are still at the heart of today’s work: receiving information from a variety of sources on ideas for proposals and drafting memoranda analyzing those proposals, the relevant law, the history of previous related proposals, and optional courses of action; circulating proposed drafts for the Advisory Committee to consider; reviewing and summarizing comments on the Civil Rules and proposed amendments and drafting revisions in light of those comments and the Committee’s reaction; drafting the Committee Notes; and drafting the reports, memoranda, and other materials needed to explain and transmit the Committee’s work. These tasks continue to lie at the heart of the Reporters’ work. It is no wonder that the responsibility for preparing periodic reports based on continuing study did not prove “achievable.” Since the 1960s, both the *506 number and variety of the Reporters’ tasks, and their complexity, have grown even more.

The Advisory Committees and Standing Committee generated rules and amendments that

became law with no significant modification by Congress until the controversy over the Evidence Rules submitted in 1972. That controversy is well documented and studied.⁴⁴ It sparked a critical reexamination of the Rules Enabling Act's allocation of rulemaking power between the judiciary and Congress and raised questions about whether the judiciary had exceeded the authority delegated to it under the Act. Critics of the proposed Evidence Rules argued that they were not rules of "practice and procedure" but instead made substantive law, particularly in proposed rules that would supersede state-law evidentiary privileges.⁴⁵ Congress intervened, indefinitely deferred the effective date of the proposed Evidence Rules, and after extensive hearings, enacted a modified version that eliminated the federal privileges.⁴⁶ Amendments to the Rules Enabling Act gave the judiciary explicit authority to amend the Federal Rules of Evidence,⁴⁷ but Congress also required affirmative legislation for any rule that created, abolished, or modified an evidentiary privilege.⁴⁸ This formed a second limit on the judiciary's delegated rulemaking authority, in addition to the provision in place since 1958 prohibiting any procedural rule from abridging, enlarging, or modifying any substantive right.⁴⁹ But when the dust settled, the basic delegation of authority and the process for making, amending, and enacting rules had not changed.⁵⁰

***507** Professor Stephen Burbank has authoritatively identified the predominant purpose of the Rules Enabling Act in 1934 as allocating authority for judicial legislation between Congress and the Court.⁵¹ Under the Act, Congress reserved to itself the right to review proposed rules before they became effective. Unless Congress affirmatively acts to defeat, change, or delay proposed rules, they become effective after a specified period.⁵² And of course, Congress also limited the judiciary's delegated rulemaking authority to rules of procedure, prohibiting any rules that enlarged, abridged, or modified substantive rights. This allocation of authority between the judiciary and legislative branches is marked by the absence of details about implementation or process. It gives the judiciary considerable discretion about how to engage in rulemaking. The rulemaking controversy of the 1970s was very much a controversy about the allocation of authority over the Federal Rules. That controversy, followed by a well-publicized dispute between the judiciary and Congress over certain criminal rules (and in the 1980s by a very different set of arguments ignited by the short-lived amendment to Rule 11 of the Federal Rules of Civil Procedure on sanctions for frivolous pleadings), generated proposals to revise the Rules Enabling Act in different ways, including ways to limit the discretion the Act provided.⁵³

Some of the proposals for amending the Act were focused on making the rulemaking process more open and participatory, and ***508** resulted in legislative change. In 1988, after years of comprehensive review by the Judicial Conference and its Standing Committee and hearings by the House Judiciary Committee, legislation was proposed to alter the Rules Committee structure and process to make the work more transparent and the Committees less insular. When it was enacted, the legislation codified what had already become the Conference requirement that all Rules Committee meetings be open to the public--while allowing executive sessions for cause--and that minutes be prepared.⁵⁴ The legislation provided for the Rules Committees to consist of trial judges, appellate judges, and members of the bar, consistent with existing practice.⁵⁵ The legislation approved the Judicial Conference's ability to authorize the appointment of standing and advisory rules committees, again codifying practice.⁵⁶ The

legislation also required the Conference to publish a statement of the Rules Committees' procedures, which had been done since 1983.⁵⁷

The 1988 amendments did not, however, adopt many of the proposals that resulted from the rigorous scrutiny applied to the rulemaking process in the early 1980s. Some of these proposals would have significantly curtailed the discretion and flexibility of the judiciary under the Rules Enabling Act. One proposal, for example, would have required each rules committee to consist of "a balanced cross section of bench and bar, and trial and appellate judges."⁵⁸ This directive was not included in the amendments to the Act. Instead, the legislation simply stated that the Rules Committees were to consist of trial and appellate judges and members of the bar, leaving the specific implementation to the judiciary's discretion. Other proposals would have imposed more requirements for earlier and different notice of proposed rulemaking, such as requiring formal public notice that a proposed rule change was being considered in advance of any publication and circulation of a preliminary draft, or requiring even earlier formal notice, at the stage when a problem is first identified.⁵⁹ Still other proposals responded to criticism that the documents generated in rulemaking did not disclose minority views, did not explain the reasons for rejecting or changing earlier proposals, and did not "alert interested persons to *509 controversial matters" or "provide a record to assist review and interpretation."⁶⁰ Some of the bills introduced would have specifically required the Conference to record timely "dissenting views" with an explanation of why the rule was nonetheless recommended.⁶¹ Again, this detailed prescription for how the Committees should operate did not make it into the amended Act.

Recounting every one of the proposals to make the rulemaking process more transparent and open to participation is neither necessary nor interesting. By the time the legislation to achieve these goals was enacted, it largely codified what had become the Rules Committees' practice and had Judicial Conference support. This end result reflected the benefits of interaction between Congress and the Rules Committees and the Judicial Conference to produce a confluence of views. The legislation avoided detailed directives to the Judicial Conference about how to implement the Rules Enabling Act and retained the structure provided under the Act essentially without change. That structure--review by the Advisory Committees and then the Standing Committee (with membership chosen by the Chief Justice), public comment, then additional input by the Advisory Committees and Standing Committee, and then review by the Judicial Conference, the Court, and Congress--remained in place. It still does, despite numerous proposals for changing the rulemaking structure, particularly the allocation of rulemaking power between Congress and the courts.⁶²

If the structure has remained intact, however, the informal processes of rulemaking have altered over the years in response to some of the criticisms and concerns expressed by thoughtful observers and under the gentle encouragement of Reporter Cooper. For example, although proposals to require that the Rules Committee have dedicated membership slots for representatives from certain groups or constituencies have never formally been adopted as part of the Rules Enabling Act, it is now the Committee's consistent practice to invite participation from the relevant bar and other groups to address and assist the Committee in areas where specialized expertise and experience and differing perspectives could be helpful. Examples of this abound.

The Committees actively ***510** encourage attendance at meetings by interested parties. Representatives of some of the larger bar organizations regularly attend, including sections of the American Bar Association, the American College of Trial Lawyers, the American Medical Association, the U.S. Equal Employment Opportunity Commission, the National Employment Lawyers Association, the Lawyers for Civil Justice, and the American Association for Justice. Their presence and the observations they make are matters of record.

The Committee has used a variety of other means to get information from the bench, bar, and academy, including “miniconferences,” surveys, and large conferences. For a miniconference, the Committee identifies a balanced group of thoughtful experts with diverse views on a specific topic and sends out questions and materials--often extensive--in advance. These miniconferences help provide the Committee with a more accurate picture of what is actually going on in the practice of law and what different segments of the bar view as problematic and helpful. They also provide perspectives on the practicability of initial--often exploratory--rules drafts. A miniconference can be held well in advance of a formal rule proposal, as part of the work to determine if there is a problem a rule change is needed to address, or further along in the process to provide guidance on alternative approaches. The Civil Rules Committee used such miniconferences to help educate itself about electronic discovery during the early stages of what became the 2006 e-discovery rule amendments⁶³ and, more recently, in studying whether those amendments should be revised to address preservation and spoliation issues more directly.⁶⁴

***511** Less frequently, the Civil Rules Committee has held large conferences to more comprehensively assess what is going on in the practice and to explore whether rules should be changed, whether better ways of making existing rules more effective should be devised, or both. The Civil Rules Committee held large conferences in 1998 and in 2010. The first, at Boston College Law School, focused on discovery. The second, at Duke University School of Law, took a pleadings-through-trial look at civil litigation, including discovery practices and problems. The conferences brought together judges, lawyers, in-house counsel, state-court judges, governmental lawyers, and nonprofit organizations. These meetings examined how to address problems of undue cost, delay, and burdens that can frustrate the goals set forth in Rule 1 since 1938: “to secure the just, speedy, and inexpensive determination of every action and proceeding.”⁶⁵ The resulting presentations, discussions, papers, and studies have been immensely important in illuminating what is taking place in the practice and providing opportunities to work toward improvement.⁶⁶

Another change in the practices of the Rules Committees is reflected in the way the Committees publicize proposals and invite responses. There have been persistent criticisms that even after the 1988 amendments, the Rules Committees remained too insular and isolated.⁶⁷ More recently, the combination of technological developments and changes in how the Committees operate has led to increased openness. The Internet has made it easier to disseminate ***512** proposals broadly and has made the comment period more effective. When the proposals concern such central topics as discovery or class actions, the Committees get many written comments during the public-comment period. The comments are posted on the Rules Committee website. The Committee then gets comments on the comments. A robust national debate can result.

Each Committee conducts as many as three public hearings around the country on published proposals, at which anyone can testify. This is not new. But additional exposure from the Internet increases the number of those who want to, and do, testify on central or controversial issues. Technology makes it easier for people to testify from remote places. This allows those facing budgetary constraints--such as judges--to testify more often. The public hearings held on the proposals later enacted as the 2010 changes to Rule 56 exemplify the use of such innovations to expand participation and make robust exchange even more so.⁶⁸

As with the proposals to allocate membership spots for particular viewpoints,⁶⁹ proposals to increase congressional participation in rulemaking have not found favor.⁷⁰ Yet informal consultation with Congress has never been more pronounced and the cooperation of Congress, where statutory amendments were needed in conjunction with rulemaking, never higher. The Committees have welcomed opportunities to work with Congress on improving the Rules. The Committee Chairs, the Reporters, and the staff of the Administrative Office of U.S. Courts have led these efforts to keep ***513** Congress well informed and involved. The Standing Committee Chair and one or more Advisory Committee Chairs routinely meet with the staff of the House and Senate Judiciary Committees--and, on occasion, with members--to let them know what the Supreme Court has approved that they will be reviewing, to preview work that is still in the pipeline, and to discuss proposals for legislation that would affect the Rules. Ed Cooper and other Reporters have aided the Committee Chairs in these communications with Congress.

Proposals for repeal of the supersession clause in the 1934 Act have also not found favor.⁷¹ An effort in an earlier version of the 1988 bill to delete the supersession clause of the 1934 Rules Enabling Act did not succeed.⁷² Those who supported it asserted that the reasons the supersession clause was important in 1935--to achieve the merger of law and equity and displace inconsistent legislation--were no longer present, and that the way in which the clause operated to repeal a statute raised constitutional questions.⁷³ With sound guidance from the Reporter, the Rules Committees have been careful to avoid using supersession authority, instead working with Congress to avoid conflicts with existing statutes.⁷⁴

Other proposals have focused on requiring that rulemaking be more informed by empirical information that demonstrates a need for a rule change and provides a basis to predict its likely impact.⁷⁵ ***514** In 1983, the amendment of the sanctions provisions of Rule 11 to, among other things, make attorney's fee awards mandatory on a finding of frivolous filing, led to an explosion of academic criticism over the lack of empirical support for the revisions.⁷⁶ Professor Burbank called for an end to any rulemaking unless, and until, there could be a thorough and empirically based study of proposed changes in light of the experience with prior amendments.⁷⁷ The 1993 discovery rule amendments led to another outpouring of criticism over the absence of empirical study.⁷⁸ Some called for legislation to create a national body to oversee experiments with local rules and create a controlled empirical basis for proposing national changes.⁷⁹ Such proposals foundered over uncertainty about who should make up such a national body, how it should function, and whether such rigid requirements would add intolerable amounts of time to a process that is already designed to take at least three years and often takes more.⁸⁰ But the

criticisms were heard. The result is a modern approach to rulemaking that heavily relies on empirical ***515** study by the Federal Judicial Center and the collection of information through national and regional conferences and calls for comment. Ed Cooper has been a leader of this trend to a more empirical rulemaking process.

Over the past two decades, the Committees, led by the Civil Rules Committee, have obtained and studied empirical data as an integral part of the rulemaking process. The Committees recognize that the need for such data is acute when the issue affects a large number or an important aspect of cases. Issues like this often come before the Committees with broad agreement that there is a serious problem under the existing rules but little agreement on a potential solution. Empirical data gathering and analysis help the Committees understand the extent and frequency of the problem, how the existing rules are in fact operating, whether the problem identified is one that can be addressed by changing a rule, and what the effect of a particular proposed rule change is likely to be. This evolution in practice is a good example of how the Committees have listened to criticisms and used the flexibility and discretion the Rules Enabling Act provides to adopt suggestions for change without legislation amending the Act and without the problems that specific legislative directives would inevitably create.

The Civil Rules Committee has been at the forefront of using empirical data, and Ed Cooper has been critical to that work. The Committee has gathered empirical information from a variety of sources throughout the rulemaking process. The Committee has frequently asked the FJC to collect and study empirical information in advance of formal rulemaking and as specific questions arose during rulemaking. Some of the studies rely on sources that have become practically available only recently. Using the tools computers and computerized docketing now provide, the FJC researches case filings to detect trends and causal relationships. This kind of research was extraordinarily difficult and time-consuming before electronic filing, but the Public Access to Court Electronic Records (PACER) system has made docket and case information remotely and efficiently available. A recent example of such work for the Civil Rules Committee is the detailed study of Rule 56 motions in the federal district courts, to help the Committee understand the likely impact of a proposed national “point-counterpoint” rule requiring a detailed statement of undisputed ***516** facts by a party moving for summary judgment and the nonmovant’s detailed fact-by-fact response.⁸¹

The Civil Rules Committee has asked the FJC to conduct surveys of the bench and bar in connection with a number of proposed rule changes. These surveys have included a 1997 closed-case survey done in connection with the changes to Rule 26(b)(1) in 2000 on the scope of discovery, changes to the rules on initial disclosures, and the imposition of presumptive limits on the number of interrogatories and the length of depositions.⁸² In 2010, the FJC did a more thorough closed-case survey on costs and discovery than it had been able to do in 1997, giving the Committee information on the number and types of cases with large discovery costs--information critical to the Committee’s work on ways to control discovery effectively and fairly.⁸³ The Committee has also asked the FJC to help analyze and explain surveys of lawyers and litigants and other empirical studies done by other organizations or scholars.⁸⁴

Through this institutionalized use of empirical information, the Civil Rules Committee has worked to draw out, consider, and address the concerns of competing interests, actively engaging those with diverse views in the discussion. The process has allowed proposals--developed through countless drafts by Ed Cooper and the Committee's Associate Reporter, Richard Marcus--to emerge with language addressing many of the concerns raised that were closely examined and found to have validity. The result is a rule proposal with broad support. That is the type of secure basis for rulemaking that proposals to mandate the use of empirical data were designed to provide. The Rules Enabling Act permitted and facilitated this *517 change in the Rules Committees' work, and the change has made that work better.⁸⁵

In response to criticisms and suggestions, the Rules Committees implemented these and similar informal changes to the ways that the Committees gather a variety of viewpoints on proposed rules, interact with Congress, avoid supersession, and collect empirical data. The flexibility and discretion provided by the Rules Enabling Act made it possible for the Rules Committees to improve the way in which they operate and adapt to changes affecting their work, without the need for externally imposed requirements. That flexibility and discretion, built into the 1934 Act, has helped produce the continued and current success of the process. This success could not have happened without calls for improvement and suggestions for change. The Rules Committees welcome continued critical examination of the process and proposals to make it work better. The changes to the Committees' procedures, using suggestions from varied voices and sources, have improved the process, within the structure of the Enabling Act.

Developments in the Rules Committees' operations reflect the guidance of the Reporters and, in turn, change the way the Reporters work. Their work, like that of the Committees they serve, has also become more varied, more exposed, and more complex. The fact that work begins on many issues and proposals so far in advance of formal rulemaking extends and expands the Reporters' work. Adding events such as miniconferences, work such as surveys and PACER studies, and duties like periodic meetings with Congress amounts to more work for the Reporter, on top of the long-standing tasks of drafting proposed rule amendments, note language, agenda materials, meeting minutes, analytical and explanatory memos, and transmittal documents. The Reporter's work *518 is public and may prompt blog posts or listserv dissemination and comments from many quarters. The Reporter for the Civil Rules Committee, which often deals with controversial issues, must work and write extraordinarily quickly, thoroughly, accurately, and clearly; must know and understand the law; must have exquisite judgment; and must be able to engage in diplomacy. The Reporter must help the Committee know when a particular proposal should be changed, adopted, or rejected, even when it represents years of work and effort. We have just described Professor Ed Cooper. His facility with words, phrases, and writing manages to both effectively communicate and entertain.

A brief description of two recent rulemaking episodes provides examples of changes in how the Committee operates and some of Professor Cooper's contributions as Reporter.

III. From Class Actions to Summary Judgment

In the 1990s, the Civil Rules Committee was looking closely at Rule 23 in response to concerns about both nationwide and multistate mass torts class actions and consumer class actions. Large-scale litigation in state and federal courts had grown significantly.⁸⁶ There was significant controversy and disagreement about whether damages class actions were appropriate for personal-injury mass claims and what a feasible alternative would be to resolve such claims efficiently and fairly.⁸⁷ There was significant controversy and disagreement over whether so-called negative-value consumer cases, in which individual recoveries were too small to justify individual litigation, were benefitting only the lawyers who filed them, usually on behalf of an uninterested class.⁸⁸ Overlapping and duplicative classes simultaneously pending in different federal courts or in federal and state court, and efforts to “shop” settlements that were rejected in one court to other courts perceived to have more relaxed standards, were major and growing concerns.⁸⁹ During the same period, what became the Class Action Fairness Act (CAFA)⁹⁰ was working its way through Congress, raising in a different way the *519 question of the proper role of the Rules Committees vis-à-vis Congress. In their essays, Professor Struve, Professor Mullenix, and Professor Kane describe well how the Committees and, in particular, Ed Cooper, recognized the complexities of a rules-based response to these problems.⁹¹ We will only briefly add to those discussions.

The process the Civil Rules Committee used in addressing the class-action issues exemplifies many of the ways the Committees now operate. The work began in the early 1990s, when Judge Sam Pointer was Chair, and continued under the chairmanships of Judge Patrick Higginbotham, Judge Paul Niemeyer, and then-Judge David Levi. The Standing and Civil Rules Committees convened a conference to bring together experienced practitioners, academic experts, and judges to educate the Committees about modern class-action practice.⁹² At the Civil Rules Committee’s request, the FJC undertook a study of federal class actions.⁹³ The Committee informally circulated proposals for change to obtain guidance from members of the bar on both sides of the “v.” Different proposals were eventually published, including the change to Rule 23 permitting interlocutory appeals from an order of the district court granting or denying class-action certification. This proposal became effective; others did not, in part because the public comments on proposals that added certification factors or called for different certification standards for a settlement class revealed deep divisions and uncertainties about the proposed changes. The empirical studies and extensive public comments gave the Committee a wealth of new information about class-action practice.⁹⁴ In 2003, amendments providing better judicial supervision of settlements, class counsel, and attorneys’ fees were enacted based largely on the insights that the long rulemaking process provided.⁹⁵

The 2003 amendments did not address two critical questions. One was whether Rule 23 could address overlapping and duplicative class actions pending simultaneously in state and federal courts. *520 The second was what position the Rules Committees and the Judicial Conference should take on the pending CAFA legislation. The Committee gave careful consideration to both questions. Although that consideration did not result in formal proposals, it was the Rules Enabling Act process that provided the framework for a thoughtful, workable resolution.

Professor Cooper issued a Reporter’s call for comment on the issues of overlapping and

duplicative class actions.⁹⁶ The response to that call for comment was thoughtful and copious. It allowed the Civil Rules Committee to explore and persuade itself--and others--of the rulemaking and federalism constraints that counseled against a formal rule change.⁹⁷ And the Standing and Civil Rules Committees collaborated with another Judicial Conference Committee--the Committee on Federal-State Jurisdiction--to craft a statement, which the Judicial Conference endorsed, on the pending legislation enacted as CAFA.⁹⁸ That statement reflected the Advisory Committee's recommendation to recognize and support "the concept of minimal diversity for large, multi-state class actions, in *521 which the interests of no one state are paramount, with appropriate limitations or threshold requirements so that the federal courts are not unduly burdened and the states' jurisdiction over in-state class actions is left undisturbed."⁹⁹ That process left to Congress what was for Congress, allowed the courts to weigh in, and resulted in the Rules Committees changing Rule 23 in ways that did not implicate jurisdiction or diversity. This reflected and preserved the Rules Enabling Act's allocation of rulemaking and legislative authority between the courts and Congress. It was all done under the structure put into place by that Act in 1934, and Professor Cooper was essential to the work.

The 2010 amendments to Rule 56 also demonstrate the Rules Committee process. As Professor Gensler points out in his essay, the Civil Rules Committee studied Rule 56 as part of the 2007 "Style" project and recognized that it badly needed revisions beyond what could be done in that project.¹⁰⁰ The rule had become so far removed from modern summary-judgment practice as to spawn numerous varying local and individual judge-made rules. About half of the ninety-two districts had local rules requiring movants to set out, in separately numbered paragraphs, the facts that they believed to be undisputed and that entitled them to summary judgment. Of the fifty-six districts with such rules, twenty required the nonmovant to respond in kind. The rest of the districts did not have such a requirement.¹⁰¹ To improve national consistency, the 2008 proposal included a so-called point-counterpoint provision. The proposed change would have required the party seeking summary judgment to file three items: a motion, a statement of the facts that are asserted to be beyond genuine dispute, and a brief. The response would have included a submission addressing each stated fact and could include a statement of additional facts asserted to preclude summary judgment, along with a brief. The movant could file a reply to any additional facts stated in the response, again with a brief.¹⁰² The proposal to make the point-counterpoint motion and *522 response the default national standard, subject to the judge's ability to deviate from it by case-specific order but beyond the ability of a district or division to deviate from it by local rule or standing or general order, provoked a robust and deeply divided debate.

During the public comment period on the proposed amendments to Rule 56 published in 2008, it became clear that imposing the point-counterpoint procedure as the default national standard would be viewed as favoring defendants at the expense of plaintiffs.¹⁰³ Lawyers representing plaintiffs, who are often opposing summary-judgment motions, argued that having to respond to individual paragraphs identifying facts asserted to be undisputed and entitling the movant to relief, in correspondingly numbered individual paragraphs, imposed yet another burden on the unrepresented and the underrepresented who were already at a disadvantage in summary-judgment practice.¹⁰⁴ These lawyers also argued that the point-counterpoint procedure

often prevented them from telling their client's story in a way that allowed the inferences as well as the facts to become clear, and instead disaggregated--sliced and diced--the evidence in a way that helped defendants and made *523 summary judgment easier to grant. In other words, the lawyers argued, the point-counterpoint procedure could itself affect the substantive standard for granting summary judgment in a way that adversely affected plaintiffs.¹⁰⁵ Other lawyers praised the procedure and emphasized how well it had worked in their cases.¹⁰⁶

And though it is not common to have judges speak out against rule proposals, it happened here. Judges in districts that had tried point-counterpoint and abandoned it came to ask the Civil Rules Committee not to recommend a change to Rule 56 that would impose the procedure on a national basis. Judges with experience both in districts with it and without it made similar pleas. A judge who had extensive experience with summary-judgment motions in districts with a point-counterpoint local rule and in districts with no such rule, having regularly served in different courts, reported on the results of what turned out to be a nice controlled experiment.¹⁰⁷ The comparison did not yield favorable reviews for the point-counterpoint system.¹⁰⁸ Yet other judges in districts with a local rule requiring point-counterpoint presentation in summary-judgment motions and responses praised its benefits and emphasized that it made deciding summary-judgment motions faster and better.¹⁰⁹ The Civil Rules Advisory Committee added to this information the FJC study on differences in the rulings and time to disposition between districts that required point-counterpoint and those that did not.¹¹⁰ At the end of the day, the Advisory Committee decided not to pursue the published proposal for a national system of point-counterpoint. There were a number of proposed changes to the summary-judgment rule that were enacted in 2010,¹¹¹ but they did not include a national system of a point-counterpoint procedure. *524 The local-rule variations could continue to operate in this area, at the expense of national consistency.

Both rulemaking episodes exemplified, and resulted from, the robust, transparent, and highly effective process under the Rules Enabling Act. They provide reason for optimism about its continued success.

Conclusion

Important changes in how the Civil Rules Committee operates have occurred during Ed Cooper's tenure as Reporter, including increased public access and participation, increased reliance on empirical research, and greater congressional interaction. These changes made his work as Reporter more challenging and the depth of his knowledge and the soundness of his judgment more apparent. As Judge Higginbotham states in recounting some of the controversial proposed amendments to Rule 23, "Professor Cooper's skilled drafting of the many changes urged upon us--his translation of myriad ideas pressed upon the Committee into the language of rules--made openness both possible and workable."¹¹² The essays in this Symposium reflect Ed Cooper's quiet and steady guidance, helping to keep the Civil and Standing Rules Committees from taking steps that would not work and, through his writing ensuring that the promise of greater transparency is fully kept. Those who are thinking about the forthcoming seventy-fifth birthday of the Civil Rules and the eightieth birthday of the Rules Enabling Act should be of good cheer.

In a recent article, Ed Cooper offered words of praise about Arthur Miller, another Reporter to the Civil Rules Committee and a contributor to this issue. Those words capture what we wanted to say about Ed Cooper himself, merely by substituting the word “we” for “I”: “[We] have learned much from him, and gained much more by association with him, than [we] could hope to repay. At most [we] can hope to pay tribute where tribute is richly deserved, *525 however far short [we] may fall in the execution.”¹¹³ We look forward to his “good work ongoing.”¹¹⁴

Footnotes

^{a1} United States District Court for the District of Connecticut; Chair, Standing Committee on Rules of Practice and Procedure (Standing Committee), 2011-2012; Chair, Civil Rules Committee, 2007-2011. Judge Kravitz died after the work on this Article and those it introduces was completed.

^{aa1} Dean, Duke University School of Law; Chair, Standing Committee, 2003-2007; Chair, Civil Rules Committee, 2000-2003.

^{aaa1} United States District Court for the Southern District of Texas; Chair, Standing Committee, 2007-2011; Chair, Civil Rules Committee, 2003-2007.

^{aaaa1} United States Court of Appeals for the Third Circuit; Chair, Standing Committee, 1998-2003. We all thank Andrea Kuperman, whose work has been invaluable to our work for the Rules Committees since 2007 and was invaluable for this introduction as well. We are also very grateful to Judge David Campbell, Judge Jeffrey Sutton, Professor Steven Gensler, and Professor Richard Marcus for their thorough and helpful feedback.

¹ Order of the Supreme Court of the United States (June 3, 1935), reprinted in Advisory Committee on Civil Rules, Report of the Advisory Committee on Rules for Civil Procedure iii (1937), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV04-1937.pdf>.

² The first committee included William D. Mitchell, later Attorney General, as Chair; Scott M. Loftin, then President of the American Bar Association; George W. Wickersham, then president of the American Law Institute; Wilbur H. Cherry, professor at the University of Minnesota Law School; Armistead M. Dobie, Dean of the University of Virginia Law School; Edmund M. Morgan, professor at Harvard Law School; Edson R. Sunderland, professor at the University of Michigan Law School; and distinguished lawyers from Boston, New Orleans, Chicago, Seattle, San Francisco, and Des Moines. See *id.* at iii-iv.

- ³ These committees include the Standing Committee on Rules of Practice and Procedure and its five advisory rules committees--Appellate, Bankruptcy, Civil, Criminal, and Evidence.
- ⁴ See Paul D. Carrington, Protecting the Right of Citizens to Aggregate Small Claims Against Businesses, 46 U. Mich. J.L. Reform 537 (2013); Arthur R. Miller, Some Very Personal Reflections on the Rules, Rulemaking, and Reporters, 46 U. Mich. J.L. Reform 651 (2013).
- ⁵ See Mary Kay Kane, Professor Edward Cooper: The Quintessential Reporter, 46 U. Mich. J.L. Reform 631 (2013).
- ⁶ See Richard Marcus, Shoes That Did Not Drop, 46 U. Mich. J.L. Reform 637 (2013).
- ⁷ See Linda S. Mullenix, Professor Ed Cooper--Zen Minimalist, 46 U. Mich. J.L. Reform 661 (2013).
- ⁸ See Patrick E. Higginbotham, Iron Man of the Rules, 46 U. Mich. J.L. Reform 627 (2013).
- ⁹ See Thomas D. Rowe, Jr., The Twelve-Person Federal Civil Jury in Exile, 46 U. Mich. J.L. Reform 691 (2013).
- ¹⁰ See Paul V. Niemeyer, Is Now the Time for Simplified Rules of Civil Procedure?, 46 U. Mich. J.L. Reform 673 (2013).
- ¹¹ See Catherine T. Struve, What Ed Cooper Has Taught Me About the Realities and Complexities of Appellate Jurisdiction and Procedure, 46 U. Mich. J.L. Reform 697 (2013).
- ¹² See Stephen B. Burbank, Thinking, Big and Small, 46 U. Mich. J.L. Reform 527 (2013).
- ¹³ See Steven S. Gensler, Ed Cooper, Rule 56, and Charles E. Clark's Fountain of Youth, 46 U. Mich. J.L. Reform 593 (2013).
- ¹⁴ See Geoffrey Hazard, Edward Cooper as Curator of the Civil Rules, 46 U. Mich. J.L. Reform 623 (2013).

- ¹⁵ See Daniel R. Coquillette, *Past the Pillars of Hercules: Francis Bacon and the Science of Rulemaking*, 46 U. Mich. J.L. Reform 549 (2013).
- ¹⁶ The height of this bar is demonstrated by the fact that Clark's assistant as Reporter was eminent Yale Law Professor James W. Moore. See Leland L. Tolman, *Discovery Under the Federal Rules: Production of Documents and the Work Product of the Lawyer*, 58 Colum. L. Rev. 498, 511-12 (1958) (noting that James William Moore was the chief assistant to Charles Clark and contributed greatly to the form of the Rules, and noting that Professor Moore's writings about the Rules are "in a very large degree responsible for their successful application in practice").
- ¹⁷ See Gensler, *supra* note 13, at 593-95; see also Charles E. Clark, *The Federal Rules of Civil Procedure 1938-1958*, 58 Colum. L. Rev. 435 (1958); Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase--Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976 (1937); Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447 (1936); Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456 (1943); Charles E. Clark & James W. Moore, *A New Federal Civil Procedure: The Background*, 44 Yale L. J. 387 (1935); Charles E. Clark & James W. Moore, *A New Federal Civil Procedure: Pleadings and Parties*, 44 Yale L. J. 1291 (1935).
- ¹⁸ See Advisory Committee on Rules for Civil Procedure, *Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States* (1946), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV06-1946.pdf>; Advisory Committee on Rules for Civil Procedure, *Report of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts* (1955), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV10-1955.pdf>; Advisory Committee on Rules for Civil Procedure, *Supplementary Report of Proposed Rule to Govern Condemnation Cases in the United States District Courts* (1951), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV03-1951.pdf>; see also Gensler, *supra* note 13, at 593 n.1, 598-601.
- ¹⁹ *Order Discharging the Advisory Committee*, 352 U.S. 803 (1956).
- ²⁰ See Admin. Office of U.S. Courts, *Annual Report of the Proceedings of the Judicial Conference of the United States* 6 (1958), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/1958-09-ST-JC_approves_ST_Comm_Adv_Comm.pdf (approving of the creation of the Standing Committee and the appointment by the Chief Justice of five advisory committees); Supreme Court of the U.S., *Press Release* (1960), available at

http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/SC_Press_Release.1960.pdf (announcing the appointment of committees to engage in a continuous study of the federal rules).

- ²¹ See Advisory Committee on Civil Rules, Meeting Minutes, December 5, 1960, at 1 (1960), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV12-1960-min.pdf> (containing minutes of the first meeting of the Advisory Committee on Civil Rules and listing Benjamin Kaplan as Reporter). That same year, Judge Clark was appointed to serve on the new Standing Committee on Rules of Practice and Procedure. See Supreme Court of the U.S., *supra* note 20, at 1; see also Gensler, *supra* note 13, at 595 n.11.
- ²² The records are somewhat unclear as to the exact date that Dean Sacks's term ended and Professor Ward's began, but the difference is small in terms of the work done.
- ²³ See Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. Rev. 747, 749 (1998) ("Party-controlled discovery reached its high-water mark in the 1970 amendments in terms of rule provisions.").
- ²⁴ See *id.* at 756-60 (describing the 1980 amendments and the controversy that the discovery limitations did not go far enough).
- ²⁵ See Fed. R. Civ. P. 16 advisory committee's notes (1983) (discussing case-management tools implemented by the amendments).
- ²⁶ See Fed. R. Civ. P. 26(b)(2)(C)(iii) ("On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:... the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."); Fed. R. Civ. P. 26 advisory committee's notes (1983) (discussing addition of the proportionality limitation on discovery).
- ²⁷ See, e.g., Advisory Committee on Civil Rules, *Agenda Book*, Ann Arbor, Michigan, March 22-23, 2012, at 249-304, 375-406 (2012), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03.pdf> (discussing work of the Discovery Subcommittee to address electronic-discovery issues in connection with concerns about preservation and sanctions and discussing work of the Duke Subcommittee on efforts to improve case

management and address proportionality); see also Advisory Committee on Civil Rules, Agenda Book, Washington, DC, November 7-8, 2011, at 53-469, 567-622 (2012), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-11.pdf> (same); Advisory Committee on Civil Rules, Agenda Book, Austin, Tx, April 4-5, 2011, at 194-236, 276-302 (2011), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-04.pdf> (same).

²⁸ Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended at 28 U.S.C. §§ 471-482 (2006)).

²⁹ See, e.g., 28 U.S.C. § 471 (2006) (requiring each district court to implement a civil-justice expense and delay-reduction plan); 28 U.S.C. § 472 (2006) (stating that in developing a civil justice expense and delay reduction plan, a district court could consider the recommendations of an advisory group); 28 U.S.C.A. § 478 (West 2008) (describing the process for selecting advisory groups).

³⁰ Ed Cooper's father was the faculty editor when the University of Michigan Journal of Law Reform, then called *Prospectus: A Journal of Law Reform*, was created. See 1 U. Mich. J.L. Reform i (1968).

³¹ See Charles A. Wright et al., *Federal Practice and Procedure*, vols. 16A-16AA (4th ed. 2008) (co-authored with Charles A. Wright, Arthur R. Miller, and Catherine T. Struve) (addressing the Appellate Rules); Charles A. Wright et al., *Federal Practice and Procedure*, vols. 13, 13A, 13B, 13C (3d. ed. 2008) (co-authored with Charles A. Wright and Arthur R. Miller) (addressing the federal judicial system and related matters); Charles A. Wright et al., *Federal Practice and Procedure*, vols. 14, 14A, 14B, 14C, 16A (3d ed. 1998) (co-authored with Charles A. Wright and Arthur R. Miller) (addressing jurisdiction, removal, and the Appellate Rules); Charles A. Wright et al., *Federal Practice and Procedure*, vols. 13-19 (2d ed. 1984) (co-authored with Charles A. Wright and Arthur R. Miller) (addressing jurisdiction and related matters); Charles A. Wright et al., *Federal Practice and Procedure*, vols. 13-19 (1975-1982) (co-authored with Charles A. Wright and Arthur R. Miller).

³² See, e.g., Edward H. Cooper, *Aggregation and Choice of Law*, 14 Roger Williams U. L. Rev. 12 (2009); Edward H. Cooper, *Aggregation and Settlement of Mass Torts*, 148 U. Pa. L. Rev. 1943 (2000); Edward H. Cooper, *Class Action Advice in the Form of Questions*, 11 Duke J. Comp. & Int'l L. 215 (2001); Edward H. Cooper, *Extraordinary Writ Practice in Criminal Cases: Analogies for the Military Courts*, 98 F.R.D. 593 (1983); Edward H.

Cooper, King Arthur Confronts TwIqy Pleading, 90 Or. L. Rev. 955 (2012); Edward H. Cooper, Rewriting Shutts for Fun, Not to Profit, 74 UMKC L. Rev. 569 (2006).

³³ See, e.g., Stephen B. Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015 (1982); Peter G. McCabe, Renewal of the Federal Rulemaking Process, 44 Am. U. L. Rev. 1655 (1995).

³⁴ See Gensler, *supra* note 13, at 593-610.

³⁵ Laurens Walker, A Comprehensive Reform for Federal Civil Rulemaking, 61 Geo. Wash. L. Rev. 455, 465 (1993) (citing Order Continuing Advisory Committee, 314 U.S. 720 (1942)).

³⁶ Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356 (codified as amended at 28 U.S.C. § 331 (2006)). The Federal Rules of Appellate Procedure took effect in 1968, and the initial Bankruptcy Rules became law in 1973. In 1972, the proposed Evidence Rules were transmitted to Congress and, as discussed later, proved controversial. They were enacted by affirmative legislation, after revision by Congress, in 1975. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (codified as amended at 28 U.S.C. App. at 314 (2006)).

³⁷ Admin. Office of U.S. Courts, *supra* note 20, at 7.

³⁸ *Id.*

³⁹ See Winifred R. Brown, Fed. Judicial Ctr., Federal Rulemaking: Problems and Possibilities 12 (1981), available at [http://www.fjc.gov/public/pdf.nsf/lookup/fdrmlmng.pdf/\\$file/fdrmlmng.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/fdrmlmng.pdf/$file/fdrmlmng.pdf) (outlining Reporters' role in ongoing study of federal rules and their operation).

⁴⁰ See *id.* at 11-12.

⁴¹ See *id.* at 12 n.23.

⁴² *Id.* at 12 (citing Albert Maris, Federal Procedural Rule-Making: The Program of the Judicial Conference, 47 A.B.A. J. 772 (1961)).

43 Id. at 12-13.

44 See, e.g., 23 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5421 (1980) (discussing the controversy surrounding the proposed Federal Rules of Evidence); Kenneth S. Broun, *Giving Codification a Second Chance--Testimonial Privileges and the Federal Rules of Evidence*, 53 *Hastings L. J.* 769, 777 (2002) (“The controversy over the Proposed Federal Rules of Evidence was not only a controversy over the merits of the proposals, but also about process.”); Eileen A. Scallen, *Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee Notes*, 28 *Loy. L.A. L. Rev.* 1283, 1290 (1995) (discussing the controversy over the initially proposed Federal Rules of Evidence).

45 See, e.g., 23 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5421 (1980).

46 See McCabe, *supra* note 33, at 1660.

47 See 28 U.S.C. § 2072(a) (2006).

48 See *id.* § 2074(b).

49 See *id.* § 2072(b).

50 The legislation also attempted to promote the national uniformity that had been one of the signature goals of the 1938 Civil Rules by limiting inconsistent local-court rules on subjects addressed by the national rules. See 28 U.S.C. § 331 (2006) (“The Judicial Conference shall review rules prescribed under section 2071 of this title by the courts, other than the Supreme Court and the district courts, for consistency with Federal law. The Judicial Conference may modify or abrogate any such rule so reviewed found inconsistent in the course of such a review.”). The legislation gave circuit judicial councils authority to modify or abrogate any district court local rules and gave the Judicial Conference authority to modify or abrogate any other rule prescribed by a court other than the Supreme Court. See *id.* § 2071(c)(1)-(2).

51 See generally Burbank, *supra* note 33 (describing the decades of effort culminating in the Act).

52 The time that Congress has to review proposed rules and amendments-- and when, absent

congressional action, they become effective--has been modified since 1938. The statute originally stated that proposed rules “shall not take effect until they have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session.” Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064. In 1950, this was changed to provide that rule proposals transmitted to Congress by May 1 could become effective ninety days later regardless of the status of the congressional session. Act of May 10, 1950, Pub. L. No. 81-510, § 2, 64 Stat. 158. The 1988 legislation required the Supreme Court to transmit proposed rule changes to Congress by May 1 and provided that the changes would take effect no earlier than December 1 of the year of transmittal. Act of Nov. 19, 1988, Pub. L. No. 100-702, § 401(a), 102 Stat. 4649 (codified at 28 U.S.C. § 2074 (2006)).

- ⁵³ See, e.g., H.R. 481, 96th Cong. (1979); H.R. 480, 96th Cong. (1979); Brown, *supra* note 39, at 35-102 (describing various proposals for change); Jack B. Weinstein, *Reform of Court Rule-Making Procedures* 89-115, 147-50 (1977); Robert N. Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 *Iowa L. Rev.* 15, 61-83 (1977); Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 *Stan. L. Rev.* 673, 685 (1975); William L. Hungate, *Changes in the Federal Rules of Criminal Procedure*, 61 *A.B.A. J.* 1203, 1207 (1975); Howard Lesnick, *The Federal Rule-Making Process: A Time for Re-Examination*, 61 *A.B.A. J.* 579, 580-82 (1975).
- ⁵⁴ See 28 U.S.C. § 2073(c) (2006). The authority to close sessions is rarely used. See McCabe, *supra* note 33, at 1671 & n.86.
- ⁵⁵ See 28 U.S.C. § 2073(a)(2) (2006).
- ⁵⁶ See *id.* § 2073(a)(2), (b).
- ⁵⁷ McCabe, *supra* note 33, at 1667; see 28 U.S.C. § 2073(a)(1) (2006).
- ⁵⁸ McCabe, *supra* note 33, at 1662 (quoting H.R. Rep. No. 100-889, at 3 (1988)).
- ⁵⁹ See Brown, *supra* note 39, at 43.
- ⁶⁰ *Id.* at 54.
- ⁶¹ *Id.* (citing H.R. 480, 96th Cong. § 2074(e) (1979); H.R. 481, 96th Cong.

(1979)).

⁶² For a discussion of various criticisms and proposals to change the rulemaking process, see Brown, *supra* note 39, at 35-86.

⁶³ See Memorandum from Myles Lynk and Rick Marcus to Advisory Committee on Civil Rules, Proposal for Effort to Draft Possible Rules Changes to Address the Problems of Electronic Discovery 2 (Apr. 14, 2003), reprinted in Advisory Committee on Civil Rules, Agenda Book, Washington, DC, May 1-2, 2003, Volume II, at 263 (2003), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2003-05%282%29.pdf> (noting that the Discovery Subcommittee hosted miniconferences in March 2000 and October 2000 on initial work on electronic-discovery amendments).

⁶⁴ See Subcommittee on Discovery, Judicial Conference Civil Rules Committee, Materials Produced for Mini-Conference on Preservation and Sanctions, U.S. Courts (Sept. 9, 2011), <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DallasMiniConfSept2011.aspx> (providing agenda and other materials used for the miniconference on preservation and spoliation). The Committee also used miniconferences to learn about problems in litigating summary-judgment motions, in the early stages of considering what became the 2010 amendments to Rule 56; about state-court experience with the type of expert-disclosure requirements that were enacted as part of Rule 26 in 2010; and about experience with subpoenas under Rule 45 in connection with changes to that Rule that, as of this writing, were pending before the Supreme Court. See Advisory Committee on Civil Rules, Meeting Minutes, November 15-16, 2010, at 3 (2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2010-min.pdf> (noting an October 2010 miniconference on Rule 45); Advisory Committee on Civil Rules, Meeting Minutes, November 8-9, 2007, at 19 (2007), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2007-min.pdf> (describing the miniconference held in November 2007 on possible amendments to Rule 56); Advisory Committee on Civil Rules, Meeting Minutes, April 19-20, 2007, at 2 (2007), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV04-2007-min.pdf> (noting that two miniconferences were held on disclosure and discovery of expert trial witnesses and that a miniconference on Rule 56 revisions was held in January 2007).

⁶⁵ Fed. R. Civ. P. 1.

⁶⁶ See, e.g., Symposium, 2010 Civil Litigation Review Conference, 60 *Duke L.J.* 537 (2010);

Symposium, 39 B.C. L. Rev. 517 (1998) (symposium issue on Boston conference on discovery rules).

⁶⁷ See, e.g., Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. Rev. 261, 294-96 (2009) (suggesting reducing the number of judges on the Committee and striving toward greater balance in the backgrounds of lawyer members); Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 Ala. L. Rev. 529, 614-18, 637 (2001) (asserting that the Civil Rules Committee's composition is not ideologically balanced and arguing that "policymakers should consider fine-tuning the generally wise Rules Enabling Act process to ensure that the various committees are more evenly balanced in socio-political makeup"); Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 Law & Contemp. Probs. 229, 238-39 (1998) (arguing that judges should be removed from the initial drafting process and put in an advisory role).

⁶⁸ The extensive comments and testimony submitted about the Rule 56 proposals are available at <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Comments/Proposed0808Comments.aspx>.

⁶⁹ See, e.g., Weinstein, *supra* note 53, at 106 (supporting Professor Lesnick's view that the "composition of the advisory committees should be more representative") (footnote omitted); Coleman, *supra* note 67, at 294-96; Lesnick, *supra* note 53, at 581 ("Greater care needs to be taken that the lawyers appointed to the advisory committees reflect a true cross-section of those segments of the public and of the bar likely to be affected by the rules in the relevant areas."); Stempel, *supra* note 67, at 614-18, 637.

⁷⁰ For examples of proposals to increase congressional involvement in rulemaking, see, for example, Clinton, *supra* note 53, at 62 (arguing that there is a continuum between substance and procedure, and that Congress must either "delineate with more particularity the areas which the Supreme Court cannot unilaterally invade, as it has begun to do in enacting section 2076, or it must again assume for itself the burden of affirmative approval (although not necessarily the initiative and drafting) of the general rules of practice and procedure for the federal judiciary"); Coleman, *supra* note 67, at 293 (suggesting that increasing congressional involvement in the rulemaking process would be beneficial, because under current procedures, "if the Committee strays from [the goal of court] access, Congress is too busy to notice"); Lesnick, *supra* note 53, at 583 ("Rule drafting, it seems clear, is legislative work, but the habits of judges and of those dealing with them are not easily altered when they turn to their nonjudicial tasks. A legislative commission, even if staffed partly by judges, would inevitably be more open, less prone to give over-riding weight to confidentiality, insularity, and the muting of controversy than is the Judicial

Conference.”).

71 The supersession clause states that “[a]ll laws in conflict with... rules [promulgated under the Act] shall be of no further force or effect after such rules have taken effect.” 28 U.S.C. § 2072(b) (2006).

72 See McCabe, *supra* note 33, at 1662-63.

73 See *id.*

74 See, e.g., Fed. R. Civ. P. 86(b) advisory committee’s notes (2007) (explaining that Rule 86(b)--which provides that if rule provisions conflict with another law, priority in time for purposes of 28 U.S.C. § 2072(b) is not affected by the 2007 amendments that restyled the Civil Rules-- was added to clarify that the restyled rules were not intended to supersede other laws through the Enabling Act’s supersession clause); Memorandum from Leonidas Ralph Mecham, Dir., Admin. Office of the U.S. Courts, to the Chief Justice of the United States and the Associate Justices of the Supreme Court (Nov. 19, 2001), reprinted in 207 F.R.D. 336 (2002) (transmitting to the Supreme Court proposed stylistic amendments to the Federal Rules of Criminal Procedure; noting that after the Judicial Conference had approved of the proposals, the USA PATRIOT Act added new provisions to two Criminal Rules; and noting that the Advisory Committee was preparing conforming amendments to avoid confusion and possible supersession problems); see also Stephen B. Burbank & Tobias Barrington Wolff, Redeeming the Missed Opportunities of Shady Grove, 159 U. Pa. L. Rev. 17, 41-42 (2010) (“[A]s part of the successful campaign to persuade the House not to insist on repeal of the supersession clause in the 1988 amendments to the Enabling Act, Chief Justice Rehnquist wrote a letter asserting that the Judicial Conference and its committees ‘have always been keenly aware of the special responsibility they have in the rules process and the duty incumbent upon them not to overreach their charter.’”).

75 See, e.g., Stephen B. Burbank, Ignorance and Procedural Law Reform: A Call for a Moratorium, 59 Brook. L. Rev. 841, 841-42 (1993) (arguing for a moratorium on rulemaking until the likely impact of the proposed amendments is understood and supported with empirical evidence); Walker, *supra* note 35, at 464 (proposing that discretion in exercising the rulemakers’ delegated power be curbed by requiring the Advisory Committee to “make rules based on adequate information” and requiring analyses of all proposed major rule changes to be submitted in advance of any publication for comment to the FJC, which would have the authority to reject the proposal); Thomas E. Willging, Past and Potential Uses of Empirical Research in Civil Rulemaking, 77 Notre Dame L. Rev. 1121, 1204 (2002) (arguing that “what is needed is a statute that would vest the power to create experimental rules in the Standing Committee”).

- ⁷⁶ See, e.g., Burbank, *supra* note 75, at 844 (“[A]mended Rule 11 was promulgated in a virtual empirical vacuum, but with numerous warnings from the bar about its potential costs.”) (footnote omitted); Carl Tobias, *Discovery Reform Redux*, 31 *Conn. L. Rev.* 1433, 1434 (1999) (noting that the 1983 version of Rule 11 proved “troubling” because the rule revisors had not collected empirical data on Rule 11’s operation before revising it in 1983); Matthew G. Vansuch, *Icing the Judicial Hellholes: Congress’ Attempt to Put Out “Frivolous” Lawsuits Burns a Hole Through the Constitution*, 30 *Seton Hall Legis. J.* 249, 304 (2006) (“Rule 11 was changed in 1983 without an empirical justification and then was altered again because the 1983 amendments were perceived to have created all of the problems that the bar had predicted but that the rulemakers had ignored.”); Willging, *supra* note 75, at 1122 (“The tone set by the original rulemakers and their successors came under attack in the late 1980s and early 1990s when commentators decried the lack of empirical support for major rule revisions relating to Rule 11 sanctions in 1983 and Rule 26(a) initial disclosures in 1993.”); see also Georgene M. Vairo, *Foreword*, 37 *Loy. L.A. L. Rev.* 515, 517 n.4 (2004) (“It is fair to say that the debate about the 1983 version of Rule 11 prompted the need for empirical study in the rulemaking process.”).
- ⁷⁷ See Burbank, *supra* note 75, at 842.
- ⁷⁸ See, e.g., *id.* at 845 (noting that the 1993 amendments to Rule 26 were based on “little relevant empirical evidence”); Willging, *supra* note 75, at 1122-23 (explaining criticism of the 1993 amendments that imposed a requirement of initial disclosures in Rule 26(a)).
- ⁷⁹ See, e.g., A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 *U. Pa. L. Rev.* 1567, 1585-86 (1991). See generally Willging, *supra* note 75 (reviewing proposals for, and evolution in the use of, empirical research in rulemaking).
- ⁸⁰ Cf. Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 *N.C. L. Rev.* 795, 829 (1991) (noting that while empirical study has its benefits, it can also delay solving a problem).
- ⁸¹ See Memorandum from Joe Cecil & George Cort to Hon. Michael Baylson, *Report on Summary Judgment Practice Across Districts with Variations in Local Rules* (Aug. 13, 2008), available at [http://www.fjc.gov/public/pdf.nsf/lookup/sujulrs2.pdf/\\$file/sujulrs2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sujulrs2.pdf/$file/sujulrs2.pdf).
- ⁸² See Thomas E. Willging et al., *Fed. Judicial Ctr., Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-Based National Survey of Counsel in Closed*

Federal Civil Cases (1997), available at [http://www.fjc.gov/public/pdf.nsf/lookup/discovery.pdf/\\$file/discovery.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/discovery.pdf/$file/discovery.pdf).

- ⁸³ See Emery G. Lee, III & Thomas E. Willging, Fed. Judicial Ctr., *Litigation Costs in Civil Cases: Multivariate Analysis* (2010), available at [http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/\\$file/costciv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/$file/costciv1.pdf); see also Emery G. Lee, III & Thomas E. Willging, Fed. Judicial Ctr., *Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules* (2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf).
- ⁸⁴ See, e.g., Emery G. Lee, III & Thomas E. Willging, Fed. Judicial Ctr., *Attorney Satisfaction with the Federal Rules of Civil Procedure: Report to the Judicial Conference Advisory Committee on Civil Rules* (2010), available at [http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/\\$file/costciv2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/$file/costciv2.pdf) (collecting and comparing results of surveys given to attorneys in the American College of Trial Lawyers, the American Bar Association Section of Litigation, and the National Employment Lawyers Association (NELA), where the FJC administered the ABA Section and NELA surveys).
- ⁸⁵ Of course, other rules committees also rely on empirical data gathering. For example, the Criminal Rules Committee's examination of whether to amend Rule 16 to include a statement of the prosecutors' obligation to disclose exculpatory or impeaching information used a variety of empirical-data-gathering methods. The Committee held a miniconference at which prosecutors, defense attorneys, individuals knowledgeable about victims' rights, and individuals knowledgeable about national security and witness protection issues all appeared. See Criminal Rule 16 Subcommittee, Advisory Committee on Criminal Rules, Agenda Book, Feb. 1, 2010 Miniconference (2010) (on file with Administrative Office of the United States Courts); see also Advisory Committee on Criminal Rules, Agenda Book, April 15-16, 2010, at 168 (2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Criminal/CR2010-04.pdf> (discussing the consultative session on Rule 16 held on Feb. 1, 2010). The FJC also did a survey regarding Criminal Rule 16. See Laural Hooper et al., Fed. Judicial Ctr., *A Summary of Responses to a National Survey of Rule 16 of the Federal Rules of Criminal Procedure and Disclosure Practices in Criminal Cases: Final Report to the Advisory Committee on Criminal Rules* (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/Rule16Rep.pdf/\\$file/Rule16Rep.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Rule16Rep.pdf/$file/Rule16Rep.pdf).
- ⁸⁶ See John K. Rabiej, *The Making of Class Action Rule 23--What Were We Thinking?*, 24 *Miss. C.L. Rev.* 323, 345 (2005) (noting the growth of class actions).

- 87 See id. at 347-48.
- 88 See id. at 356.
- 89 See id. at 387 (noting the problems with overlapping and duplicative class actions).
- 90 Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. §§ 1332(d), 1453, 1711-1715 (2006)).
- 91 See Kane, *supra* note 5, at 631-36; Mullenix, *supra* note 7, at 664-71; Struve, *supra* note 11, at 697 n.3.
- 92 See Advisory Committee on Civil Rules, Meeting Minutes, October 22-23, 2001 (2001), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CRAC1001.pdf> (minutes of the October 2001 conference on Rule 23 at the University of Chicago Law School).
- 93 See Thomas E. Willging et al., Fed. Judicial Ctr., Empirical Study of Class Actions in Four Federal District Courts: Final Report to Advisory Committee on Civil Rules 1-2 (1996), available at [http://www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/\\$file/rule23.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/$file/rule23.pdf).
- 94 See Rabiej, *supra* note 86, at 367-68 (noting the wealth of materials that came from the study of class actions, which led to the 1998 amendments to Rule 23).
- 95 See id. at 368-69 (describing the proposals to amend Rule 23 that took effect in 2003 and how they were influenced by the Committee's earlier work on Rule 23).
- 96 See David F. Levi, Chair, Advisory Committee on Federal Rules of Civil Procedure, Report of the Civil Rules Advisory Committee 293 (2002), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2002.pdf>.
- 97 See id. (“[T]he Committee expressed a unanimous consensus that the problems created by overlapping class actions are worthy of congressional attention and that some form of minimal diversity legislation might provide an appropriate answer to some of the problems.”); id. at 13 (“In light of... constraints on rulemaking, and because of the sensitive issues of jurisdiction and federalism implicated by overlapping class actions, Congress would seem the appropriate body to deal with the question.”).

⁹⁸ The Judicial Conference's Committee on Federal-State Jurisdiction, after extensive discussions with the Standing Committee, recommended, with the Standing Committee's concurrence, adopting the following resolution, which the Judicial Conference unanimously adopted:

The Judicial Conference recognizes that the use of minimal diversity of citizenship may be appropriate to the maintenance of significant multi-state class action litigation in the federal courts, while continuing to oppose class action legislation that contains jurisdictional provisions that are similar to those in the bills introduced in the 106th and 107th Congresses. If Congress determines that certain class actions should be brought within the original and removal jurisdiction of the federal courts on the basis of minimal diversity of citizenship and an aggregation of claims, Congress should be encouraged to include sufficient limitations and threshold requirements so that federal courts are not unduly burdened and states' jurisdiction over in-state class actions is left undisturbed, such as by employing provisions to raise the jurisdictional threshold and to fashion exceptions to such jurisdiction that would preserve a role for the state courts in the handling of in-state class actions. Such exceptions for in-state class actions may appropriately include such factors as whether substantially all members of the class are citizens of a single state, the relationship of the defendants to the forum state, or whether the claims arise from death, personal injury, or physical property damage within the state. Further, the Conference should continue to explore additional approaches to the consolidation and coordination of overlapping or duplicative class actions that do not unduly intrude on state courts or burden federal courts.

Judicial Conference of the U.S., Report of the Proceedings of the Judicial Conference of the U.S. 13-14 (2003), available at <http://www.uscourts.gov/uscourts/FederalCourts/judconf/proceedings/2003-03.pdf>.

⁹⁹ Levi, *supra* note 96, at 17.

¹⁰⁰ See Gensler, *supra* note 13, at 611-12.

¹⁰¹ See Memorandum from Jeffrey Barr & James Ishida to Hon. Michael Baylson, Survey of District Court Local Summary Judgment Rules, at 1-3 (Mar. 21, 2007), reprinted in Hon. Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure, Report of the Civil Rules Advisory Committee 110-12 (2007), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2007.pdf>.

¹⁰² In relevant part, the proposed amendments to Rule 56(c) that were published in 2008 provided:
(2) Motion. The motion must:

(A) describe each claim, defense, or issue as to which summary judgment is sought; and
 (B) state in separately numbered paragraphs only those material facts that the movant asserts are not genuinely in dispute and entitle the movant to judgment as a matter of law.

(3) Response. A response:

(A) must, by correspondingly numbered paragraphs, accept, qualify, or deny-- either generally or for purposes of the motion only--each fact in the Rule 56(c)(2)(B) statement;
 (B) may state that those facts do not support judgment as a matter of law; and
 (C) may state additional facts that preclude summary judgment.

(4) Reply. The movant may reply to any additional fact stated in the response in the form required for a response.

Rosenthal, *supra* note 101, at 66-67.

¹⁰³ See, e.g., Summary of General Comments: 2008 Rule 56 Proposal (Jan. 26, 2009), reprinted in Advisory Committee on Civil Rules, Agenda Book, April 20-21, 2009, at 120 (2009), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2009-04.pdf> (summarizing comments received on proposed amendments to Rule 56 from a professor concerned that “[t]he detailed statement and response procedure may aggravate an already unsatisfactory situation” in civil rights and employment cases in which summary judgment is more frequently sought and granted than in other categories of cases).

¹⁰⁴ See, e.g., *id.* at 145 (summarizing comments by a lawyer that the point-counterpoint system in his district “doesn’t work and unfairly favors the defendants” and that “[t]he point-counterpoint system is, for many reasons, ‘biased against plaintiffs and their lawyers in civil rights cases’”).

¹⁰⁵ See, e.g., *id.* at 148 (summarizing comments by a lawyer stating that “[p]oint-counterpoint ‘is... very disturbing... because it encourages defendants to set forth excessive, unnecessary facts that must be addressed by the plaintiff in a painstaking piecemeal way’”).

¹⁰⁶ See, e.g., *id.* at 140-60 (summarizing the comments of several lawyers who felt that the procedure was beneficial).

¹⁰⁷ See *id.* at 140-41 (summarizing the comments of a judge who had experience in both the District of Alaska, which did not use point-counterpoint, and the District of Arizona, which did use it).

¹⁰⁸ See *id.*

- ¹⁰⁹ See, e.g., *id.* at 147 (summarizing the comments of a judge who supported the proposed revisions). Cf. *id.* at 155 (summarizing the testimony of a judge describing how his district successfully uses point-counterpoint, but only by placing limits on the briefing that contains the undisputed facts and responses).
- ¹¹⁰ See Cecil & Cort, *supra* note 81.
- ¹¹¹ The amendments that took effect in 2010 require a party asserting a fact that cannot be genuinely disputed to provide a “pinpoint citation” to the record, restore “shall” to express the direction to grant summary judgment when the standard is met, provide courts with “options when an assertion of fact has not been properly supported by the moving party or responded to by the opposing party,” and explicitly recognize authority to grant partial summary judgments. See Judicial Conference Committee on Rules of Practice and Procedure, 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 14-15, 17 (2009), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/Combined_ST_Report_Sept_2009.pdf; see also Fed. R. Civ. P. 56 advisory committee’s notes (2010).
- ¹¹² Higginbotham, *supra* note 8, at 629.
- ¹¹³ Edward H. Cooper, King Arthur Confronts TwIqy Pleading, 90 Or. L. Rev. 955, 955 n.* (2012).
- ¹¹⁴ The words “good work ongoing” come from a poem: “What are we sure of? Happiness isn’t a town on a map, or an early arrival, or a job well done, but good work ongoing.” Mary Oliver, Work, Sometimes, in *New and Selected Poems* 6 (2005).

TAB 7B

THIS PAGE INTENTIONALLY BLANK

4 Am. U. L. Rev. 1655

American University Law Review
June 1995

L. Ralph Mechem & Federal Courts Administration: A Decade of Innovation and Progress

***1655 RENEWAL OF THE FEDERAL RULEMAKING PROCESS**

Peter G. McCabe^a

Copyright (c) 1995 Washington College of Law of The American University; Peter G. McCabe

Table of Contents

Introduction	1656
I. Historical Background	1658
II. Current Rulemaking Procedures	1664
A. Committee Membership	1664
B. Publication of Procedures	1666
C. Soliciting Comments from the Public	1667
D. Documentation of Changes	1669
E. Public Hearings	1670
F. Open Meetings	1670
G. Open Records	1671
H. Length of the Process	1671
1. Initial consideration by the advisory committee	1672
2. Publication and public comment	1672
3. Consideration of the public comments and final approval by the advisory committee	1672
4. Approval by the standing committee	1673

5. Judicial Conference approval	1673
6. Supreme Court approval	1673
7. Congressional review	1673
I. Supreme Court Review	1674
III. Continuing Renewal Efforts	1675
A. Long Range Planning	1675
B. Greater Participation by the Bar	1676
C. Frequency of Rule Changes	1678
D. Content, Organization, and Style of the Rules	1681
*1656 E. The Judiciary and Congress	1682
F. National Uniformity and Local Rules	1687
Conclusion	1691

INTRODUCTION

The federal rules of practice and procedure regulate litigation in the federal courts and are designed “to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay.”¹ The Federal Rules of Civil Procedure, in particular, have been described as “among the most significant accomplishments of American jurisprudence,”² setting the standard “against which all other systems of procedure must be judged.”³ The success of the civil rules led to the establishment of federal rules for criminal, appellate, and bankruptcy procedure, as well as federal rules of evidence.

The process by which the federal rules⁴ are promulgated, although subject to periodic criticism, has been praised as “perhaps the most thoroughly open, deliberative, and exacting process in the nation for developing substantively neutral rules.”⁵ The essence of the federal rulemaking process has remained constant for the past sixty years. Its basic features include: (1) the drafting of new rules and rule amendments by prestigious advisory committees composed of judges, lawyers, and law professors; (2) circulation of the committees’ drafts to the bench, bar, and public for comment; (3) fresh consideration of *1657 the proposed changes by the advisory committees, after taking into account the comments of the bench, bar, and public; (4) careful review of the advisory committees’ proposals; (5) promulgation of the proposals by the Supreme

Court; and (6) “enactment” of the proposals into law following the expiration of a statutory period in which Congress is given an opportunity to reject, modify, or defer them.

At various points over the last sixty years both Congress and the judiciary have acted to reaffirm and renew the rulemaking process, with the objective of making it more effective and more open. Significant organizational and procedural improvements have been made as a result both of self-evaluation efforts by the judiciary and criticisms from the bar and Congress. One recommendation in the Proposed Long Range Plan for the Federal Courts,⁶ which was recently approved by the Judicial Conference of the United States,⁷ reaffirms the judiciary’s commitment to periodic, comprehensive reexaminations of the rulemaking process.⁸ The Plan recommends that:

rules of practice, procedure, and evidence should be developed exclusively in accordance with the time-tested and orderly process established by the Rules Enabling Act;

the national rules should strive for greater uniformity of practice and procedure in the federal courts, but individual courts should have some limited rulemaking authority to account for differing local circumstances and to experiment with innovative procedures; and

the Judicial Conference and the courts should seek significant participation in rulemaking by the interested public and representatives of the bar, including federal and state judges.⁹

Part I of this Article provides a brief history of the federal rulemaking process. Part II describes the current rulemaking procedures, focusing on how they have been changed to address past criticisms. Part III discusses future initiatives in the rulemaking process.

***1658 I. HISTORICAL BACKGROUND**

Although there has been debate among scholars over the authority of the federal judiciary, vis-a-vis Congress, to promulgate procedural rules for the federal courts,¹⁰ the matter was resolved by the Rules Enabling Act of 1934.¹¹ By virtue of the Act, Congress delegated almost all rulemaking authority to the judiciary, reserving to itself the post facto right to reject, enact, amend, or defer any of the rules. The legislation delegated to the Supreme Court the explicit power to prescribe rules for the district courts governing practice and procedure in civil actions.¹²

In 1935, the Supreme Court appointed a blue ribbon advisory committee to draft the first Federal Rules of Civil Procedure.¹³ Over the next two years, the advisory committee widely circulated proposed drafts to the bench and bar for comment, and it made numerous changes to the drafts thanks to extensive assistance from the legal profession.¹⁴ After the Supreme Court adopted the rules and Congress *1659 did not act to modify them, the civil rules took effect in September 1938.¹⁵

In 1940, Congress authorized the Supreme Court to promulgate rules governing criminal cases in the district courts.¹⁶ The Supreme Court followed the same procedure it had used to prepare the civil rules. A distinguished advisory committee prepared and circulated draft rule proposals,

received comments from the bench and bar, and submitted the proposed rules to the Court.¹⁷ The Federal Rules of Criminal Procedure took effect, by operation of law, without congressional action in March 1946.¹⁸

In 1958, Congress enacted legislation transferring the major responsibility for the rulemaking function from the Supreme Court to the Judicial Conference of the United States.¹⁹ The Conference was mandated to “carry on a continuous study of the operation and effect of the [federal] rules” and to recommend appropriate amendments in the rules.²⁰ The Supreme Court retained its statutory authority to promulgate the rules, but it would henceforth do so by acting on recommendations made by the Judicial Conference.²¹

Following enactment of the 1958 legislation, the Judicial Conference established a Standing Committee on Rules of Practice and Procedure and five advisory committees, to amend or create the civil, criminal, bankruptcy, appellate, and admiralty rules.²² The Standing Committee’s mission was to supervise the rulemaking process for the Conference and to coordinate and approve the work of the advisory committees.²³

The Admiralty Rules were merged into the Federal Rules of Civil Procedure in 1966.²⁴ The Federal Rules of Appellate Procedure took effect in 1968,²⁵ the federal Bankruptcy Rules became law in 1973, *1660²⁶ and the rules governing post-conviction collateral remedies for prisoners took effect in 1977.²⁷ The separate rules for misdemeanor and petty offense cases before magistrate judges were merged into the Federal Rules of Criminal Procedure in 1990.²⁸

New proposed rules and amendments to the rules approved by the Supreme Court were accepted by Congress without change for approximately thirty-five years following promulgation of the Federal Rules of Civil Procedure.²⁹ The picture changed sharply in the 1970s, however, as a result of controversy surrounding the Federal Rules of Evidence.

Chief Justice Earl Warren appointed an advisory committee to draft rules of evidence in 1965, and the Supreme Court transmitted the rules to Congress in 1972.³⁰ Immediate concern was expressed that the judiciary had exceeded its statutory authority on the grounds that: (1) the Rules Enabling Act, which authorized the Supreme Court to promulgate rules of “practice and procedure,” was not broad enough to govern the promulgation of rules of evidence; and (2) the new rules had impermissibly overstepped the boundary between procedure and substance, particularly in attempting to supersede evidentiary privileges established by state law.³¹

Congress deferred the proposed rules indefinitely and held extensive hearings on them. Eventually, the Federal Rules of Evidence were revised by Congress and enacted into law by affirmative legislation.³² The principal legislative revision was to eliminate the proposed federal evidentiary privileges, thereby continuing to leave the matter to federal common law and applicable state law.³³ Congress also amended the Rules Enabling Act to give the judiciary explicit authority to amend the Federal Rules of Evidence.³⁴ It provided, *1661 however, that no rule establishing, abolishing, or modifying a privilege has any force unless approved by an act of Congress.³⁵

Following enactment of the Federal Rules of Evidence, Congress periodically intervened to

delay, reject, or modify proposed federal rules.³⁶ The controversy over the evidence rules also evoked criticism directed at the procedures under which the new rules had been promulgated. Generally, the complaints were that the process was not sufficiently “open” and had not allowed for adequate public input.³⁷ Accordingly, one member of the House Judiciary Committee suggested that the time was ripe to reexamine the rulemaking process and possibly amend the Rules Enabling Act.³⁸

Chief Justice Warren E. Burger, in his 1979 *The State of the Federal Judiciary* report, took note of the controversy and suggested that it was time to take a “fresh look” at the entire rulemaking process.³⁹ He requested that the Judicial Conference and the Federal Judicial Center, the judiciary’s primary research arm, study the matter in light of the experience under the Rules Enabling Act.⁴⁰ In response, the Federal Judicial Center prepared a report to assist the Standing Committee on Rules of Practice and Procedure.⁴¹ The report analyzed the strengths and weaknesses of the process and focused on those aspects of the process that had been singled out for criticisms and change.⁴²

The Standing Committee conducted a comprehensive review of rulemaking procedures and instituted a number of changes. The innovations included making the records considered by the rules committees available to the public, documenting all changes made by the committees at the various stages of the process, and conducting public hearings on proposed amendments. The Conference also committed *1662 its procedures to writing and published them for the benefit of the bench and bar.⁴³

In 1983, the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice initiated a comprehensive review of the rulemaking process.⁴⁴ The House Subcommittee conducted hearings in both the 98th and 99th Congresses, during which it invited comment on the rulemaking process and engaged in a productive dialogue with the Judicial Conference and the Standing Committee chairman.⁴⁵

Following five years of study, hearings, and dialogue, the House subcommittee marked up a bill to codify formally some of the rulemaking procedures already being used by the Judicial Conference and also to require that all meetings of rules committees be open to the public and that minutes of the meetings be prepared.⁴⁶ The legislation ratified the Judicial Conference’s authority to appoint a standing committee and appropriate advisory committees.⁴⁷

The House version of the legislation specified “that each rules committee consist of ‘a balanced cross section of bench and bar, and trial and appellate judges.’”⁴⁸ The judiciary endorsed this provision.⁴⁹ As eventually enacted, however, the legislation did not contain the requirement of a balanced cross section, merely providing for the committees to consist of trial judges, appellate judges, and members of the bar.⁵⁰

One of the major objectives of the House sponsors of the legislation was to eliminate the “supersession” clause of the 1934 Act, providing that “all laws in conflict with . . . rules [promulgated under the Act] shall be of no further force or effect after such rules have taken effect.”⁵¹ It was asserted that the clause was unnecessary because its original purpose (to

override various procedural rules scattered throughout *1663 the United States Code) had passed.⁵² More importantly, it was argued that the provision was of questionable constitutional validity in light of *INS v. Chadha*,⁵³ because the Rules Enabling Act authorizes the repeal of statutes without conforming to the requirements of Article I.⁵⁴ The Senate, however, did not accept the House provision,⁵⁵ and the Rules Enabling Act amendments were enacted in 1988 without deleting the supersession clause.⁵⁶

The 1988 amendments also attempted to stem the proliferation of local rules of courts and to provide for more public participation in the adoption of local rules. The House subcommittee expressed particular concern that some local court rules were inconsistent with federal rules and statutes.⁵⁷ It noted, however, that the Judicial Conference had taken steps to deal with the problems of local rules by: (1) establishing a Local Rules Project to review all local rules, and (2) amending the national rules⁵⁸ to require that local court rules be prescribed only after giving appropriate public notice and an opportunity to comment.⁵⁹

Congress codified these local rule requirements in the Rules Enabling Act.⁶⁰ It also required each court, other than the Supreme Court, to appoint an advisory committee to study the court's rules of practice and internal operating procedures and make recommendations concerning them.⁶¹ The legislation gave the judicial councils of the circuits authority to modify or abrogate any district court local rules and the Judicial Conference the authority to modify or abrogate the local rules of any court of appeals or other federal court except the Supreme Court.⁶²

*1664 Ironically, while Congress attempted to promote national uniformity and limit the proliferation of local court rules in 1988, it took an entirely different approach just two years later in enacting the Civil Justice Reform Act of 1990.⁶³ That legislation requires each district court to implement its own, individualized civil justice expense and delay reduction plan.⁶⁴

II. CURRENT RULEMAKING PROCEDURES

Although many changes have been made in operating procedures, the rulemaking structure today is essentially the same as that established by the Judicial Conference following the 1958 legislation assigning it the central role in drafting and monitoring the federal rules.⁶⁵ The Conference's Standing Committee supervises the rulemaking process and recommends to the Conference such changes to the rules as it believes are necessary to maintain consistency and promote the interest of justice.⁶⁶

The Standing Committee is assisted by five advisory committees, each of which is responsible for one set of federal rules, i.e., civil, criminal, appellate, bankruptcy, or evidence.⁶⁷ The advisory committees conduct ongoing studies of the operation of their respective rules, prepare appropriate amendments and new rules, draft explanatory committee notes, conduct hearings, and submit proposed changes through the Standing Committee to the Judicial Conference.

A. Committee Membership

The committees are composed of federal judges, practicing lawyers, law professors, state chief justices, and representatives of the Department of Justice. Each committee has a Reporter, a law professor with demonstrated expertise in the committee's subject area, who is responsible for coordinating the committee's agenda and drafting appropriate amendments to the rules and explanatory committee notes. The Administrative Office of the United States Courts, through the Office of the Secretary and the Rules Committee Support Office, coordinates the operational aspects of the rules process, provides administrative and legal support to the committees, and maintains the committees' records.

During congressional hearings in the 1970s and 1980s, it was argued that the rulemaking committees were not broadly based and did not adequately reflect the diversity of the legal community.⁶⁸ In addition, there has been criticism that there are not enough practicing lawyers on the committees.⁶⁹ The present composition of the committees is as follows:

	Committees					
	App.	Bankr.	Civil	Crim.	Evid.	Standing
Attorneys and Professors						
Private Practice Att'ys	3	5	4	3	3	3
Government Att'ys	1	1	1	1	1	1
Law Professors	-	1	1	1	2	2
Federal Judges						
Circuit Judges	4	1	3	1	2	3
District Judges	-	2	3	5	2	5
Other Judges	-	5	-	1	1	-
Other						
State Chief Justice	1	-	1	1	1	1
Total	9	15	13	13	12	15

The advisory committee that drafted the original Federal Rules of Civil Procedure was comprised entirely of lawyers and professors. Judges were added to the committees shortly thereafter and eventually became a large majority on each committee. In the past few

years, however, the number of attorneys vis-a-vis judges on the committees has been increasing. Federal judges presently are a minority on three of the six committees, and they constitute about fifty percent of the membership of the committees as a whole.

The committees' membership is geographically balanced and increasingly represents different perspectives within the legal profession, including members of large and small law firms, government attorneys, "public interest" lawyers, teachers, federal defenders, and criminal defense attorneys. Diversity in membership has increased, but the primary criteria for membership remain professional ability and experience.

Commentators suggested that there be greater turnover in the membership of the committees.⁷⁰ This objective has been achieved. At present, members of the rules committees, as with almost all Judicial Conference committees, serve for terms of three years.⁷¹ Only one reappointment is allowed.⁷² Thus, a member may serve on a committee for a maximum of six years. Chairs of the committees are normally appointed for just one three-year term.⁷³ The current chair of the Standing Committee is District Judge Alicemarie H. Stotler of the Central District of California, who was appointed by the Chief Justice in 1993.

Several of the committees invite persons with important and specialized knowledge to assist them as a resource at committee meetings. The appellate and bankruptcy committees, for example, have included a clerk of court in their deliberations for many years. The clerks are extremely helpful in identifying the practical impact of the rules on administrative operations and on case management. In addition, the bankruptcy committee invites the director of the U.S. trustee program to participate in committee meetings.

***1667 B. Publication of Procedures**

During the early 1980s, the Judicial Conference was criticized for not having published its rulemaking procedures.⁷⁴ In response, in 1983 the Standing Committee developed a written Statement of Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, which incorporated long-standing practices of the rules committees and adopted many suggested procedural improvements.⁷⁵ The publication requirement was codified in the 1988 amendments to the Rules Enabling Act.⁷⁶

The rulemaking procedures are now published as an integral part of the public announcement of all proposed rule amendments when they are distributed to the bench and bar. A new easy-to-read pamphlet, *The Federal Rules of Practice and Procedure: A Summary for Bench and Bar*,⁷⁷ is also included with all distributions to the public and is made available to bar groups and others as a means of fostering knowledge about the rulemaking process and stimulating comments on the rules.

C. Soliciting Comments from the Public

A number of people complained that inadequate advance notice had been provided of proposed

amendments to the rules, thereby depriving the public of a meaningful opportunity to shape the rules before promulgation.⁷⁸ In addition, it was said that the mailing list for distribution of proposed amendments was too limited.⁷⁹ Accordingly, proposals for amendments in the rules did not reach a sufficiently broad cross section of the legal profession.

Today, extensive efforts are made to reach all segments of the bench and bar, as well as organizations and individuals likely to be interested in or affected by proposed changes to the rules. The Administrative Office mails all rules proposals to about forty major legal publishing firms, and they are reprinted in advance sheets. They are also mailed to more than 10,000 persons and organizations on its rules mailing list, including --

- federal judges and other federal court officers,
- U.S. Attorneys and other Department of Justice officials,
- other federal government agencies and officials,
- federal defenders,
- state chief justices,
- state attorneys general,
- legal publications,
- law schools,
- bar associations, and
- any lawyer, individual, or organization who requests distribution.

In addition to circulating the full text of all proposed rule amendments and advisory committee notes, the Administrative Office now prepares “user-friendly” pamphlets summarizing the proposed amendments and highlighting the dates of scheduled public hearings and the cut off date for written comments. The pamphlets are distributed together with the full text of the amendments and advisory committee notes. The bench and bar are informed in all publications that further information and materials may be obtained from the Secretary and the Rules Committee Support Office, whose address and telephone number are provided.

To supplement the general mailings, the advisory committees have sought to obtain important input through special mailings to targeted segments of the legal profession and interested organizations. In September 1994, for example, the Advisory Committee on the Rules of Evidence solicited public comment on statutory changes to Federal Rules of Evidence 413, 414, and 415, dealing with evidence of prior, similar acts in cases involving sexual assault or child molestation.⁸⁰ The mailing was sent to 900 professors of evidence, 40 women’s rights

organizations, and 1000 other interested individuals and organizations.

The goal of the committees is to stimulate greater participation by the bar in the rulemaking process by actively encouraging individuals and organizations to comment on specific amendments to the rules and to identify problems in the operation and effect of the rules generally. *1669 The public comments are extraordinarily helpful and are taken very seriously by the committees. They regularly result in improvements in the amendments, and have led to the withdrawal of proposed amendments.⁸¹

In addition to increasing the amount, readability, and distribution of printed information on the rules, the advisory committees seek input from the bar outside the context of specific pending amendments. The Advisory Committee on Civil Rules has invited bar organizations to send representatives to attend its meetings, and it has, in appropriate cases, solicited the views of lawyers and professors on preliminary proposals before they were drafted.

The advisory committees have also convened special meetings with lawyers and nonlawyers to assess the potential need for rule changes to certain discrete areas of practice. The civil advisory committee, for example, has invited knowledgeable, experienced lawyers to meet with it to explore the problems of class actions and mass tort litigation. The bankruptcy committee has met with chapter 13 lawyers and trustees to examine the impact of the bankruptcy rules on chapter 13 cases. It has also invited publishers to provide input on the bankruptcy forms.

D. Documentation of Changes

People had voiced complaints that the deliberations of the committees were not adequately documented and that it was difficult to discern the rationale for proposed changes to the rules and to discover the minority views of members.⁸² Additionally, some expressed concern that proposed amendments were materially changed after they had been circulated for comment and that no opportunity for further comment had been provided.⁸³

Under current procedures, each action taken by a committee with regard to a proposed amendment is documented and included in the public record. The advisory committees are required to submit a separate “Gap” report, summarizing the public comments and explaining any changes made following publication. The Standing Committee submits a report to the Judicial Conference setting forth the *1670 reasons for all proposed amendments and identifying any changes it made in the recommendations of the advisory committee. After the Conference approves amendments, the Administrative Office transmits to the Supreme Court the text of the proposed amendments, the advisory committee notes, pertinent portions from the advisory committee and Standing Committee reports, and a special report identifying any controversial proposals and explaining the source and nature of the controversy.

If an advisory committee or the Standing Committee makes any “substantial” change in a rule after publication, it normally provides an additional period for public notice and comment. Changes more extensive than the original publication are republished. On the other hand, if a change is similar to, but less extensive than the original publication, it will not generally be

republished. Similarly, purely technical changes and corrections are not normally published for comment.

E. Public Hearings

During the course of the controversy over adoption of the Federal Rules of Evidence in the early 1970s, there were complaints that the judiciary had not held public hearings on the proposed rules.⁸⁴ Written statements were seen as an inadequate substitute for the opportunity of the public to appear in person and engage in a face-to-face dialogue with decisionmakers. Today, public hearings are scheduled on all proposed changes to the rules. Where the subject matter of the changes is controversial, such as the 1992 amendments to Rule 26 of the Federal Rules of Civil Procedure, large numbers of individuals and organizations will ask to testify. On the other hand, many hearings attract few or no requests to testify and are cancelled for lack of public interest.

F. Open Meetings

There had been criticism that the meetings of the Standing Committee and the advisory committees were not open to the public.⁸⁵ Until enactment of the 1988 amendments to the Rules Enabling Act, meetings of the Standing Committee and the advisory committees *1671 had generally been closed to the public. The 1988 amendments to the Rules Enabling Act require open meetings, but allow a committee to go into executive session for cause.⁸⁶

All meetings of the rules committees are open to the public and are announced in advance in the Federal Register and leading legal publications. For the most part, though, public attendance is light, except when committees address controversial items.⁸⁷

G. Open Records

There had been complaints that committee agendas and materials relied upon in promulgating rules were not made available to the public.⁸⁸ Filed comments were made available only to persons with a "legitimate purpose" in seeing them, and minutes, reporters' notes, memoranda, and drafts were not made public until 1980.⁸⁹

Today, all records are open and readily available from the Administrative Office, including minutes of committee meetings, suggestions and comments submitted by individuals and organizations, statements of witnesses, transcripts of public hearings, and memoranda prepared by the reporters. In addition, the reports of the Standing Committee to the Judicial Conference and the minutes of Standing Committee and advisory committee meetings are available on-line through computer-assisted legal research.

All records more than two years old -- dating back to 1935 -- have been placed on microfiche and indexed. They are available for review either at the Administrative Office or at a government repository and may be purchased from a commercial service. Planning has begun on developing an electronic docket of all records and expanding the availability of materials electronically.

H. Length of the Process

The rulemaking process demands exacting and meticulous care in drafting proposed rule changes. It is time-consuming and involves a minimum of seven stages of formal input and review. From beginning to end, it usually takes two to three years for a suggestion to be enacted as a rule, fourteen months of which is directly attributable to the *1672 built-in statutory period for review by the Supreme Court and Congress. This seven-step process is discussed below.

1. Initial consideration by the advisory committee

Proposed changes to the rules are initiated in writing by lawyers, judges, clerks of court, law professors, government agencies, or other individuals and organizations. The Secretary acknowledges each suggestion and distributes it to the appropriate advisory committee, whose Reporter analyzes it and makes appropriate recommendations for consideration by the committee. The suggestions and the Reporter's recommendations are placed on the committee's agenda and normally discussed at its next meeting. The Secretary now advises each person making a suggestion of its eventual disposition. When an advisory committee decides that a particular change in the rules has merit, it normally asks its Reporter to prepare a draft amendment to the rules and an explanatory committee note.

2. Publication and public comment

Once an advisory committee has voted initially to pursue a new rule or an amendment to the rules, it must obtain the approval of the Standing Committee, or its chair, to publish the proposal for public comment. In seeking publication, the advisory committee must explain to the Standing Committee the reasons for its proposal, including any minority or separate views.

Once publication is approved, the Secretary arranges for printing and wide distribution of the proposed amendment to the bench and bar, to publishers, and to the general public. The public is normally given six months to comment on the proposal. During the six-month comment period, one or more public hearings on the proposed changes are scheduled.

3. Consideration of the public comments and final approval by the advisory committee

At the end of the public comment period, the Reporter is required to prepare a summary of the written comments received from the public and the testimony presented at the hearings. The advisory committee then takes a fresh look at the proposed rule changes in light of all the written comments and testimony.

If the advisory committee decides to proceed in final form, it submits the proposed rule or amendment to the Standing Committee for approval. Each proposal must be accompanied by a separate report summarizing the comments received from the public and explaining *1673 any changes made by the advisory committee following the original publication.⁹⁰ The advisory

committee's report must also include minority views of any members who wish to have their separate views recorded. If, on the other hand, the advisory committee decides to make any substantial change in its proposal, it will republish it for further public comment.

4. Approval by the standing committee

The Standing Committee considers the final recommendations of the advisory committee and may accept, reject, or modify them. If the Standing Committee approves a proposed rule change, it will transmit the change to the Judicial Conference with a recommendation for approval, accompanied by the advisory committee's reports and its own report explaining any changes it made. If the Standing Committee makes a modification that constitutes a substantial change from the recommendation made by the advisory committee, the proposal will normally be returned to the advisory committee with appropriate instructions.

5. Judicial Conference approval

The Judicial Conference normally considers proposed amendments to the rules at its September session each year. If it approves the amendments, they are transmitted to the Supreme Court.

6. Supreme Court approval

The Supreme Court has seven months, from the time the proposed amendments are received from the Conference until May 1, to review them, prescribe them, and transmit them to Congress.⁹¹

7. Congressional review

Congress has a statutory period of at least seven months to act on any new rules or amendments prescribed by the Supreme Court. If Congress does not enact positive legislation to reject, modify, or defer the rules or amendments, they take effect as a matter of law on December 1.⁹²

***1674** The lengthy process may be expedited when there is an urgent need to consider an amendment to the rules. This normally occurs when Congress has requested prompt consideration of a proposal or when legislation has been introduced in Congress to amend the rules directly by statute. The fourteen-month delay for review by the Supreme Court and Congress, however, is established by statute and cannot be reduced by the Judiciary.⁹³

I. Supreme Court Review

It has been proposed that the Supreme Court be removed from the rulemaking process and that the rules be promulgated by the Judicial Conference.⁹⁴ The original version of the legislation that became the Rules Enabling Act amendments of 1988, for example, would have removed the Supreme Court from the rulemaking process.⁹⁵ The provision, however, was withdrawn after

Chief Justice Burger informed the chairman of the House Judiciary subcommittee that “[t]he Justices conclude that it would be better to keep the ultimate authority of passing on rulemaking within the Court as it is now, but to allow the Court to defer to the decision of the Judicial Conference.”⁹⁶

On most occasions, the Court has deferred to the Judicial Conference and has prescribed without change proposed rules amendments submitted by the Judicial Conference.⁹⁷ Nevertheless, the Court has accorded serious, independent review to proposed amendments in the 1990s, *1675* deferring a proposed amendment to Rule 4 of the Federal Rules of Civil Procedure in 1991,⁹⁸ approving amendments to Rule 11 of the Federal Rules of Civil Procedure and five civil discovery rules⁹⁹ over three dissents in 1993,¹⁰⁰ and withholding part of the amendments to Rule 412 of the Federal Rules of Civil Procedure in 1994.¹⁰¹ The Court’s recent orders transmitting rules changes to Congress have specified that: “While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.”¹⁰²

Although the length of the rulemaking process would be shortened by eliminating the role of the Supreme Court, the Court’s enormous prestige clearly contributes to the legitimacy and credibility of the process.

III. CONTINUING RENEWAL EFFORTS

Most of the criticisms of the rulemaking process over the past twenty years have been addressed by procedural improvements made by the Judicial Conference and the 1988 amendments to the Rules Enabling Act. Nevertheless, the rules committees are continuing to examine other important procedural issues that have not been fully resolved.

A. Long Range Planning

The judiciary established a permanent long range planning process designed to identify the mission and future directions of the federal courts. The Proposed Long Range Plan for the Federal Courts (Plan) is the first major product of this planning process. With regard to the federal rules, the Plan encourages significant participation by the bar in *1676* the rulemaking process, exclusive adherence to the Rules Enabling Act process, and greater uniformity in federal practice and procedure.¹⁰³

As part of the long range planning process, the Standing Committee on Rules of Practice and Procedure has appointed a long range planning subcommittee to conduct a study of the rulemaking process and make recommendations for procedural improvements. In addition, the advisory committees have initiated their own long range planning efforts. The Advisory Committee on Bankruptcy Rules, for example, has a standing subcommittee on automation that has been active in evaluating the impact of technology and in considering changes to the bankruptcy rules to take advantage of the benefits of automation.¹⁰⁴

Likewise, the bankruptcy, appellate, and civil advisory committees have proposed and circulated for public comment proposed rule amendments that would allow individual courts to permit attorneys to file, sign, and verify documents with the court electronically.¹⁰⁵ If approved through the Rules Enabling Act process, the amendments would take effect on December 1, 1996.¹⁰⁶

B. Greater Participation by the Bar

Despite substantial efforts to persuade attorneys to take the time to suggest improvements in the rules and comment on proposed amendments, the bar is considerably less active than the committees would like. A handful of bar organizations and individuals respond regularly to requests for public comments by providing comprehensive, balanced analyses of proposed rules amendments. But most judges, lawyers, and professors simply do not respond to requests for comments, and those who do, generally oppose specific amendments on an ad hoc basis.¹⁰⁷ Accordingly, the public responses tend to be moderate in number and not necessarily representative of the bench and bar as a whole.

The Proposed Long Range Plan for the Federal Courts encourages an active partnership with the bar in the rulemaking process, both through membership of practicing attorneys on the rulemaking committees and greater participation by attorneys and bar associations in commenting on proposed amendments to the rules.¹⁰⁸ The Plan asks the rules committees to continue their outreach efforts in stimulating lawyers and bar associations to provide practical advice to the committees.¹⁰⁹

As one of his many initiatives to improve judicial administration and service, Administrative Office Director L. Ralph Mecham established a Rules Committee Support Office in 1992 to provide legal and operational support to the Secretary and the rules committees and to provide a higher level of information services to the bar. To stimulate additional responses on rules issues by bar associations, individual lawyers, and academia, the mailing list for the rules is being expanded and rejuvenated. Every six months an additional 200 attorneys and 100 law professors selected at random will be added until an additional 2500 names are added. If no comments are received from addressees for three years, their names will be removed from the list and replaced with others.

The Standing Committee has also requested that the bar associations of each of the states designate an attorney as a point of contact to solicit and coordinate bar comments on proposed amendments. It is anticipated that the bar associations will encourage their members to discuss the rules and provide thoughtful and practical input to the advisory committees. It is also hoped that representatives of the bar will attend committee meetings and hearings.

In an effort to assess the practical operation of the rules, the Advisory Committee on Civil Rules scheduled two conferences in 1995 with members of the bar and academia to discuss class actions and the effectiveness of Rule 23 of the Federal Rules of Civil Procedure. In addition, members of the advisory committee will participate with attorneys and law professors in a conference to consider the strengths and weaknesses of the civil rules generally.

C. Frequency of Rule Changes

The 1958 statute assigning rulemaking responsibilities to the Judicial Conference requires the Conference to conduct a “continuous study of the operation and effect of the general rules of practice and procedure.”¹¹⁰ Contemporary commentators suggested that the rules committees should have ample staff, should engage in grassroots surveys, and should conduct hearings, regional meetings, and discussions with the bar to monitor the rules in practice.¹¹¹ More recently, Justice Scalia stated that it is essential to have constant reform of the federal rules to correct emerging problems.¹¹²

The requirement to conduct a continuous study of the operation and effect of the rules, however, does not compel the conclusion that amendments should be frequent. Nor does it imply that all perceived problems with the rules and all conflicts in case law should be rectified. To the contrary, one of the most persistent criticisms of the rules process is that there are simply too many amendments.¹¹³

Some amendments have been criticized as mere “tinkering” with the rules.¹¹⁴ And it has been suggested that there should be no change *1679 in a rule “unless there is substantial need for the change.”¹¹⁵ One critic even has argued for a moratorium on procedural law reform.¹¹⁶

Too many minor changes to the rules can lead to uncertainty and confusion in the bench and bar.¹¹⁷ Constant changes, moreover, tend to undermine the stability and prestige of the rules as a whole. The challenge, therefore, is to weigh the benefits of a proposed improvement in the rules against the inherent cost of introducing change and possible uncertainty.

Some rule amendments, even though minor, are necessary to implement recent legislation,¹¹⁸ to conform to modern language usage,¹¹⁹ to correct improper statutory cross-references,¹²⁰ and to coordinate with pending congressional action.¹²¹ As a general rule, however, there is now a reluctance to make changes to the rules unless they can be shown to be necessary to correct a serious problem in practice. Although many suggestions for improvements in the rules are received from the bench and bar to clarify or reconcile case law among the circuits, the advisory committees have generally opted to allow case law interpreting the rules take its course.¹²²

*1680 In September 1994, for example, the Advisory Committee on the Rules of Evidence published its tentative decisions not to amend twenty-five evidence rules.¹²³ The committee announced its philosophy that an amendment to a rule should not be undertaken absent a showing either that it is not working well in practice or that it embodies an erroneous policy decision.¹²⁴ The advisory committee pointed out that any amendment in the rules of evidence “will create new uncertainties as to interpretation and unexpected problems in practical application.”¹²⁵

To avoid the appearance of piecemeal changes, the advisory committees have begun to use the device of deferring and “batching” miscellaneous rule changes into a single package of amendments. One possible option for the advisory committees to consider in the future is to prescribe a set schedule for submitting non-urgent rules changes -- perhaps every three to five years. This approach, although appealing, is complicated by unpredictable congressional activity

that increasingly tends to interrupt any schedules or planning efforts. The 103d Congress, for example, passed a comprehensive bankruptcy reform law that will require rules changes,¹²⁶ and the 104th Congress, as part of the Republican “Contract with America,” is considering a number of changes both in civil litigation and criminal law.¹²⁷

It has also been recommended widely that rules changes be predicated on a sounder empirical basis.¹²⁸ To that end, the advisory committees have been increasing their requests for assistance from the Federal Judicial Center to conduct research on litigation practices and the impact of the rules. The Federal Judicial Center conducted a major study of Rule 11 of the Federal Rules of Civil Procedure before the Advisory Committee on Civil Rules proceeded with the 1993 amendments to that rule.¹²⁹ The civil advisory committee *1681 also asked the Federal Judicial Center to conduct studies on the use and operation of protective orders under Rule 26(c), offers of settlement under Rule 68, consensual settlement of class actions under Rule 23, and the effect of mandatory disclosure under the 1993 amendments to Rule 26. The Advisory Committee on Criminal Rules considered the results of the Federal Judicial Center’s study on cameras in the courtroom before approving amendments to Rule 53.¹³⁰

D. Content, Organization, and Style of the Rules

Simplicity and uniformity were central goals of the drafters of the federal rules.¹³¹ There are complaints, however, that the rules are no longer simple and uniform, but have become cumbersome, lengthy, and unpredictable.¹³²

Commentators suggest that fundamental changes are needed and that it is time to take a fresh look at the rules.¹³³ It has also been suggested that it is time to reconsider the trans-substantive character of the rules, so that different categories of cases could be governed by different rules.¹³⁴ Obviously, such sweeping changes would take considerable time to effectuate and would require major input from the bar and academia, empirical research, substantial committee deliberations, and public hearings. The civil and bankruptcy advisory committees have, as part of their long range planning efforts, begun to *1682 think about whether changes of such magnitude will eventually be necessary or desirable.

Apart from changes to substance, there are opportunities to improve the style, consistency, and readability of the rules. Under the leadership of Judge Robert E. Keeton, former chairman of the Standing Committee, efforts have been initiated to redraft the body of rules in clear and concise English -- without substantive change -- following the best conventions of modern statutory revision and the advice of legal writing teachers. There are no present plans to adopt the revised version of the rules, but at an appropriate point in the future -- perhaps integrated with a major revision of the rules -- the “re-styled” language could be substituted for the present language.

The Standing Committee is now assisted by a legal writing consultant and a style subcommittee, and it will publish a guide to clear and simple rule drafting.¹³⁵ The consultant works with the advisory committees and their reporters to promote clear and consistent language in proposed rules amendments.

As part of its long range planning efforts, the committees could also consider eventual integration of all five sets of federal rules into one. The result, for example, might be the consolidation of similar provisions that now appear separately in each of the rules, such as the provisions dealing with computation of time,¹³⁶ courts' and clerks' offices,¹³⁷ and local rules.¹³⁸

E. The Judiciary and Congress

The success of the rulemaking process relies on a delicate balance of authority and continuing cooperation between the judicial and legislative branches of the government. The Rules Enabling Act of 1934, as reaffirmed by Congress in 1988, establishes a statutory structure under which the judiciary prescribes rules of procedure, practice, and evidence for the federal courts, after giving the bench, bar, and public a generous opportunity for input. Congress then retains the ultimate authority to accept, reject, amend, or defer proposed amendments to the rules. The process works exceedingly well when the procedures by which rules are crafted are credible and when mutual respect prevails between the two branches.

***1683** The credibility of the rulemaking process was seriously questioned during the 1970s' controversy over the Federal Rules of Evidence. Complaints were made that proceedings before the rules committees had been closed and that changes had been made in the proposals without public notice or input. Complaints about the procedures, combined with concerns that the rulemakers had exceeded their authority and abridged substantive rights, led opponents to petition Congress to defer or reject the rules.¹³⁹

The credibility of rulemaking procedures has been enhanced by its current openness and accessibility.¹⁴⁰ When proposed changes to the rules are now submitted to Congress, an extensive public record has been developed to support the changes, including careful consideration by expert advisory committees, public comments, public hearings, and four levels of review. Members of Congress can be assured that the changes received thorough consideration and that all interested parties had an opportunity to comment, both in writing and at hearings. By comparison, it is extremely rare for any product of the legislative process to receive such objective consideration, public input, and expert review.

Congress has a legitimate interest in federal rule amendments because even procedurally neutral rules may affect substantive rights, may give a practical advantage to one type of litigant over another, and may require adjustment of comfortable habits and practices.¹⁴¹ Persons and organizations displeased with proposed amendments, accordingly, are likely to exercise their political rights by encouraging Congress to reject or modify specific amendments. Congress, of course, is free under the Rules Enabling Act to make its own independent judgment on the merits of any proposal, but it should -- and normally does -- give considerable deference to rules amendments prescribed by the Supreme Court.¹⁴²

***1684** As the Proposed Long Range Plan for the Federal Courts points out, however, "[i]t is troubling . . . that bills are introduced in the Congress to amend federal rules directly by statute, bypassing the orderly and objective process established by the Rules Enabling Act."¹⁴³ In the 103d Congress, for example, at least thirteen provisions were introduced to amend the federal

rules without following the prescribed statutory procedures.

Most of the provisions dealt with matters of considerable political interest, such as victims' rights,¹⁴⁴ evidence in sexual assault and child molestation cases,¹⁴⁵ and other criminal law issues.¹⁴⁶ For some controversial social policy issues, it is inevitable -- or desirable -- to have policy established by the legislature.¹⁴⁷ By avoiding the Rules Enabling Act process entirely, however, Congress loses the benefit of the extensive record developed by the rules committees, including the public comments and professional review by judges, lawyers, and law professors. Moreover, recent experience shows that some legislation amending the rules may be enacted without any hearings at all, without public input, and without thoughtful review by the bench and bar.

Two examples from the 103d Congress illustrate contrasting ways in which Congress has dealt with controversial statutory amendments to the rules. In the Violent Crime Control and Law Enforcement Act of ***1685** 1994,¹⁴⁸ Federal Rule of Evidence 412 was completely revised and new Rules 413, 414, and 415 were added. The former received substantial public input and careful review by bench and bar. The latter did not.

The proposed revision of Rule 412, commonly known as the "rape shield" rule, was first included in comprehensive criminal legislation introduced in the Senate.¹⁴⁹ It was designed to extend to all criminal cases and all civil litigation the rule's long-standing prohibition against admitting evidence of a victim's past sexual behavior in a case where the defendant has been accused of a crime of sexual abuse. After the Senate bill was introduced, the judiciary committees of both the House and the Senate asked the Judicial Conference to consider the merits of the proposed rule on an expedited basis.¹⁵⁰

The Advisory Committee on the Rules of Evidence drafted a substantially improved version of the Senate rule, circulated it for public comment, and conducted a public hearing.¹⁵¹ The carefully crafted, revised rule met with overwhelming public approval,¹⁵² including approval from women's rights groups,¹⁵³ and was subsequently adopted by the advisory committee, the Standing Committee, and the Judicial Conference.¹⁵⁴ As a result, the House decided not to include a revision of Rule 412 in its version of the crime legislation and chose, instead, to let the rule drafted by the advisory committee take effect in accordance with the normal operation of the Rules Enabling Act.¹⁵⁵

In contrast to the cooperation between Congress and the judiciary in Rule 412, new Federal Rules of Evidence 413, 414, and 415 were added as floor amendments to the Senate crime control bill without public ***1686** comment or hearings and without communication with the rules committees.¹⁵⁶ The new rules will admit evidence of a defendant's past similar acts in a criminal or civil case involving a sexual assault or child molestation offense "for its bearing on any matter to which it is relevant."¹⁵⁷ The rules contain no reference to Federal Rule of Evidence 403, which allows a court to exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, or needless delay. Neither do they reference the hearsay provisions of Article VIII of the Federal Rules of Evidence. Congressional conferees added a provision to the Senate version of the bill specifying

that the new rules would take effect 150 days after enactment, unless the Judicial Conference within that period recommends against them or submits alternate recommendations, in which case the effective date of the rules will be delayed for an additional 150 days.¹⁵⁸

As a practical matter, the only restraints on Congress are self-imposed. They include the existence of the Rules Enabling Act, which has codified a process of openness and inter-branch coordination; the ordinary respect that one branch of government owes the others; and the quality of the work product of the rulemaking process. Obviously, political and social policy imperatives may tempt legislators to bypass the objective and orderly process of the rulemakers in favor of quick and popular results. As the recent experience with Rule 412 shows, however, legislative objectives can be achieved -- with a substantially superior product and in a reasonable time ***1687** -- through adherence at least to the spirit of the Rules Enabling Act.

On occasion, members of Congress work cooperatively with the rules committees, deferring legislative proposals in order to give the rules committees the opportunity to consider them as part of the rulemaking process.¹⁵⁹ Congress also has the option of requesting that the Judicial Conference study a particular subject and report its findings and recommendations. The 1994 crime control legislation, for example, asked the Judicial Conference to evaluate and report on whether the Federal Rules of Evidence should be amended to guarantee that the confidentiality of communications between sexual assault victims and their therapists or counselors will be adequately protected in federal court proceedings.¹⁶⁰

Recent experience, thus, suggests that a de facto dual track procedure might emerge to deal with rules amendments. On the one hand, the great majority of rules changes would continue to be handled through the Rules Enabling Act procedure. On the other hand, proposed changes with political implications might be referred by the judiciary committees of Congress to the rules committees of the Judicial Conference for consideration on an expedited basis.

F. National Uniformity and Local Rules

Local court rules have been criticized by Congress and commentators as a threat to the goal of uniform, simple rules of federal practice and ***1688** a serious trap for lawyers.¹⁶¹ Criticism has also been directed at the sheer number of local rules, which makes it difficult for lawyers to practice effectively in more than one jurisdiction.¹⁶² It has been argued, too, that some local rules are inconsistent with the national rules.¹⁶³

The 1988 amendments to the Rules Enabling Act were designed in part to restrict the use of local rules. They set forth procedural requirements for courts to follow in adopting rules and provide an oversight mechanism to ensure their consistency with each other and with national rules.¹⁶⁴ Nevertheless, there are more than 5000 local rules regulating civil procedure alone, not including standing orders and other local procedural requirements.¹⁶⁵

The Standing Committee established a Local Rules Project in 1985 to review the local rules of the district courts and the rules of the courts of appeals.¹⁶⁶ The project's analysis of the rules and internal operating procedures of the courts of appeals led the Advisory Committee on Appellate

Rules to propose various amendments to the Federal Rules of Appellate Procedure that substitute a single, national rule for local variations.¹⁶⁷ The Local Rules Project has also informed the district courts of problems with their local rules, including inconsistencies with national rules or statutes, and it has devised a uniform numbering system for local civil rules keyed to the numbering of the national rules. Through voluntary cooperation with the courts and the circuit judicial councils, progress is being made toward reducing the number of local rules and improving their content.¹⁶⁸

Federal rule amendments are pending in the Supreme Court that would require local court rules to conform to any uniform numbering system *1689 that the Judicial Conference may prescribe, thereby making it easier for an increasingly national bar to locate a local rule that applies to a particular procedural issue.¹⁶⁹ The amendments would also provide that no local rule imposing a requirement of form may be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.¹⁷⁰ Finally, the rules would prohibit a court from imposing sanctions or other disadvantages for noncompliance with any requirement not set forth in federal law, federal rule, or local court rule, unless the alleged violator has been furnished with actual notice of the requirement in the particular case.¹⁷¹

The Civil Justice Reform Act of 1990 has been seen as an even greater threat to uniformity of federal practice.¹⁷² The Act encourages each court to experiment and innovate procedurally, taking into account the assessments and recommendations of an advisory group of local lawyers and litigants.¹⁷³ It requires the courts to consider six case management “principles and guidelines” prescribed in the statute and authorizes them to include in their plan an additional five “techniques” of litigation management and cost and delay reduction.¹⁷⁴ The principles, guidelines, and techniques set forth in the Act, if adopted by a district court, have been claimed to supersede certain provisions of the Federal Rules of Civil Procedure.¹⁷⁵

Some commentators argue that the Civil Justice Reform Act has resulted in much greater “balkanization”¹⁷⁶ of civil practice and procedure among the ninety-four district courts. In addition, the December 1, 1992 amendments to Federal Rule of Civil Procedure 26, dealing *1690 with pretrial disclosure and discovery, authorize the district courts individually to “opt out” of its provisions, thereby adding further variations to practice among the district courts.¹⁷⁷

The Civil Justice Reform Act, however, contemplates a possible return to greater national uniformity following a review of the results of its mandated pilot programs. The Judicial Conference will consider the results of a comprehensive empirical study assessing the extent to which costs and delays will have been reduced as a result of the Act’s pilot programs and experimentation.¹⁷⁸ The Conference must submit a report to Congress by December 31, 1996, recommending whether the Act’s principles and guidelines should be made mandatory and incorporated in the federal rules. The Conference is further required to “initiate” appropriate changes to the federal rules to implement any changes recommended.¹⁷⁹

Can greater national uniformity in federal practice and procedure be achieved? Probably so -- but not before the period of experimentation and evaluation required by the Civil Justice Reform Act has been concluded. The Proposed Long Range Plan for the Federal Courts recognizes that some

local rules are appropriate to account for differing local conditions and to allow experimentation with new procedures.¹⁸⁰ It declares, however, that the long term emphasis of the courts should be on promoting nationally uniform rules of practice and procedure.¹⁸¹ To this end, the Plan calls for the Judicial Conference and the circuit judicial councils to exercise their statutory authority¹⁸² to review local rules and reduce the number of ***1691** local rules and standing orders.¹⁸³

CONCLUSION

The organizational structure and the procedural approach of the rulemaking process are largely accepted as fundamentally sound by Congress, the bench, and the bar. Nevertheless, specific procedural aspects of the process have been criticized in recent years. In response, the process has been reexamined and periodically renewed as part of: (1) the Judicial Conference's "fresh look" at the process in the 1980s; (2) the five-year review of rulemaking by Congress that culminated in the 1988 amendments to the Rules Enabling Act; and (3) the judiciary's ongoing long range planning efforts.

Enormous progress has been made toward opening the rulemaking process and to stimulating participation by the bench, bar, academia, and the public. All activities of the rules committees are documented and readily accessible. Several important opportunities and challenges, however, remain to be addressed by the rules committees. The most common complaints are that the rules are not as simple, well written, and predictable as they once were and that federal practice is far less uniform than it should be. Moreover, Congress on occasion does not adhere to the time-tested and orderly process established by the Rules Enabling Act.

The newly approved Long Range Plan for the Federal Courts recognizes these problems and calls upon the judiciary to place greater emphasis on adopting rules that promote simplicity in procedure, fairness in administration, and the just, speedy, and inexpensive determination of litigation. It also calls for adherence to the Rules Enabling Act process, greater uniformity in federal practice, fewer local rules, and greater participation by the bar in the rulemaking process. The recommendations of the Plan, together with ongoing scrutiny by the bench, bar, academia, Congress, and the public, will ensure the continuing renewal of the federal rulemaking process.

Footnotes

^a J.D., Harvard Law School; A.B., Columbia University. Assistant Director for Judges Programs, Administrative Office of the United States Courts and Secretary to the Judicial Conference Standing Committee on Rules of Practice and Procedure. The views expressed in this Article are the author's own.

¹ 28 U.S.C. s 331 (1988).

² Rules Enabling Act: Hearings on H.R. 4144 Before the Subcomm. on Courts, Civil

Liberties and the Administration of Justice of the House Comm. on the Judiciary, 98th Cong., 1st & 2d Sess. 12 (1983 & 1984) [hereinafter 1983-84 Hearings] (statement of Judge Edward Thaxter Gignoux, Judicial Conference of the United States). The success of the Federal Rules of Civil Procedure has been described as “quite phenomenal.” Charles A. Wright, *Law of Federal Courts* s 62, at 429 (5th ed. 1994); see also Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. Pa. L. Rev. 2237, 2237 (1989) (describing Rules as “a major triumph of law reform”); Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. Pa. L. Rev. 1901, 1905-07 (1989) (describing Rules as a “great success” and cautioning against utilizing Rules to erect barriers to courts).

³ Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* , s 1005 (2d ed. 1987). See, e.g., H.R. Rep. No. 889, 100th Cong., 2d Sess. 27 (1988); Howard Lesnick, *The Federal Rule-Making Process: A Time for Re-examination*, 61 A.B.A. J. 579, 579 (1975).

⁴ The term “federal rules” is used to collectively describe the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Bankruptcy Procedure, the Federal Rules of Appellate Procedure, the Federal Rules of Evidence, the Rules Governing Section 2254 Cases in the United States District Courts, and the Rules Governing Proceedings in the United States District Courts Under Section 2255 of Title 28, United States Code.

⁵ Committee on Long Range Planning, Judicial Conference of the U.S., *Proposed Long Range Plan for the Federal Courts recommendation 30*, at 54 (2d prtg. 1995) [hereinafter 1995 Proposed Long Range Plan]; see also *infra* note 7.

⁶ 1995 Proposed Long Range Plan , *supra* note 5, at 54; see also *infra* note 7.

⁷ 60 Fed. Reg. 30,317 (1995). The Judicial Conference’s Long Range Planning Committee prepared the Plan following consultation with the other Conference committees, wide distribution within and outside the judiciary, and public comments and hearings.

⁸ See, e.g., Winifred R. Brown, *Federal Judicial Ctr., Federal Rulemaking: Problems and Possibilities* (1981); Warren E. Burger, *The State of the Federal Judiciary, 1979*, 65 A.B.A. J. 358, 360 (1979); Symposium: *The Rule-Making Function and the Judicial Conference of the United States*, 21 F.R.D. 117 (1957) [hereinafter Symposium].

⁹ See 1995 Proposed Long Range Plan , *supra* note 5, at 54.

¹⁰ See, e.g., Wright & Miller, *supra* note 3, s 1001; see generally Joseph R. Biden, Jr., *Congress and the Courts: Our Mutual Obligation*, 46 *Stan. L. Rev.* 1285 (1994); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 *U. Pa. L. Rev.* 1015 (1982); A. Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 *U. Pa. L. Rev.* 291 (1958); Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 *Minn. L. Rev.* 375 (1992) [hereinafter Mullenix, *Counter-Reformation*]; Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 *Minn. L. Rev.* 1283 (1993); Roscoe Pound, *The Rule-Making Power of the Courts*, 12 *A.B.A. J.* 599 (1926); John H. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 *Ill. L. Rev.* 276 (1928).

The Supreme Court recognizes the ultimate power of Congress to regulate the practice and procedure of federal courts and has declared that Congress may exercise that power by delegating it to the judiciary to make rules not inconsistent with the Constitution or federal statutes. See *Hanna v. Plumer*, 380 U.S. 460, 472-74 (1965); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941).

Judge Weinstein points out that rulemaking falls within an area where activities of the legislative and judicial branches merge and that historically there has been a “practical accommodation” between the two branches. Jack B. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 *Colum. L. Rev.* 905, 916, 922 (1976). Judge Weinstein’s law review article is an abbreviated version of his book. See Jack B. Weinstein, *Reform of Court Rule-Making Procedures* (1977).

¹¹ Act of June 19, 1934, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. ss 331,2071-77 (1988 & Supp. V 1993)); see also *Hanna*, 380 U.S. at 472-74.

¹² 28 U.S.C. s 331 (1988 & Supp. V 1993). While the 1934 Act applied explicitly only to civil actions at law, the Court had long-standing rulemaking authority over equity and admiralty practice. See, e.g., Act of May 8, 1792, ch. XXXVI, 1 Stat. 275.

¹³ Order of June 3, 1935, Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774, 774-75 (1935) (ordering committee “to prepare and submit to the Court a draft of a unified system of rules”).

¹⁴ Final Report of the Advisory Committee on Rules for Civil Procedure, at V (Nov. 4, 1937).

¹⁵ Fed. R. Civ. P. 86(a).

- ¹⁶ Act of June 29, 1940, ch. 445, 54 Stat. 688. This Act was superseded by the Rules Enabling Act amendments of 1988 and is now incorporated in 28 U.S.C. s 2072(a) (1988). The Court had been given authority in 1933 to prescribe rules for criminal proceedings after verdict. Act of Feb. 24, 1933, ch. 119, 47 Stat. 904.
- ¹⁷ Report of the Advisory Committee on Federal Rules of Criminal Procedure (1944).
- ¹⁸ Fed. R. Crim. P. 59.
- ¹⁹ Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356 (codified at 28 U.S.C. s 331 (1988 & Supp. V 1993)).
- ²⁰ Id. s 331.
- ²¹ 28 U.S.C. ss 2072, 2073.
- ²² Judicial Conference of the U.S. , Reports of the Proceedings of the Judicial Conference of the United States 6-7 (1958).
- ²³ Id.; see also Albert B. Maris, Federal Procedural Rule-Making: The Program of the Judicial Conference, 47 A.B.A. J. 772, 772 (1961).
- ²⁴ 383 U.S. 1029 (1966).
- ²⁵ 389 U.S. 1063 (1968).
- ²⁶ 411 U.S. 989 (1973). Statutory authority to promulgate bankruptcy rules was provided in 1964. Act of Oct. 3, 1964, Pub. L. No. 88-623, s 1, 78 Stat. 1001 (codified as amended at 28 U.S.C. s 2075 (1988)).
- ²⁷ Act of Sept. 28, 1976, Pub. L. No. 94-426, s 1, 90 Stat. 1334 (codified as amended at 28 U.S.C. s 2254, 2255 (1988 & Supp. V 1993)).
- ²⁸ Fed. R. Crim. P. 58. This rule was added in 1990 and essentially restated the prior misdemeanor rules.

29 Between 1937 and 1972, the Supreme Court transmitted new rules or rules amendments to Congress on 14 occasions.

30 Order of Nov. 20, 1972, 56 F.R.D. 183, 184 (S. Ct. 1972).

31 See H.R. Rep. No. 422, 99th Cong., 1st Sess., 12-14, 20-21 (1985); Dissent of Justice Douglas to submission of the proposed Federal Rules of Evidence, 409 U.S. 1132 (1973); see also Charles A. Wright, Book Review of Jack B. Weinstein, Reform of Court Rule-Making Procedures, 9 St. Mary's L.J. 652, 653-54 (1978) [hereinafter Wright, Book Review].

32 Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (codified at 40 U.S.C. s 472 (1988)).

33 See Fed. R. Evid. 501.

34 28 U.S.C. s 2074(b) (1988).

35 Id.

36 A list of the instances of congressional intervention is set forth in H.R. Rep. No. 422, supra note 31, at 8-9. Most recently, in 1994, Congress took the unprecedented step of enacting revised Federal Rule of Evidence 412 that had been approved by the Judicial Conference, enacting portions of the Conference proposal that had been withheld by the Supreme Court. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, s 40141, 108 Stat. 1796, 1918 (codified in scattered sections of 42 U.S.C.).

37 See Weinstein , supra note 10, at 316-17; Lesnick, supra note 3, at 580-81.

38 William L. Hungate, Changes in the Federal Rules of Criminal Procedure, 61 A.B.A. J . 1203, 1207 (1975).

39 Burger, supra note 8, at 360.

40 Id. The functions of the Federal Judicial Center are set forth generally at 28 U.S.C. s 620.

41 See Brown , supra note 8.

42 See Brown , supra note 8.

43 See Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, 98 F.R.D. 337, 347 (1983).

44 See, e.g., H.R. Rep. No. 889, 100th Cong., 2d Sess. 27 (1988) (describing subcommittee's review of rulemaking process from 1983 to 1988).

45 See 1983-84 Hearings, supra note 2; Rules Enabling Act of 1985: Hearings on H.R. 2633 and H.R. 3550 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 99th Cong., 1st Sess. (1985) [hereinafter 1985 Hearings].

46 See H.R. Rep. No. 889, supra note 44, at 3-4. Congress eventually enacted the bill. See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642, 4649 (1988) (codified as amended at 28 U.S.C. ss 2071-2075 (1988 & Supp. V 1993)).

47 28 U.S.C. s 2073(a)(2)(b); see also H.R. Rep. No. 889, supra note 44, at 3.

48 See H.R. Rep. No. 889, supra note 44, at 3.

49 1985 Hearings, supra note 45, at 248 (statement of Judge Edward Thaxter Gignoux).

50 See 28 U.S.C. s 2073(a)(2).

51 Id. s 2072(b).

52 See H.R. Rep. No. 889, supra note 44, at 28.

53 462 U.S. 919 (1983).

54 See H.R. Rep. No. 889, supra note 44, at 28; see also H.R. Rep. No. 422, supra note 31, at 16-17. In *Chadha*, the Court held that the one-house veto provision of the Immigration and Naturalization Act, under which either the House or the Senate could by resolution invalidate an executive branch decision to allow a deportable alien to remain in the United

States, was unconstitutional because Article I of the Constitution requires all legislation to be passed by both the House and the Senate and either signed by the President or repassed by both the House and the Senate over the President's veto. See *INS v. Chadha*, 462 U.S. 919, 956-59 (1983).

⁵⁵ See H.R. Rep. No. 889, *supra* note 44, at 3.

⁵⁶ Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified as amended at 28 U.S.C. ss 2071-2075 (1988 & Supp. V 1993)).

⁵⁷ See H.R. Rep. No. 422, *supra* note 31, at 14-15, 17; see also Daniel R. Coquillette et al., *The Role of Local Rules*, 75 A.B.A. J. 62, 64-65 (1989); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. Pa. L. Rev. 1999, 2018-26 (1989).

⁵⁸ Fed. R. Civ. P. 83; Fed. R. Crim. P. 57 .

⁵⁹ See H.R. Rep. No. 889, *supra* note 44, at 28-29.

⁶⁰ 28 U.S.C. s 2071(b) (1988).

⁶¹ *Id.* s 2077(b) (Supp. V 1993).

⁶² *Id.* ss 331, 2071(c) (1988).

⁶³ Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. ss 471-482 (Supp. V 1993)). The impetus for the Rules Enabling Act amendments of 1988 came from the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice. See *supra* notes 44-56 and accompanying text. The driving force behind the Civil Justice Reform Act was the Senate Judiciary Committee and its chairman, Senator Joseph R. Biden, Jr. See, e.g., 136 Cong. Rec. S. 407, S. 414 (daily ed. Jan. 25, 1990) (statement of Sen. Biden).

⁶⁴ 28 U.S.C. ss 471, 472 (Supp. V 1993); see Part III, *infra*; see also Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 Stan. L. Rev. 1589 (1994) (discussing inconsistencies between 1988 and 1990 statutes).

⁶⁵ The 1988 amendments to the Rules Enabling Act codified the committee structure

established by the Conference in 1958. See 28 U.S.C. s 2073(a), (b) (1988).

⁶⁶ Id. s 331.

⁶⁷ The Advisory Committee on the Rules of Evidence was discharged in 1975 and reestablished in 1993. Judicial Conference of the U.S., Reports of the Proceedings of the Judicial Conference of the United States 80 (1992) [[[hereinafter 1992 Judicial Conference Reports]].

⁶⁸ See H.R. Rep. No. 422, supra note 31, at 24; American Bar Association, Policy on the Rules Enabling Act, reprinted in 1983-84 Hearings, supra note 2, at 46, 51; Lesnick, supra note 3, at 581.

⁶⁹ The American Bar Association, for example, has proposed that “practicing lawyers” comprise a majority of the rules committees. Resolution of the ABA House of Delegates, Aug. 9-10, 1994.

⁷⁰ See, e.g., 1985 Hearings, supra note 45, at 64 (statement of the American Bar Association).

⁷¹ Judicial Conference of the U.S., Reports of Proceedings of the Judicial Conference of the United States 60 (1987) [hereinafter 1987 Judicial Conference Reports] (establishing current membership policies). It has been suggested that the terms of office of committee chairs and members, once viewed as too long in the rules context, now might not be long enough. See 1995 Proposed Long Range Plan , supra note 5, recommendation 46, at 73.

⁷² See 1987 Judicial Conference Reports , supra note 71, at 60.

⁷³ See 1987 Judicial Conference Reports , supra note 71, at 60.

⁷⁴ See Lesnick, supra note 3, at 580; see also 1985 Hearings, supra note 45, at 57, 70-71 (statement of Professor Paul F. Rothstein, American Bar Association); 1983-84 Hearings, supra note 2, at 87 (statement of Rep. Kastenmeier); id. at 43-44 (statement of James F. Holderman, American Bar Association).

⁷⁵ See Rules of Civil Procedure, Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, 98 F.R.D. 337, 347 (1983). The statement, however, did not include a requirement of open committee meetings.

- ⁷⁶ See 28 U.S.C. s 2073(a)(1) (1988).
- ⁷⁷ Administrative Office of the U.S. Courts, *The Federal Rules of Practice and Procedure: A Summary for Bench and Bar* (1993).
- ⁷⁸ See 1983-84 Hearings, *supra* note 2, at 46 (statement of the American Bar Association’s Criminal Justice Section); *id.* at 36 (statement of Alan B. Morrison, Director, Public Citizen, Litigation Group).
- ⁷⁹ See 1985 Hearings, *supra* note 45, at 47 (statement of Professor Paul F. Rothstein, American Bar Association).
- ⁸⁰ Congress enacted the new evidence rules as part of the Violent Crime Control and Law Enforcement Act of 1994, *supra* note 36, s 320935.
- ⁸¹ For example, the Advisory Committee on Criminal Rules deferred action on proposed amendments to Criminal Rules 10 and 43 in response to generally negative written comments and public testimony. The proposed amendments would have permitted the use of video conferencing in arraignments and in other pretrial sessions when the accused was not present in the courtroom. H.R. Doc. No. 65, 104th Cong., 1st Sess. 15-16 (1995).
- ⁸² See Lesnick, *supra* note 3, at 580.
- ⁸³ See Wright, *supra* note 31, at 656.
- ⁸⁴ See, e.g., 1983-84 Hearings, *supra* note 2, at 44 (statement of James F. Holderman, American Bar Association); Lesnick, *supra* note 3, at 580.
- ⁸⁵ See, e.g., 1983-84 Hearings, *supra* note 2, at 34-36 (statement of Alan B. Morrison, Director, Public Citizen, Litigation Group) (describing process as “secretive”); *id.* at 125-28 (statement of Richard M. Schmidt, Jr., General Counsel, American Society of Newspaper Editors).
- ⁸⁶ 28 U.S.C. s 2073(c) (1988). The authority has been exercised rarely.
- ⁸⁷ The April 1994 meeting of the Advisory Committee on Criminal Rules, which included a

discussion of cameras in the courtroom, was televised on C-SPAN.

⁸⁸ 1983-84 Hearings, *supra* note 2, at 34, 35 (statement of Alan B. Morrison, Director, Public Citizen Litigation Group).

⁸⁹ See Brown, *supra* note 8, at 23, 27; cf. 1983-84 Hearings, *supra* note 2, at 36-39 (statement of Alan B. Morrison, Director Public Citizen Litigation Group) (noting that filed comments were not widely read).

⁹⁰ This report is commonly known as the “Gap” report. See *supra* Part II.D (discussing process of “Gap” report).

⁹¹ See 28 U.S.C. ss 2074, 2075 (1988 & Supp. V 1993).

⁹² See *id.* The effective date of the Federal Rules of Bankruptcy Procedure (and other procedural requirements) were made consistent with the other federal rules by the Bankruptcy Reform Act of 1994. See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, s 104(e), (f), 1994 U.S.C.C.A.N. (108 Stat.) 4106. Previously, the effective date had been 90 days after the Chief Justice reported the changes to Congress, i.e., about August 1. See 28 U.S.C. s 2075 (1988).

⁹³ See 28 U.S.C. ss 2074, 2075 (1988 & Supp. V 1993).

⁹⁴ See Weinstein , *supra* note 10, at 96-104, 147-49; see also Amendments to Rules of Civil Procedure for the U.S. District Courts, 374 U.S. 861, 869-70 (1963) (statement of Justices Black and Douglas) (opposing submission of proposed amendments to the Federal Rules of Civil Procedure); Reporter’s Note on Order of Nov. 20, 1972, 409 U.S. 1132, 1133 (1963) (Douglas, J., dissenting) (arguing that Court is “mere conduit” to Congress and its approval of rules amendments is only perfunctory).

⁹⁵ H.R. 4144, 98th Cong., 1st Sess. (1983).

⁹⁶ Letter from Warren E. Burger, Chief Justice of the United States, to Chairman Robert W. Kastenmeier, reprinted in 1983-84 Hearings, *supra* note 2, at 195. The Conference of Chief Justices of the States also opposed elimination of a role for the Supreme Court, arguing that “the rule-making power is an inherent power necessary to the functioning of the judicial branch of government and ... should be vested only in the Supreme Court itself.” Letter of March 6, 1984 from Connecticut Chief Justice John A. Speziale to Robert W. Chairman Kastenmeier, reprinted in 1983-84 Hearings, *supra* note 2, at 231.

- ⁹⁷ In voting to prescribe the 1993 amendments to the Federal Rules of Civil Procedure, Justice White stated that the Court should defer to the Judicial Conference and its committees if they have a rational basis for the proposed amendments to the rules. Justice White saw the Court's role as limited to transmitting the Judicial Conference's recommendations without change and without careful study, as long as the rules committee system has acted with integrity. See Communication from the Chief Justice, the Supreme Court of the United States, Transmitting Amendments to the Federal Rules of Civil Procedure and Forms, Pursuant to 28 U.S.C. s 2072, 113 S. Ct. 476, 575, 578-79 (1992) [hereinafter Amendments to the Federal Rules of Civil Procedure] (statement of Justice White).
- ⁹⁸ Letter of Transmittal from William H. Rehnquist, Chief Justice of the United States to the U.S. Congress, 500 U.S. 964 (1991) (transmitting amendments to Federal Rules of Criminal Procedure).
- ⁹⁹ Amendments to the Federal Rules of Civil Procedure, *supra* note 97, at 478 (granting order approving amendments to Federal Rules of Civil Procedure).
- ¹⁰⁰ Amendments to the Federal Rules of Civil Procedure, *supra* note 97, at 581-87 (Scalia, Thomas, Souter, J.J., dissenting).
- ¹⁰¹ Communication from the Chief Justice, the Supreme Court of the United States, Transmitting an Amendment to the Federal Rules of Evidence as Adopted by the Court, Pursuant to 28 U.S.C. s 2076, 114 S. Ct. 682, 684-85 (1994) [hereinafter Communication from the Chief Justice] (noting in letter to John F. Gerry, Chair of the Executive Committee of the Judicial Conference, that Court withheld Rule 412); see *infra* notes 148-58 and accompanying text.
- ¹⁰² See Letter of Transmittal from William H. Rehnquist, Chief Justice of the United States, to Thomas S. Foley, Speaker of the U.S. House of Representatives (Apr. 22, 1993), reprinted in Amendments to the Federal Rules of Civil Procedure, *supra* note 97, at 477.
- ¹⁰³ 1995 Proposed Long Range Plan , *supra* note 5, recommendation 30, at 54.
- ¹⁰⁴ As a result of the subcommittee's efforts, Rule 9036 of the Federal Rules of Bankruptcy Procedure took effect on August 1, 1993, authorizing the bankruptcy courts, or their designees, to send required notices by electronic means, rather than by mail, with the consent of the recipients. Fed. R. Bankr. P. 9036. The rule is designed to expedite cases

and reduce costs to litigants and the courts by allowing creditors to receive information on meetings of creditors, discharges, and other events by electronic transmission on their own computer terminals. *Id.* advisory committee's note.

¹⁰⁵ See Fed. R. App. P. 25(a)(2)(D) (proposed amendments); Fed. R. Bankr. P. 5005(a)(2) (proposed amendments); Fed.R.Civ.P. 5(e) (proposed amendments), in Committee on Rules of Practice and Procedure of the Judicial Conference of the U.S., Request for Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, 156 F.R.D. 339, 15, 113 (1994) [hereinafter Proposed Amendments].

¹⁰⁶ See 28 U.S.C. s 2074(a) (1988 & Supp. V 1993).

¹⁰⁷ Professor Hazard has suggested that most members of the bar and the public have little that is worth saying about procedural rules and do not take advantage of the abundant opportunity they have to provide input. Geoffrey C. Hazard, Jr., *Undemocratic Legislation*, 87 *Yale L.J.* 1284, 1291 (1978) (reviewing Weinstein, *supra* note 10).

¹⁰⁸ 1995 Proposed Long Range Plan, *supra* note 5, recommendation 30 commentary, at 54-55.

¹⁰⁹ 1995 Proposed Long Range Plan, *supra* note 5, recommendation 30 commentary, at 54-55. In proposing the 1958 legislation that required the Judicial Conference to conduct a "continuous study of the operation and effect of the [federal] rules," it was contemplated that the bar would have an active and important part in formulating the rules. "[E]very member of the bar [[[should have] an ample opportunity to set forth his views, have them debated, and have them decided." Symposium, *supra* note 8, at 125 (statement of Chief Judge John Biggs, Jr., former Chief Judge of the Third Circuit). "What ... lawyers expect and have a right to expect is an opportunity to state [their] view and assurances they will be given consideration." *Id.* at 120 (remarks of Thomas Scanlon, President of the Seventh Circuit Bar Association, former Chairman of the Committee on Civil Procedure of the Indiana Bar Association); see also *id.* at 118 (statement of Chief Justice Earl Warren) (agreeing with Chief Judge Biggs that bar will have active and important part in formulation of rules).

¹¹⁰ 28 U.S.C. s 331 (1988 & Supp. V 1993).

¹¹¹ See Symposium, *supra* note 8, at 123-24 (statement of Chief Judge John Biggs, Jr., former Chief Judge of the Third Circuit); *id.* at 131-32 (statement of Professor James W. Moore). The vision of activist committees with permanent monitoring capabilities, however, never

came to pass. In fact, for many years Congress included a strict limit on funding for the rules committees in the judiciary's annual appropriations.

¹¹² Amendments to the Federal Rules of Civil Procedure, *supra* note 97, at 581, 586-87 (Scalia, Thomas, Souter, J.J., dissenting).

¹¹³ See Wright, *supra* note 2, at 435. Professor Wright noted that the criminal rules “have been amended so frequently that even scholars in the field find it difficult to follow the constant changes or to be certain what a particular rule provided at a particular time.” *Id.* Likewise, he pointed out his difficulty in knowing what appellate rules were in effect at a given time, because four different sets of amendments to the Federal Rules of Appellate Procedure had recently been adopted or were proceeding to adoption. Charles A. Wright, Foreword: The Malaise of Federal Rulemaking, 14 *Rev. Litig.* 1, 9 (1994) [hereinafter Wright, Foreword].

¹¹⁴ Order Prescribing Amendments to the Federal Rules of Civil Procedure, 446 U.S. 995, 1000 (1980) (Powell, J., dissenting); see also Michael E. Tigar, Pretrial Case Management Under the Amended Rules: Too Many Words for a Good Idea, 14 *Rev. Litig.* 137, 138 (1994) (arguing that there has been such “tinkering and fiddling” with Federal Rules of Civil Procedure that rulemakers are defeating primary objective of a “just, speedy, and inexpensive determination of every action”).

¹¹⁵ See John P. Frank, The Rules of Civil Procedure -- Agenda for Reform, 137 *U. Pa. L. Rev.* 1883, 1884-85 (1989).

¹¹⁶ See Stephen B. Burbank, Ignorance and Procedural Law Reform: A Call for a Moratorium, 59 *Brook. L. Rev.* 841 (1993).

¹¹⁷ See Frank, *supra* note 115, at 1884-85.

¹¹⁸ Congress, for example, enacted comprehensive bankruptcy reform legislation in 1984, 1986, and 1994, effecting both substantive and procedural changes, including establishment of a new court system, expansion of the U.S. trustee system, addition of Chapter 12 for family farmers, inclusion of numerous commercial and consumer bankruptcy changes, and addition of new procedural requirements. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333; Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088; Bankruptcy Reform Act of 1994, *supra* note 92. The first two statutes required extensive changes in the Federal Rules of Bankruptcy Procedure, which took effect in 1987 and 1991. H.R. Doc. No. 54, 100th Cong., 1st Sess.

152 (1987); H.R. Doc. No. 80, 102d Cong., 1st Sess. 170 (1991). Rules changes to accommodate the 1994 legislation are presently under consideration by the Advisory Committee on Bankruptcy Rules.

119 Each set of federal rules was amended in the mid-1980s to eliminate gender-specific language.

120 For example, the Judicial Conference in September 1994 approved an unpublished amendment to Fed. R. Crim. P. 49(e) to delete a reference to an abrogated section of the U.S. Code. Judicial Conference of the U.S., Reports of the Proceedings of the Judicial Conference of the United States 67 (1994) [[[hereinafter 1994 Judicial Conference Reports]].

121 See *infra* Part III.E (discussing relationship between judiciary and Congress).

122 To the contrary, in 1992 the Advisory Committee on Civil Rules proposed a general revision of the summary judgment rule, Fed. R. Civ. P. 56, that would have codified case law. The proposal, however, was rejected by the Judicial Conference. 1992 Judicial Conference Reports , *supra* note 67, at 82.

123 Proposed Amendments, *supra* note 105, at 484.

124 Proposed Amendments, *supra* note 105, at 484.

125 Proposed Amendments, *supra* note 105, at 484.

126 Bankruptcy Reform Act of 1994, *supra* note 92.

127 See Common Sense Legal Reform Act, H.R. 10, 104th Cong., 1st Sess. (1995); Taking Back Our Streets Act, H.R. 3, 104th Cong., 1st Sess. (1995).

128 The 1993 amendments to the Federal Rules of Civil Procedure, for example, were criticized for being promulgated without awaiting the results of the empirical studies carried out under the Civil Justice Reform Act of 1990. See Amendments to the Federal Rules of Civil Procedure, *supra* note 97, at 585-86 (Scalia, Thomas, Souter, J.J., dissenting); see also Burbank, *supra* note 116, at 844-46; Linda S. Mullenix, Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking, 46 Stan. L. Rev. 1393, 1396 (1994).

- ¹²⁹ See Elizabeth C. Wiggins et al., *The F.J.C. Study of Rule 11*, F.J.C. Directions 3 (Nov. 1991) (summarizing results of three separate analyses of Rule 11 activity in cases filed in five federal district courts); see also Fed. R. Civ. P. 11 advisory committee's note 1993 (listing various empirical studies that committee considered).
- ¹³⁰ Fed. R. Crim. P. 53. The advisory committee and the Standing Committee proposed an amendment to Fed. R. Crim. P. 53 that would have removed the rule's absolute prohibition on cameras in the courtroom in criminal cases, but the proposal was rejected by the Judicial Conference. 1994 Judicial Conference Reports, *supra* note 120, at 67.
- ¹³¹ See Burbank, *supra* note 10, at 1042-98; Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 *Stan. L. Rev.* 1447, 1449, 1483 (1994).
- ¹³² See Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 *U. Pa. L. Rev.* 1925, 1941 (1989) [hereinafter Burbank, *Transformation*]; Frank, *supra* note 115, at 1884-85.
- ¹³³ See generally Frank, *supra* note 115, at 1884-85.
- ¹³⁴ See Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 *U. Chi. L. Rev.* 494, 547 (1986) (arguing that trans-substantive premise of rules has proved "unworkable"); Mark C. Weber, *The Federal Civil Rules Amendments of 1993 and Complex Litigation: A Comment on Transsubstantivity and Special Rules for Large and Small Federal Cases*, 14 *Rev. Litig.* 113, 114-15 (1994) (suggesting need for special rules for small cases). Compare Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Body of Non-Trans-Substantive Rules of Civil Procedure*, 137 *U. Pa. L. Rev.* 2067, 2067 (1989) (arguing that rules must be applied trans-substantively, and that process is not competent to develop process of rules to be applicable to only one subject area) with Burbank, *Transformation*, *supra* note 132, at 1934-35 (arguing that legislative history does not support trans-substantive application of rules). The Civil Justice Reform Act requires the district courts to consider systems to separate civil cases into different "tracks," with different pretrial requirements based on the degree of a case's complexity, the time the case requires for trial preparation, and the resources it will require. 28 U.S.C. s 473(a) (Supp. V 1993).
- ¹³⁵ Bryan A. Garner, *Guidelines for Drafting and Editing Court Rules* (forthcoming 1995).
- ¹³⁶ See Fed. R. Bankr. P. 9006; Fed. R. Civ. P. 6; Fed. R. Crim. P. 45.

- ¹³⁷ See Fed. R. App. P. 45; Fed. R. Bankr. P. 5001; Fed. R. Civ. P. 77; Fed. R. Crim. P. 56.
- ¹³⁸ See Fed. R. App. P. 47; Fed. R. Bankr. P. 9029; Fed. R. Civ. P. 83; Fed. R. Crim. P. 57.
- ¹³⁹ Representative Kastenmeier suggested that “as a result of the shadowy nature of the rulemaking process, a number of proposed rules changes” were rejected by Congress in the 1970s and early 1980s. 1983-84 Hearings, *supra* note 2, at 154 (statement of Rep. Kastenmeier from Congressional Record of Oct. 18, 1983).
- ¹⁴⁰ Professor Wright suggests, however, “that the rulemaking process worked far better when it was carried on in private.” Wright, Foreword, *supra* note 113, at 2-3 n.6.
- ¹⁴¹ It has been suggested that some amendments pushed “the rulemaking process into controversial uncharted areas of law and this has been affecting the rights of litigants in a fashion more likely to create the kind of pressure from the public and the legal profession that generates congressional response.” Robert N. Clinton, Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts, 63 Iowa L. Rev. 15, 52 (1977). Any amendments, for example, that are seen as affecting the balance between the prosecution and the defense in criminal cases are likely to generate a congressional response.
- ¹⁴² William L. Hungate, Changes in the Federal Rules of Criminal Procedure, 61 A.B.A. J. 1203, 1207 (1975). Hungate states:
The result of [the judiciary’s rulemaking] procedure is that any change proposed by the Supreme Court has received careful consideration by a number of able people. This does not mean that we in Congress should forgo our responsibility to make an independent judgment on the merit of any proposal. It does mean, however, that we should accord a healthy respect to any amendment proposed by the Supreme Court.
Id. Judge Weinstein suggests that Congress should confine itself “to the review of substantial principles,” rather than “details of rules.” Weinstein, *supra* note 10, at 963.
- ¹⁴³ 1995 Proposed Long Range Plan, *supra* note 5, recommendation 30 commentary, at 54.
- ¹⁴⁴ Violent Crime Control and Law Enforcement Act of 1994, *supra* note 36, s 230101 (dealing with victim’s right of allocution in sentencing).
- ¹⁴⁵ Violent Crime Control and Law Enforcement Act of 1994, *supra* note 36, s 320935 (dealing with admissibility of evidence of similar crimes in sex offense cases).

- ¹⁴⁶ Legislation, however, has also been introduced as a service to particular constituents. Newly enacted Federal Rule of Bankruptcy Procedure 7004(h), for example, requires that service of process on an insured depository institution in certain matters be made by certified mail, rather than first class mail. Bankruptcy Reform Act of 1994, *supra* note 36, s 114. The judiciary objected to the amendment on the grounds that it violated the Rules Enabling Act, was unnecessary, and added expense to the administration of estates. 1994 Judicial Conference Reports , *supra* note 120, at 14.
- ¹⁴⁷ Judge Weinstein has suggested that: “If a matter becomes important enough for detailed congressional intervention, legislation is probably desirable, with formal participation by both houses and the President.” Weinstein , *supra* note 10, at 940. It has also been suggested that rulemakers should not propose changes, even in matters of procedure, if the changes will have important effects on substantive rights. Wright, Book Review, *supra* note 31, at 654.
- ¹⁴⁸ Pub. L. No. 103-322, 108 Stat. 1796 (codified in scattered sections of 42 U.S.C.).
- ¹⁴⁹ Violence Against Women Act, S. 15, 102d Cong., 1st Sess. s E (1991).
- ¹⁵⁰ H.R. Doc. No. 250, 103d Cong., 2d Sess. 5 (1994).
- ¹⁵¹ *Id.*
- ¹⁵² *Id.*
- ¹⁵³ *Id.*
- ¹⁵⁴ *Id.*
- ¹⁵⁵ The Supreme Court later withheld approval of the portion of the rule approved by the Judicial Conference that extended its reach to civil cases. Members of the Court were concerned that the proposed rule might violate the Rules Enabling Act, which forbids the enactment of rules that “abridge, enlarge or modify any substantive right,” and might encroach on the rights of defendants in sexual harassment cases because it might be inconsistent with *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). Letter from William H. Rehnquist, Chief Justice of the United States, to Judge John F. Gerry, Chairman of the Judicial Conference’s Executive Committee (Apr. 29, 1994), reprinted in *Communication*

from the Chief Justice, *supra* note 101, at 684.

Congressional conferees, however, restored the portion of the rule deleted by the Supreme Court, and Congress proceeded to enact revised Rule 412 in the form approved by the Judicial Conference. Violent Crime Control and Law Enforcement Act of 1994, *supra* note 36, s 40141.

¹⁵⁶ Violent Crime Control and Law Enforcement Act of 1994, *supra* note 36, s 320935 (dealing with admissibility of evidence of similar crimes in sex offense cases).

¹⁵⁷ Violent Crime Control and Law Enforcement Act of 1994, *supra* note 36, s 320935.

¹⁵⁸ Violent Crime Control and Law Enforcement Act of 1994, *supra* note 36, s 320935. The evidence, civil, and criminal advisory committees met and considered the new rules during the 150-day statutory period. The Advisory Committee on the Rules of Evidence also solicited public comment on the rules, sending the rules to 900 evidence professors and 40 women's rights organizations. The overwhelming majority of judges, lawyers, law professors, and organizations responding stated their opposition to the rules, principally on the grounds that they contained numerous drafting problems apparently not intended by their authors and would permit the admission of unfairly prejudicial evidence. The committee received 84 responses, representing 112 individuals and 16 organizations. Of the total responses, 100 individuals and organizations were opposed, 10 were supportive, and 18 either were neutral or recommended modifications. Law professors were opposed to the new rules by 56 to 3.

The Judicial Conference formally asked Congress to reconsider its decision to adopt the new rules, thereby delaying their effective date for another 150 days. Alternatively, the Conference recommended that Congress enact substitute language prepared by the Advisory Committee on the Rules of Evidence that would not change the substance of the congressional enactment but would clarify drafting ambiguities and eliminate possible constitutional infirmities. Judicial Conference of the U.S. , Report of the Judicial Conference of the United States on the Admission of Character Evidence in Certain Sexual Misconduct Cases (1995).

¹⁵⁹ In August 1993, Senator Herb Kohl introduced S. 1404, the Sunshine in Litigation Act. The bill proposed amending Rule 26(c) of the Federal Rules of Civil Procedure to require that federal judges make particularized findings before issuing protective orders to ensure that public health and safety would not be jeopardized. S. 1404, 103d Cong, 1st Sess. (1993). No action was taken on Senator Kohl's legislation while the Advisory Committee on Civil Rules reviewed the results of a Federal Judicial Center study on protective orders. The advisory committee completed its work within the Rules Enabling Act process and transmitted proposed amendments to Rule 26(c) to the Judicial Conference for consideration at its March 1995 session. Judicial Conference of the U.S., 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 6-8 (1995). Assuming approval by the Conference, the amendments would be submitted to the Supreme Court with a recommendation that they be approved and transmitted to Congress.

¹⁶⁰ Violent Crime Control and Law Enforcement Act of 1994, *supra* note 36 s 40153(c) A similar approach has been followed by Congress on other occasions, when it has asked the Judicial Conference to report on such matters as the future of the federal defender program. See Civil Justice Reform Act of 1990, Pub. L. No. 101-650, s 318, 104 Stat. 5089; Judicial Conference of the U.S., Report of the Judicial Conference of the United States on the Federal Defender Program (1993). Also, Congress has asked the Judicial Conference to report on the impact of drug activity on the federal courts. See Anti-Drug Abuse Amendments Act of 1988, Pub. L. No. 100-690, s 6159(b), 102 Stat. 4312; Judicial Conference of the U.S. , Report of the Judicial Conference of the United States to the Congress -- Impact of Drug Related Criminal Activity on the Federal Judiciary (1989).

¹⁶¹ See H.R. Rep. No. 422 , *supra* note 31, at 14-15; Wright , *supra* note 2, at 431-32; John P. Frank, Local Rules, 137 U. Pa. L. Rev. 2059 (1989); Subrin, *supra* note 57, at 2018, 2021. But see Steven Flanders, Local Rules in Federal District Courts: Usurpation, Legislation, or Information?, 14 Loy. L.A. L. Rev. 213, 216 (1981) (arguing that local courts' rulemaking has been "well-reasoned and beneficial").

¹⁶² See Coquillette et al., *supra* note 57, at 62; Subrin, *supra* note 57, at 2018-26.

¹⁶³ See H. Rep. No. 422 , *supra* note 31, at 15; Coquillette et al., *supra* note 57, at 62.

¹⁶⁴ See *supra* Part I.

¹⁶⁵ Committee on Rules of Practice and Procedure, Judicial Conference of the U.S., Local Rules Project, Part I , at 1 (1988).

¹⁶⁶ The Local Rules Project is under the direction of the Standing Committee's Reporter, Professor Daniel R. Coquillette of the Boston College Law School. The project director is Mary P. Squiers, Esquire.

¹⁶⁷ See Fed. R. App. P. 28 advisory committee's note to 1993 amendment; Report of Advisory Committee on Appellate Rules to the Standing Committee, Dec. 1, 1992, 144 F.R.D. 459 (1992) [hereinafter Appellate Rules].

¹⁶⁸ There is evidence, for example, that many courts are conducting thorough reviews of the

content and numbering of their local rules. In addition, many courts and local rules committees have solicited assistance from the Local Rules Project's director, Mary P. Squiers, on how to re-number the rules and how to draft particular rules more precisely and coherently.

¹⁶⁹ H.R. Doc. No. 67, 104th Cong., 1st Sess. 3 (1995) (Bankruptcy Rule 9029); H.R. Doc. No. 66, 104th Cong., 1st Sess. 5 (1995) (Appellate Rule 47); H.R. Doc. No. 65, 104th Cong., 1st Sess. 7 (1995) (Criminal Rule 57); H.R. Doc. No. 64, 104th Cong., 1st Sess. 6 (1995) (Civil Rule 83).

¹⁷⁰ See *supra* note 169.

¹⁷¹ Fed. R. App. P. 47; Fed. R. Bankr. P. 9029; Fed. R. Civ. P. 83; Fed. R. Crim. P. 57. The amendments were approved by the Judicial Conference on September 24, 1994 and transmitted to the Supreme Court on November 2, 1994. See 1994 Judicial Conference Reports, *supra* note 120, at 66-67.

¹⁷² See Wright, *supra* note 2, at 436.

¹⁷³ 28 U.S.C. ss 471-473, 478 (Supp. V 1993).

¹⁷⁴ *Id.* s 473(a), (b). The Act emphasizes strong judicial case management efforts, separate procedural tracks for different categories of civil cases, and increased use of alternate dispute resolution techniques.

¹⁷⁵ See S. Rep. No. 101-416, 101st Cong., 2d Sess. 10-11 (1990). Professor Mullenix argues that the Civil Justice Reform Act effectively repealed the Rules Enabling Act and rendered impotent the federal rulemaking process that has traditionally relied on careful study to achieve simple and uniform national rules. Mullenix, *supra* note 10, at 379-80. The contrary view is well expressed in Robel, *supra* note 131, at 1448, 1464-70, 1473.

¹⁷⁶ See Carl Tobias, Civil Justice Reform and the Balkanization of Federal Civil Procedure, 24 *Ariz. St. L.J.* 1393 (1992); Article, *Federal Discovery News*, Dec. 1994, at 4-7.

¹⁷⁷ Fed. R. Civ. P. 26; see Randall Samborn, Districts' Discovery Rules Differ, *Nat'l L.J.*, Nov. 14, 1994, at A1; Wright, Foreword, *supra* note 113, at 10-11.

¹⁷⁸ The Administrative Office has contracted with the RAND Corporation to conduct the

statutorily required study. See generally Terence Dunworth & James S. Kakalik, Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990, 46 Stan. L. Rev. 1301 (1994).

¹⁷⁹ Civil Justice Reform Act of 1990, Pub. L. No. 101-650, sec. 105, 104 Stat. 5089, amended by the Judicial Amendments Act of 1994, s 4, 1994 U.S.C.C.A.N (108 Stat.) 4343.

¹⁸⁰ 1995 Proposed Long Range Plan , supra note 5, recommendation 30 commentary, at 55.

¹⁸¹ 1995 Proposed Long Range Plan , supra note 5, recommendation 30 commentary, at 55.

¹⁸² 28 U.S.C. ss 331, 2071(c) (1988 & Supp. V 1995). In March 1994, the Judicial Conference was asked for the first time to exercise this statutory oversight authority when five state attorneys general requested that the Judicial Conference modify or abrogate Local Rule 22 of the Ninth Circuit -- regarding the processing of capital cases -- asserting that the local rule was inconsistent with federal law. The request has been considered by the Advisory Committee on Appellate Rules and the Standing Committee and is still pending. Judicial Conference of the U.S., 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 21-22 (Sept. 1994).

¹⁸³ 1995 Proposed Long Range Plan , supra note 5, recommendation 30 commentary, at 55.

TAB 8

THIS PAGE INTENTIONALLY BLANK

TAB 8A

THIS PAGE INTENTIONALLY BLANK

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

From: Honorable David G. Campbell, Chair, Advisory Committee
on Federal Rules of Civil Procedure

Date: December 6, 2013

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on November 7-8, 2013. The first day of the meeting was a hearing on proposed Civil Rules amendments published for comment in August. Forty-one witnesses testified. The transcript of the hearing is available at the Rules Committee Support Office and will be available on line by the end of December. Draft Minutes of the meeting are attached. This report has been prepared by Professor Cooper, Committee Reporter, with Professor Marcus, Associate Reporter.

Part IA of this Report presents for action a proposal recommending publication at a suitable time for comment on an amendment of Civil Rule 82 that accounts for legislation that revises the venue statutes.

Part IB presents for action a proposal recommending publication at a suitable time for comment on an amendment of Civil Rule 6(d) that would delete service by electronic means from the modes of service that add three days to the time set for

11 Rule 82 is amended to reflect the enactment of 28
12 U.S.C. § 1390 and the repeal of § 1392.

13 It has long been understood that the general venue statutes
14 do not apply to actions in which the district court exercises
15 admiralty or maritime jurisdiction, except that the transfer
16 provisions do apply. This proposition could become ambiguous when
17 a case either could be brought in the admiralty or maritime
18 jurisdiction or could be brought as an action at law under the
19 "saving to suitors" clause. Rule 82 has addressed this problem by
20 invoking Rule 9(h) to ensure that the Civil Rules do not seem to
21 modify the venue rules for admiralty or maritime actions. Rule
22 9(h) provides that an action cognizable only in the admiralty or
23 maritime jurisdiction is an admiralty or maritime claim for
24 purposes of Rule 82. It further provides that if a claim for
25 relief is within the admiralty or maritime jurisdiction but also
26 is within the court's subject-matter jurisdiction on some other
27 ground, the pleading may designate the claim as an admiralty or
28 maritime claim.

29 The occasion for amending Rule 82 arises from legislation
30 that added a new § 1390 to the venue statutes and repealed former
31 § 1392 (local actions). The reference to § 1392 must be deleted.
32 And it is appropriate to add a reference to new § 1390 for
33 reasons that are only slightly more complicated.

34 New § 1390(b) provides:

35 (b) Exclusion of Certain Cases.—Except as otherwise
36 provided by law, this chapter shall not govern the
37 venue of a civil action in which the district court
38 exercises the jurisdiction conferred by section 1333,
39 except that such civil actions may be transferred
40 between district courts as provided in this chapter.

41 Section 1333 "establishes original jurisdiction, exclusive
42 of the courts of the States, of: (1) Any civil case of admiralty
43 or maritime jurisdiction, saving to suitors in all cases all
44 other remedies to which they are otherwise entitled."

45 Section 1390(b), by referring to cases in which the court
46 "exercises the jurisdiction conferred by section 1333," thus
47 ousts application of the general venue statutes for cases that
48 can be brought only in the admiralty or maritime jurisdiction,
49 and also for cases that might have been brought in some other
50 grant of subject-matter jurisdiction but that have been
51 designated as admiralty or maritime claims under Rule 9(h).

91 after being served¹ and service is made under Rule
92 5(b)(2)(C)(mail), (D)(leaving with the clerk),
93 (~~E~~), or (F)(other means consented to),² 3 days are
94 added after the period would otherwise expire
95 under Rule 6(a).

96 COMMITTEE NOTE

97 Rule 6(d) is amended to remove service by electronic means
98 under Rule 5(b)(2)(E) from the modes of service that allow 3
99 added days to act after being served.

100 Rule 5(b)(2) was amended in 2001 to provide for service by
101 electronic means. Although electronic transmission seemed
102 virtually instantaneous even then, electronic service was
103 included in the modes of service that allow 3 added days to act
104 after being served. There were concerns that the transmission
105 might be delayed for some time, and particular concerns that
106 incompatible systems might make it difficult or impossible to
107 open attachments. Those concerns have been substantially
108 alleviated by advances in technology and in widespread skill in
109 using electronic transmission.

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

115 Deleting the 3 added days to respond after electronic
116 transmission is supported by an affirmative reason in addition to
117 the diminution of the concerns that prompted its adoption. Many
118 rules have been changed to ease the task of computing time by
119 adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-

¹ This anticipates adoption of the proposed amendment published in August, 2013.

² The naked cross-references to Rule 5(b)(2) may seem awkward. The parenthetical descriptions are added to relieve much of the flipping back through the rules. It seems likely that e-service will dominate other modes, but absent some descriptions many anxious readers will track down the cross-references just to make sure e-service is not among the means listed. The risk that brief descriptions may mislead or confuse seems minimal. Anyone who wishes to be sure of what a Rule 5(b)(2) subparagraph says can easily find it.

120 week" counting. Adding 3 days at the end complicated the
121 counting, and increased the occasions for further complication by
122 invoking the provisions that apply when the last day is a
123 Saturday, Sunday, or legal holiday.

124 **IIA. RULE 17(c)(2): INFORMATION – DUTY OF INQUIRY**

125 Rule 17(c)(2) directs that "The court must appoint a
126 guardian ad litem – or issue another appropriate order – to
127 protect a minor or incompetent person who is unrepresented in an
128 action."

129 In *Powell v. Symons*, 680 F.3d 301 (3d Cir. 2012), the court
130 struggled to identify the circumstances that might oblige a judge
131 to initiate an inquiry into the competence of an unrepresented
132 litigant. It concluded that the duty of inquiry arises only if
133 there is "verifiable evidence of incompetence," and that the duty
134 is not triggered simply by bizarre behavior. At the same time, it
135 lamented "the paucity of comments on Rule 17" and observed that
136 "We will respectfully send a copy of this opinion to the
137 chairperson of the Advisory Committee to call its attention to"
138 the question.

139 The Committee discussed this question extensively at its
140 meeting in April, 2013, and carried the matter over for further
141 research. Judge Grimm had an intern and a law clerk survey
142 reported decisions. They found that although there are some
143 variations in expression, the courts that have considered the
144 question limit the duty of inquiry in much the same way as the
145 Third Circuit did.

146 Three alternatives were considered. One would add an express
147 duty to inquire into the competence of an unrepresented person on
148 motion or when the person's conduct in the litigation suggests
149 the person is incompetent to act without a representative or
150 other appropriate order. The second would seek to express in rule
151 text something like the approach now taken by the courts. The
152 third was to take no further action on the question.

153 The decision to take no further action on the question was
154 influenced by several concerns. Expanding the duty to inquire on
155 the court's own motion could impose heavy burdens in a
156 substantial number of cases, depending in part on the measure
157 used to assess "competence." Should the court ask whether a
158 person is not equal to the task of litigating? Totally
159 overwhelmed? Manifesting bizarre behavior? A foil for this

160 question is provided by a Fourth Circuit statement: "[p]arties to
161 a litigation behave in a great variety of ways that might be
162 thought to suggest some degree of mental instability. Certainly
163 the rule contemplates by 'incompetence' something other than mere
164 foolishness or improvidence, garden-variety or even egregious
165 mendacity or even various forms of the more common personality
166 disorders." *Hudnall v. Sellner*, 800 F.2d 377, 385 (4th Cir.
167 1986).

168 The practical problems that may arise from expanding the
169 duty to inquire, whether or not an attempt is made to define a
170 standard of competence, gave further grounds for concern. The
171 decision whether to appoint counsel or a guardian in a particular
172 case is usually a very fact-specific decision that does not lend
173 itself to general principles or guidelines. Such difficult
174 decisions are better handled through the case-by-case development
175 of the common law. And substantial difficulties arise when a
176 court does seek to arrange representation for a party who has
177 none and apparently needs it. The desire to provide adequate
178 representation for those who would benefit from it must confront
179 the reality of limited resources.

180 Foreseeable problems also generated concern about possible
181 unforeseen problems.

182 Taken together, these concerns led the Committee to decide
183 against further action. These questions can be restored to the
184 agenda if greater signs of distress emerge.

185 **IIB. INFORMATION: E-RULES**

186 The task of digesting the still developing comments and
187 hearing testimony on the proposed rule amendments published in
188 August, along with other chores, have left little opportunity for
189 the Committee to consider the matters being addressed by the
190 Subcommittee appointed to consider revisions of all the rules to
191 reflect increasing reliance on electronic means of generating,
192 storing, and communicating information. The Committee has made
193 the recommendation to publish Rule 6(d) for comment, described as
194 an action item above. Beyond that, it believes that consideration
195 of other proposals will require more time than it is likely to
196 have before summer.

197 One broad proposal is to adopt a general rule allowing
198 electrons to be used whenever paper can be used. Proponents of
199 this approach recognize that any general rule must recognize some
200 exceptions. Preliminary study suggests that at least for the

201 Civil Rules, identification of the appropriate exceptions will
202 prove difficult. Some, to be sure, may be relatively clear. There
203 is as yet little enthusiasm for authorizing service of the
204 initial summons and complaint by electronic means. Others will
205 prove more elusive. Rule 49, for example, speaks of special
206 "written findings" for a special verdict, or "written questions"
207 to supplement a general verdict. Has the time come to submit Rule
208 49 verdicts by tablet, laptop, or jury-room computer terminals?
209 It may prove difficult even to choose whether to list all
210 exceptions in the general rule, or to amend each excepted rule
211 under the authorization of an "except as otherwise provided"
212 clause in the general rule. Serious study will be required if
213 this possibility is to be explored further.

214 Short of a general rule, it may be that the most useful
215 opportunities lie in expanding the already general use of
216 electronic filing and electronic service. Rule 5(b)(2)(E), for
217 example, provides for service by electronic means "if the person
218 [served] consented in writing." The element of consent has been
219 effectively reduced in many districts that require electronic
220 filing, and that require consent to electronic service as a
221 condition of registering for electronic filing. Electronic
222 service seems to work. It could be put on a more regular
223 foundation by simply authorizing electronic service, subject to
224 some exceptions. Identification of the exceptions will require
225 some thought, but the combined forces of the several advisory
226 committees may be able to manage the task with some expedition.
227 The same holds for electronic filing.

228 It may be that suitable provisions for electronic filing and
229 service, more or less common among the different sets of rules,
230 will satisfy the needs for joint action. If so, that will leave
231 the way open for each advisory committee to consider other
232 opportunities to adjust specific rules for the electronic era.
233 One small example: Civil Rule 7.1 requires a corporate party to
234 file 2 copies of a disclosure statement. Providing one copy for
235 the clerk's office and one copy for the judge assigned to the
236 case can be convenient in a paper world. But is it useful in a
237 world of electronic dockets? Although it is useful to keep such
238 questions on the agenda, and if possible to treat a package of
239 them together, it may make sense to allow each advisory committee
240 to work at its own pace.

241 One specific concern arises from the frequent need for an
242 authorized user of an e-filing system to file a document signed
243 by someone else. Authentication of the signature is addressed by
244 alternative provisions in Bankruptcy Rule 5005, which was
245 published for comment last summer. The Civil Rules Committee has

246 encountered some perplexity in understanding how the alternative
247 that calls for notarization of the nonfiler's signature would
248 work. This question may be illuminated by comments on the
249 proposed rule.

250 **IIC. INFORMATION: DISCOVERY COST SHIFTING**

251 Laments about the costs that discovery requests can inflict
252 are common. Various proposals have been made to depart from the
253 presumption that the responding party bears the expense of
254 responding, see *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340,
255 358 (1978). These proposals have been advanced by independent
256 groups that often suggest rules reforms and comment on published
257 proposals. Congress has shown a clear interest in these
258 questions. Present Rule 26(c) authorizes an order to protect a
259 party against "undue burden or expense" that would flow from a
260 discovery request. The proposals published for comment last
261 August include a revision of Rule 26(c) that explicitly calls
262 attention to the authority, already recognized and used in some
263 cases, to order an "allocation of expenses" as part of a
264 protective order. But in order to make sure that the broader
265 suggestions are taken seriously, the Discovery Subcommittee has
266 begun the process of investigating the possibility that it might
267 be useful to consider a more specific provision for transferring
268 some discovery costs to the requesting party. There is no thought
269 that the general rule should be reversed, creating a presumption
270 that the requester pays absent good reason to direct that the
271 responding party bear the costs of responding. The question
272 instead is whether it is possible to identify categorical
273 distinctions between types of requests that continue to fall
274 within the present practice that the responder bears the costs
275 and other types of requests that justify requiring the requester
276 to pay some or all of the costs of responding.

277 Much work remains to be done before the Subcommittee will be
278 in a position even to determine whether there is any real reason
279 to pursue development of possible amendments. It may be that
280 there will be added reason for caution if the current Rule 26(c)
281 proposal is recommended for adoption and in fact is adopted.
282 Experience under the amendment is likely to develop over a course
283 of some years. Awaiting that experience may be wise.

284 A general cost-bearing proposal was advanced, but in 1999
285 the Judicial Conference decided not to recommend adoption. That
286 experience is a reason to be deliberate, but it is not
287 dispositive. Discovery continues to evolve.

288 **IID. INFORMATION: COURT ADMINISTRATION AND CASE MANAGEMENT PROJECTS**

289 The Court Administration and Case Management Committee has
290 raised a number of topics that may lead to Civil Rules
291 amendments. Action on all of these topics has been deferred
292 pending further development by CACM.

293 Issues relating to e-filing have been raised in the process
294 of developing the next generation CM/ECF system. One is whether
295 the Notice of Electronic Filing can automatically be treated as a
296 certificate of service. This issue continues to hold a place as
297 part of the overall project to evaluate the impact of electronic
298 case management.

TAB 8B

THIS PAGE INTENTIONALLY BLANK

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 7-8, 2013

1 The Civil Rules Advisory Committee met at the Administrative
2 Office of the United States Courts in Washington, D.C., on November
3 7-8, 2013. Participants included Judge David G. Campbell, Committee
4 Chair, and Committee members John M. Barkett, Esq.; Elizabeth
5 Cabraser, Esq.; Hon. Stuart F. Delery; Judge Paul S. Diamond; Judge
6 Robert Michael Dow, Jr.; Parker C. Folse, Esq.; Judge Paul W.
7 Grimm; Peter D. Keisler, Esq.; Dean Robert H. Klonoff; Judge John
8 G. Koeltl; Judge Scott M. Matheson, Jr.; Chief Justice David E.
9 Nahmias; Judge Solomon Oliver, Jr.; and Judge Gene E.K. Pratter.
10 Professor Edward H. Cooper participated as Reporter, and Professor
11 Richard L. Marcus participated as Associate Reporter. Judge
12 Jeffrey S. Sutton, Chair, and Professor Daniel R. Coquillette,
13 Reporter, represented the Standing Committee. Judge Arthur I.
14 Harris participated as liaison from the Bankruptcy Rules Committee.
15 Laura A. Briggs, Esq., the court-clerk representative, also
16 participated. The Department of Justice was further represented by
17 Theodore Hirt, Esq.. Judge Jeremy Fogel and Dr. Emery Lee
18 participated for the Federal Judicial Center. Jonathan C. Rose,
19 Andrea Kuperman, Benjamin J. Robinson, and Julie Wilson represented
20 the Administrative Office. Observers included Judge Lee H.
21 Rosenthal, past chair of the Committee and of the Standing
22 Committee; Jonathan Margolis, Esq. (National Employment Lawyers
23 Association); John K. Rabiej (Duke Center for Judicial Studies);
24 Jerome Scanlan (EEOC); Alex Dahl, Esq. and Robert Levy, Esq.
25 (Lawyers for Civil Justice); John Vail, Esq.; Valerie M. Nannery,
26 Esq., and Andre M. Mura, Esq. (Center for Constitutional
27 Litigation); Thomas Y. Allman, Esq.; Ariana Tadler, Esq.; Henry
28 Kelsen, Esq.; and Elsa Rodriguez Preston, Esq. (Law Department,
29 City of New York).

30 The first day of the meeting, November 7, was devoted to a
31 public hearing on proposed rule amendments that were published for
32 comment in August, 2013. The testimony of forty-one witnesses is
33 preserved in a separate transcript.

34 Judge Campbell opened the second day of the meeting, November
35 8, by welcoming Judge Dow as a new Committee member. Judge Dow has
36 served in the Northern District of Illinois since 2007. He had been
37 serving on the Appellate Rules Committee – "We won the tug-of-war."
38 He has degrees from Yale, Oxford (as a Rhodes Scholar), and
39 Harvard. He served as law clerk to Judge Flaum, and practiced as a
40 litigator and appellate lawyer.

41 Chief Justice Nahmias and Parker Folse also were welcomed to
42 the first meeting they have been able to attend in person; they
43 were able to participate in their first meeting as members last
44 April only by telephone.

45 Judge Pratter and Elizabeth Cabraser have been renewed for
46 their second three-year terms. And, in a welcome departure from the
47 usual two-term limit, the Chief Justice has extended Judge Koeltl's
48 term by one year, to maintain continuity in perfecting the proposed
49 amendments that have grown out of the 2010 Duke Conference.

50 Judge Gorsuch will be the new liaison from the Standing
51 Committee.

52 John Vail, who has been a long-time friend of the Committee,
53 has entered private practice. Two new representatives from the
54 Center for Constitutional Litigation are attending this meeting,
55 but all hope that Vail will continue to be involved.

56 The next meeting will be on April 10 and 11 in Portland,
57 Oregon. The first day will be at the Lewis and Clark Law School;
58 part of the day will be devoted to a conference in tribute to Judge
59 Mark R. Kravitz, the immediate prior chair of this Committee and of
60 the Standing Committee. The second day, to be held at the federal
61 court house, will likely be a full day.

62 The Standing Committee acted at its June meeting to approve
63 publication of the Civil Rules amendments in August.

64 Judge Sutton noted that the Standing Committee got the rules
65 proposals recommended for adoption and the Standing Committee
66 meeting minutes to the Judicial Conference earlier than usual. With
67 the Conference's approval of the proposals, this will give the
68 Court a bit more time to consider the proposals in the fall. And,
69 if the Court has concerns, there will be more time for the
70 Committee to respond. As an example of the benefits, it has been
71 possible to consider the question whether one of the Bankruptcy
72 Rule proposals should be withheld because the Court granted
73 certiorari on a related issue late last June.

74 Judge Campbell observed that the present rules proposals
75 reflect the need for more effective case management in some courts.
76 "We can write rules." But training by the Federal Judicial center
77 is an essential part of making them effective. Judge Fogel observed
78 that there seems to be a perception in Congress that judges do not
79 manage cases effectively enough. The current efforts to encourage
80 early and active case management will provide important reassurance
81 that the rules committees are pursuing these issues vigorously.

82 The Committee had no proposals for review at the September
83 Judicial Conference meeting.

84 The Rule 45 Subpoena amendments will take effect December 1.
85 The Administrative Office forms are being revised to account for

November 27 version

86 the changes. John Barkett will hold an ABA webinar to inform
87 lawyers about the changes. Judge Harris has written an article to
88 inform bankruptcy lawyers of the changes. It is important that the
89 bar learn of the changes and adapt to them – technically, a lawyer
90 who on December 1 issues a subpoena from a district court in
91 Michigan to a witness in Michigan for a deposition in Michigan to
92 support an action in Illinois will be issuing an invalid subpoena,
93 since the new rules direct issuance from the court in Illinois.

94 Judge Campbell concluded his opening remarks by thanking all
95 the observers for their interest and attendance.

96 *April 2013 Minutes*

97 The draft minutes of the April 2013 Committee meeting were
98 approved without dissent, subject to correction of typographical
99 and similar errors.

100 *Legislative Activity*

101 Benjamin Robinson reported on current legislative activity.

102 Congress is considering bills to amend Rule 11. The House has
103 passed similar bills in recent years. The full House is expected to
104 vote on the Lawsuit Abuse Reduction Act next week. It is not clear
105 whether the Department of Justice will express views on the bill.
106 The rules committees have clearly expressed their opposition. The
107 dissenters in the House have addressed the concerns with the
108 provisions that would make sanctions mandatory. Should the bill
109 pass in the House, prospects in the Senate are uncertain.

110 Representative Goodlatte has a bill, House 3309, that
111 addresses discovery costs and concerns, especially in patent-
112 infringement actions. Section 6 requires the Judicial Conference,
113 using existing resources, to generate rules. Section 6 further
114 prescribes the content of the rules, mandating discovery cost-
115 shifting for discovery beyond "core" discovery. Judge Sutton and
116 Judge Campbell have submitted a letter expressing concerns about
117 the relationship of these provisions to the Enabling Act procedure
118 that Congress has adopted for revising court rules. Working with
119 staffers on the Hill in the last few months has been productive.
120 The best outcome for the Enabling Act process may be an expression
121 of the sense of Congress on what might be desirable rules. One
122 possibility, for example, would be to generate for patent cases
123 something like the protocol for individual employment cases
124 developed under the leadership of the National Employment Lawyers
125 Association. Much further work should be done in assessing the
126 desirability of a system in which a party requesting discovery pays
127 for the cost of responding to all discovery beyond the "core,"

November 27 version

128 however the core might be defined. One reason to avoid precipitous
129 action is that there are pilot projects for patent litigation, and
130 much may be learned from them.

131 Judge Fogel noted that the Federal Judicial Center is studying
132 the pilot projects. The pending bills reflect the sense of both
133 political parties and the White House that something should be done
134 about patent litigation brought by nonpracticing entities, referred
135 to by some as "patent trolls." There is a perception that these
136 plaintiffs use the cost of discovery as a weapon to force
137 settlement. The bill, in its present form, is not very flexible. It
138 prohibits discovery on anything but claim construction before the
139 Markman hearing, absent exceptional circumstances. But there are
140 cases in which claim construction is not a critical issue, and in
141 which prompt discovery on other issues is important. Another
142 provision directs that the nonprevailing party pay the other
143 party's fees unless it can show its position was substantially
144 justified.

145 Judge Campbell noted that the rules committees comment only on
146 the parts of pending legislation that affect civil procedure
147 directly. Substantive issues – here, substantive patent issues –
148 are beyond the committees' scope. We do urge Congress to respect
149 the Enabling Act. But there are many procedural provisions. Core
150 discovery is limited to documents. The requester pays for
151 everything after that, including non-core documents and attorney
152 fees for depositions. Discovery of electronically stored
153 information is limited to 5 custodians, and search terms must be
154 specified. The committees are pleased to address issues that
155 Congress finds troubling or important, but they ask that Congress
156 not dictate the terms of rules amendments. Staff members in both
157 houses seem receptive to this message.

158 One specific provision of the patent bill directly abrogates
159 Form 18 of the Rule 84 official forms. Congress knows that the
160 Committee proposes to abrogate Rule 84 and all the forms, but it
161 also knows how much time remains in the full Enabling Act process.
162 Some are impatient with that. "It is an ongoing process."

163 It also was noted that there are private groups that oppose
164 the patent bill. They believe there should be no distinctions
165 between nonpracticing entities and other patent owners. Free
166 transfer of patent rights is argued to enhance the value of the
167 patent system. There will be vigorous representation of all views.

168 Benjamin Robinson also described a November 5 hearing by the
169 Senate Judiciary Committee Subcommittee on Bankruptcy and the
170 Courts that was, in substance, deliberate and thoughtful. The
171 witnesses were well-informed and thoughtful. They expressed

November 27 version

172 concerns about the adequacy of judicial resources. And there were
173 criticisms of the rules proposals published in August, which are
174 seen to create "procedural stop signs." Many of those at the
175 hearing reflected their interest in the Enabling Act process, and
176 were concerned that the committees work hard to "get it right."
177 Four specific questions were posed at the end: what, specifically,
178 the proposals are intended to accomplish; what failures of the
179 system they are designed to correct; whether the amendments are
180 likely to be effective; and what are the likely costs, including
181 collective costs, and how the costs should be weighed against the
182 hoped-for benefits. Concerns also were expressed that recent
183 procedural developments will impede access to justice – pleading
184 standards and summary judgment are particular subjects of concern.

185 *E-Rules*

186 The Standing Committee has appointed a subcommittee
187 constituted by two representatives from each of the advisory
188 committees, together with the reporters. Judge Chagares serves as
189 chair. Professor Capra is the reporter. Judge Oliver and Clerk
190 Briggs are the delegates from the Civil Rules Committee. The task
191 of the subcommittee is to consider the ways in which developing
192 methods of electronic communication may warrant adoption of common
193 approaches that are adopted in each set of rules. The initial goal
194 has been to produce a set of proposals that can be recommended for
195 publication in time for the June 2014 Standing Committee meeting.

196 Rule 6(d): "3 days are added": A proposal to eliminate the "3 days
197 are added" provision for reacting after being served by electronic
198 means has reached a consensus. All committees with this rule will
199 eliminate the 3 added days. A common Committee Note has been
200 drafted. There is one small issue for the text of Civil Rule 6(d).
201 Professor Capra suggested that parenthetical word descriptions
202 should be added to the cross-references to the rules that will
203 continue to activate the 3 added days to respond. The
204 parentheticals could prove useful to avoid repeated flipping back
205 to the corresponding Rule 5 provisions. Although only Rules 5.1 and
206 5.2 intervene between Rule 5 and Rule 6, the added convenience may
207 be more useful because there are 3 cross-references to service by
208 mail, by leaving with the clerk, and by other means consented to.
209 There is no risk that these simple identifying words will create
210 confusion in the rules. On the other hand, there are many cross-
211 references throughout the rules, and they do not add parenthetical
212 descriptions. Generalizing this practice might encounter greater
213 dangers that parenthetical descriptions would be read as
214 interpretations. And the burden of following cross-references may
215 be reduced by the growing use of hyperlinks in electronic versions
216 of the rules. The Style Consultant will no doubt have views on this
217 proposal.

November 27 version

218 The Committee approved recommendation of the draft Rule 6(d)
219 for publication.

220 Electronic Signatures: Verification of signatures on papers filed
221 by electronic means has raised some disquiet. An amendment of
222 Bankruptcy Rule 5005 addressing these issues was published this
223 summer. The first part provides that the user name and password of
224 a registered user serves as a signature. The second part addresses
225 signatures by persons other than the registered user who makes the
226 filing. Two alternatives are provided. The first alternative states
227 that by filing the document and the signature page, the registered
228 user certifies that the scanned signature was part of the original
229 document. The second alternative directs that the document and
230 signature page must be accompanied by an acknowledgment of a notary
231 public that the scanned signature was part of the original
232 document.

233 The Civil Rules delegates to the subcommittee are puzzled by
234 the alternative that would require a notary's acknowledgment. The
235 underlying concern seems to be that as compared to paper documents,
236 it easier to misuse an authentic signature many times by electronic
237 submissions. An original paper signature page might be detached
238 from one document and attached to a filed document. An electronic
239 signature might be replicated many times. And bankruptcy practice
240 may involve more frequent needs for the same person to sign several
241 documents than arise in other areas of practice. That of itself may
242 serve to distinguish the bankruptcy rules from the other sets of
243 rules - if they need the notary alternative, there may be good
244 reason to adopt a different approach in the other sets of rules.
245 Interest in adopting a different approach stems from uncertainty
246 about how the notary will participate in a way that reduces the
247 perceived danger. If the paper is signed before it is filed, the
248 notary could guarantee authenticity only by retaining the
249 electronic file and being present at the time of filing - indeed,
250 perhaps, making the filing to ensure there is no legerdemain in the
251 filing process. Or the notary could be present at the time of
252 signing and simultaneous filing. Either alternative seems
253 cumbersome at best. And it could apply to many filings - the
254 affidavits or declarations of several witnesses might be needed for
255 a summary-judgment motion, for example. Involving a notary also
256 seems inconsistent with the movement away from requiring
257 notarization, as reflected in 28 U.S.C. § 1746. Relying on the
258 filer to ensure authenticity has seemed to work for paper filings.
259 It is not clear that anything more should be required for e-
260 filings.

261 These observations were elaborated by comments that e-
262 signatures have generated much discussion. The Evidence Rules
263 Committee planned to present a panel on these issues, developed by

November 27 version

264 the Department of Justice, at the conference scheduled for October
265 but cancelled for the government shutdown. The IRS has used scanned
266 e-signatures, under a statute that relieves the prosecutor of the
267 burden. The FBI argues that it is impossible to verify forgeries of
268 scanned signatures. One solution is to require that lawyers keep
269 "wet signature" documents. Lawyers do not want that burden. Nor are
270 lawyers eager to have to produce documents that harm their clients'
271 positions. The Department of Justice has discussed these issues
272 extensively, and finds them complicated.

273 It was noted that the problems of filing are complemented by
274 evolving concepts of admissibility in evidence. Social media
275 postings, for example, may be offered to show motive and intent.
276 Evidence Rules 803(6)(E) and (8)(B), and 901(a), are not much help
277 in telling you what needs to be done to show a source is
278 trustworthy. Addressing what need be done to file a paper is like
279 the tail wagging the dog – the more important questions are what
280 can be done with the paper. "This is a moving target."

281 Further discussion confirmed that the signature rule is
282 addressed to all papers signed by someone other than the registered
283 user. The example of affidavits or declarations submitted with a
284 summary-judgment motion recurred. The rule applies to anything
285 filed. A settlement agreement would be another example. And the
286 fear indeed is that a lawyer will cheat. But fraudsters will cheat
287 in either medium, paper or electronic filing. The burden of
288 invoking notarization would be great. It was urged again that we
289 should continue to rely, as we do now, on the integrity of lawyers.

290 e=Paper: Continuing advances in electronic technology and parallel
291 advances in its use raise the question whether the time has come to
292 adopt a general rule that electrons equal paper. The subcommittee
293 has prepared a generic draft rule that provides that any reference
294 to information in written form includes electronically stored
295 information, and that any act that may be completed by filing or
296 sending paper may also be accomplished by electronic means. The
297 draft recognizes that any particular set of rules may need to
298 provide exceptions – that could be done either by adding "unless
299 otherwise provided" to the general rule and adding specific
300 provisions to other rules, or by listing a presumably small number
301 of exceptions in the general rule. The task of identifying suitable
302 exceptions may be challenging; multiple questions are suggested in
303 the materials. It will be helpful to think about the need for a
304 general provision by starting with e-service and e-filing. If those
305 rules cover most of the important issues, and if it is difficult to
306 be confident in creating exceptions to a more general rule, it may
307 be that the provisions for service and filing will suffice for now.

308 e-Service, e-Filing: Rule 5(b)(2)(E) now provides for electronic

November 27 version

309 service of papers after the initial summons and complaint if the
310 person served consented in writing. This "consent" provision has
311 been stretched in many courts by local rules that require consent
312 as an element in registering to participate in electronic filing.
313 At least some courts would be more comfortable with open authority
314 to require e-service. The agenda includes a draft that begins by
315 authorizing service by electronic means, and then suggests a number
316 of alternative exceptions - "unless" good cause is shown for
317 exemption, or a person files a refusal at the time of first
318 appearing in the action, or the person has no e-mail address, or
319 local rules provide exemptions. The initial temptation to exempt
320 pro se filers was resisted because some courts are experimenting
321 successfully with programs that require prisoners to participate in
322 e-filing and e-service.

323 Rule 5(d)(3) authorizes a court to adopt a local rule that
324 allows e-filing, so long as reasonable exceptions are allowed. Here
325 too it may be desirable to put greater emphasis on e-action. The
326 agenda materials include a draft directing that all filings must be
327 by electronic means, but also directing that reasonable exceptions
328 must be allowed by local rule.

329 Judge Oliver opened the discussion by noting that many courts
330 effectively require consent to e-service, and that the subcommittee
331 is interested in emphasizing e-service. At the same time, some
332 exceptions will prove useful. Clerk Briggs noted that her court
333 has a good-cause exception, but it has been invoked only once - and
334 that was eight or nine years ago. They have a prisoner e-filing
335 project that has been surprisingly successful. Another committee
336 member observed that e-service is done routinely; "this is the
337 world we live in."

338 The value of allowing exceptions by local rules was supported
339 by suggesting that this is an area where geography may make a
340 difference. Some areas may encounter distinctive circumstances that
341 warrant a general exception by local rule.

342 A question was raised about a pro se litigant who wants to be
343 served electronically but may present difficulties. One has argued
344 an equal protection right to be treated the same as litigants
345 represented by counsel.

346 Benjamin Robinson reported that a survey of all districts
347 uncovered 92 local rules and 2 administrative orders. Eighty-five
348 districts mandate e-filing. Nine are permissive. One difficulty in
349 unraveling this is that some local rules treat civil and criminal
350 proceedings together. All have various exceptions. The variety may
351 make life difficult for a lawyer who practices in multiple
352 jurisdictions, but registration itself is the biggest hassle.

November 27 version

353 Without going further into the agenda materials - and
354 particularly without returning to the question whether to recommend
355 a general rule that equates electrons with paper, and electronic
356 action with paper action, it was asked whether these issues alone
357 suggest that it may be too ambitious to attempt to develop
358 recommendations for rules that warrant publication next summer. One
359 reason for caution is the hope that courts and lawyers will be able
360 to work together to develop sensible solutions to problems as they
361 arise, and that this process will provide a better foundation for
362 new rules than more abstract consideration. If there are no general
363 calls for help, no widespread complaints that the rules need to be
364 brought into the present and near future, perhaps there is no need
365 to rush ahead on a broad basis.

366 One committee member offered his own experience as an
367 anecdote. "I practice all over the country. I do not see these
368 issues as problems." It makes sense to do the simple and obvious
369 things now. Leaving the rest to the future is not a bad idea. These
370 questions do not impact daily practice, even though 99% of practice
371 is accomplished by electronic means.

372 A judge observed that he had never seen a problem with e-
373 communications. They are happening, and working.

374 Caution was urged with respect to service of the initial
375 summons and complaint under Rule 4, and similar acts that bring a
376 party into the court's jurisdiction. Expanding e-service to this
377 area could affect the "finality" of judgments, both directly and in
378 terms of recognition and enforcement in other courts. This caution
379 was seconded.

380 Discussion returned to the concern that local rules that
381 impose consent to e-service as a condition of registering with the
382 court's sytem are potentially inconsistent with the national rule
383 that recognizes e-service only with the consent of the person
384 served.

385 On the other hand, "the big problem is the people who are not
386 in the e-system." Pilot projects that are bringing prisoners into
387 the e-system are really important.

388 A committee member suggested that it is worthwhile to look at
389 these questions more thoughtfully, but not immediately. "There are
390 issues out there, but they are not yet big issues. Time will bring
391 more information." We should do the obvious things now, and find
392 out whether lawyers are complaining about other things.

393 A broader view noted that this discussion reflects a regular
394 pattern in rulemaking. We often confront a choice. We could attempt

November 27 version

395 to anticipate the future and provide for it. Or we can wait and
396 codify what the world has come to do, at least generally. "We do
397 want to reflect what people are doing. But perhaps not just yet."

398 States "may get ahead of us." And we can learn from them.

399 So there are any number of cybersecurity experts who worry
400 about many of these problems. They are working, for example, to
401 develop electronic notary seals. "Answers may emerge and be used."

402 The discussion concluded by suggesting three steps. First, the
403 Committee agrees to the proposal to delete the "3 added days" to
404 respond after e-service. And it will wait to see what can be
405 learned from public comments on the Bankruptcy Rule proposal for
406 dealing with e-signatures. Second, a few Committee members should
407 be assigned to talk to bar groups and state groups to learn what
408 problems may be out there and what efforts are being made to
409 address them. Finally, the Committee believes that it may be better
410 not to attempt broad action as soon as a recommendation to publish
411 next June, although the 3 added days question itself seems to be
412 rightly resolved.

413 Separate note was made of a suggestion by the Committee on
414 Court Administration and Case Management that a notice of
415 electronic filing should serve as a certificate of service. The
416 agenda materials include a sketch of Rule 5(d)(1) that so provides,
417 while maintaining the certificate requirement for any party that
418 was not served by means that provide a notice of electronic filing.
419 Preliminary consideration of this question suggested a further
420 question. It is not clear on the face of the rules whether a
421 certificate of service need be served on the parties, or whether
422 filing suffices. The Rule 5(a)(1)(E) reference to "any similar
423 paper" is open to interpretation. These questions will be held in
424 abeyance pending further advice from CACM.

425 *Rule 17(c)(2)*

426 The second sentence of Rule 17(c)(2) provides: "The court must
427 appoint a guardian ad litem – or issue another appropriate order –
428 to protect a minor or incompetent person who is unrepresented in an
429 action." The court grappled with this provision in *Powell v.*
430 *Symons*, 680 F.3d 301 (3d Cir.2012), finding a relative dearth of
431 case guidance that would help a court determine whether it is
432 obliged to act on its own to open an inquiry into the competence of
433 an unrepresented party. It urged the Advisory Committee to consider
434 whether something might be done to provide greater direction. This
435 question was considered at the April meeting, and postponed for
436 further research in the case law. Judge Grimm enlisted an intern
437 and a law clerk to undertake the research. The results of their

November 27 version

438 work are described in a memorandum and a circuit-by-circuit
439 breakdown in the agenda materials.

440 The additional research has found the state of the law much as
441 the Third Circuit found it. Although there are variations in
442 expression, there is a clear consensus that a court is not obliged
443 to open an inquiry into the competence of an unrepresented litigant
444 unless there is something like "verifiable evidence of
445 incompetence." If the inquiry is opened, whether on the court's own
446 or by request, the court has broad discretion both in determining
447 competence and in choosing an appropriate order if a party is found
448 not competent. An adjudication of incompetence for other purposes,
449 for example, need not automatically compel a finding of
450 incompetence to conduct litigation.

451 The questions of initiating the inquiry and of dealing with a
452 party who is not competent to litigate are both independent and, in
453 part, interdependent. What circumstances might trigger a duty to
454 inquire will be shaped by the concepts applied in measuring
455 competence. So too, practical constraints on what can be done to
456 secure a guardian ad litem or other representation may be
457 considered in determining whether it is practical to pursue further
458 development of Rule 17(c)(2).

459 So the present question is whether the Committee should pursue
460 this question further by developing a rule amendment that might be
461 recommended for publication and comment. The agenda materials
462 provide initial sketches of two different approaches. The first
463 would expand the duty to inquire: "The court must inquire into a
464 person's competence on motion or when the person's litigating
465 behavior [strongly] suggests the person is incompetent to act
466 without a representative [or other appropriate order]." The second
467 approach would attempt to capture the present approach, for more
468 reassuring guidance: "The court must inquire into a person's
469 competence when evidence is presented to it that [alternative 1 the
470 person has been adjudicated incompetent] [alternative 2 strongly
471 suggests the person is incompetent] [alternative 3 the person is
472 incompetent to manage the litigation without appointment of a
473 guardian ad litem or other appropriate order]." The third
474 approach, to do nothing and remove the question from the agenda,
475 does not require an illustrative sketch.

476 Judge Grimm opened the discussion by noting that his intern
477 and law clerk had done a good job of researching the issue. The
478 threshold that imposes an obligation to open an inquiry into an
479 unrepresented party's competence is high. The Fourth Circuit has
480 provided an illustrative statement of the behavior that may not
481 trigger an inquiry: "Parties to a litigation behave in a great
482 variety of ways that might be thought to suggest some degree of

November 27 version

483 mental instability. Certainly the rule contemplates by
484 'incompetence' something other than mere foolishness or
485 improvidence, garden-variety or even egregious mendacity or even
486 various forms of the more common personality disorders." *Hudnall v.*
487 *Sellner*, 800 F.2d 377, 385 (4th Cir.1986).

488 The problem may not be a need for more guidance; at most, it
489 is lack of familiarity with the guidance that in fact is provided
490 by the cases. A real part of the challenge, however, is to do
491 something effective after a party is found to lack competence. One
492 pending case provides an illustration. A person confined in a state
493 mental hospital has filed a petition for habeas corpus complaining
494 of events in the hospital. State courts have appointed a guardian
495 for her property and for her person. On inquiry put to the
496 guardians, the petitioner objected that she did not want them to
497 represent her. What should be done? "We cannot by rule address the
498 problems of what to do when you find incompetence."

499 It would ask too much to impose a duty to inquiry when a court
500 sees something irregular. It would be better to leave the rule as
501 it is.

502 Another example was provided of a pro se litigant who asked
503 for counsel in a § 1983 action against prison guards. He was found
504 incompetent on the basis of a state criminal court finding that he
505 was not competent. Now the challenge is to find a lawyer to
506 represent him. It has not been easy. But how could we write a rule
507 that gives the court more guidance?

508 Another judge suggested that these questions verge into the
509 broader questions characterized as "civil Gideon." "Now is not the
510 time to wade into this."

511 Yet another judge suggested that it is difficult to imagine a
512 rule that would do much to help with the question put by the Third
513 Circuit. The issue often arises in § 2254 petitions and § 2255
514 motions. Can we appoint guardians ad litem for them?

515 An illustration of the problems was provided by the example of
516 a child pornography prosecution of the child victim's father. The
517 statute directs that a guardian ad litem be appointed for the
518 child. But the statute does not provide a source of funding, and
519 none can be found.

520 The Committee concluded to remove this topic from the agenda.

521 *Rule 82*

522 Rule 82 provides that the rules do not extend or limit

November 27 version

523 jurisdiction or venue. The second sentence cross-refers to a venue
524 statute that has been repealed. And there is a new venue statute to
525 be considered. Rule 82 must be amended in some way. The proposal is
526 to adopt this version:

527 An admiralty or maritime claim under Rule 9(h) is not a
528 civil action for purposes of 28 U.S.C. §§ 1390-1391 =
529 ~~1392~~.

530 New section 1390 provides that the general venue statutes do
531 not govern "a civil action in which the district court exercises
532 the jurisdiction conferred by section 1333." Section 1333
533 establishes exclusive federal jurisdiction of "[a]ny civil case of
534 admiralty or maritime jurisdiction, saving to suitors in all cases
535 all other remedies to which they are otherwise entitled."

536 The complication addressed by Rule 9(h) and invoked in Rule 82
537 arises from the "saving to suitors" clause. Some claims are
538 intrinsically admiralty claims. For such claims, a federal court
539 inherently exercises the § 1333 jurisdiction. But there are other
540 claims that can be brought either as an admiralty claim or as a
541 general civil action. Rule 9(h) gives the pleader an option in such
542 cases. The pleader may designate the claim as an admiralty claim
543 for purposes of Rules 14(c), 38(e), and 82.

544 The effect of invoking Rule 9(h) to designate a claim as an
545 admiralty claim is that the court is then exercising § 1333
546 jurisdiction. Section 1390(b) confirms the longstanding
547 understanding that in such cases the general venue statutes do not
548 apply. It makes sense to add § 1390 to the cross-reference in Rule
549 82.

550 The other step is simpler. Congress has repealed § 1392, which
551 applied to "local actions." The cross-reference to § 1392 must be
552 deleted from Rule 82.

553 The Committee voted to recommend the proposed Rule 82
554 amendment to the Standing Committee for publication. Although the
555 amendment seems on its face to be a clearly justified technical
556 change to conform to recently enacted legislation, it seems better
557 to publish for comment. Admiralty jurisdiction involves some
558 questions that are arcane to most, and complex even to those who
559 are familiar with the field. A period for comment will provide
560 reassurance that there are no unwelcome surprises.

561 *Rule 67(b)*

562 The final sentence of Rule 67(b) provides that money paid into
563 court under Rule 67 "must be deposited in an interest-bearing

November 27 version

564 account or invested in a court-approved, interest-bearing
565 instrument." In 2006 the IRS adopted a regulation dealing with
566 "disputed ownership funds on deposit." Interpleader actions are a
567 common illustration. The regulation requires a separate account and
568 administrator for each fund, and quarterly tax reports. The
569 Administrative Office became aware of the regulation in 2011. The
570 practice has been to deposit these funds in a common account. The
571 burden of establishing a separate account for each fund, with
572 separate administration, and providing quarterly tax reports, would
573 be considerable. The estimated annual cost is \$1,000 per fund, with
574 an additional \$400 for the quarterly tax reports. This cost
575 compares to the report that the average fund is \$36,000. And the
576 clerk of court cannot be appointed as administrator. But the IRS
577 has taken the position that it will look to the clerks to assure
578 compliance.

579 The Administrative Office staff initially proposed that rule
580 67(b) should be amended to delete the interest-bearing account
581 requirement. But further discussion has led to a preferred position
582 that would carry forward with a common depository fund, with a
583 single administrator. Preparing a common quarterly tax report would
584 not be much burden. The opportunity to garner some income on the
585 deposited funds would be maintained – an opportunity that seems
586 likely to become more important as interest rates return closer to
587 historically normal levels. This approach is functionally better.
588 And it avoids the need to embark on a rule amendment that would
589 draw strong opposition – forgoing interest on deposited funds does
590 not make any obvious sense.

591 The Administrative Office has begun discussions with the IRS
592 to explore the preferred solution. This should be to the advantage
593 of the IRS as well as the court system and claimants to deposited
594 funds. A single fund is likely to generate greater aggregate income
595 than many separate, and often rather small, funds. The IRS will get
596 as much or more tax revenue, and it will have to deal with only a
597 single return. Everyone will be better off.

598 Further consideration of these questions will await the
599 outcome of negotiations with the IRS.

600 *Requester Pays For Discovery*

601 Judge Campbell opened discussion of "requester pays" discovery
602 issues by noting that various groups, including members of
603 Congress, have asked the Committee to explore expansion of the
604 circumstances in which a party requesting discovery can have
605 discovery only by paying the costs incurred by the responding
606 party. The suggestions are understood to stop short of a general
607 rule that the requesting party must always bear the cost of

November 27 version

608 responding to any discovery request. Instead they look for more
609 modest ways of shifting discovery costs among the parties.

610 Judge Grimm outlined the materials included in the agenda
611 book. There is an opening memorandum describing the issues; a copy
612 of his own general order directing discovery in stages and
613 contemplating discussion of cost-shifting after core discovery is
614 completed; notes of the September 16 conference-call meeting of the
615 Discovery Subcommittee; and Professor Marcus' summary of a cost-
616 shifting proposal that the Standing Committee approved for adoption
617 in 1998, only to face rejection by the Judicial Conference.

618 Several sources have recommended further consideration of
619 cost-shifting. Congress has held a hearing. Patent-litigation
620 reform bills provide for it. Suggestions were made at the Duke
621 Conference. The proposed amendments published for comment this
622 August include a revision of Rule 26(c) to confirm in explicit rule
623 text the established understanding that a protective order can
624 direct discovery on condition that the requester pay part or all of
625 the costs of responding. That builds on the recently added
626 provisions in Rule 26(b)(2)(B).

627 The Subcommittee has approached these questions by asking
628 first whether it is possible to get beyond the "anecdotal" to find
629 whether there are such problems as to justify rules amendments. Are
630 such problems as may be found peculiar to ESI? to particular
631 categories of actions? What are the countervailing risks of
632 limiting access to justice? How do we get information that carries
633 beyond the battle cries uttered on both sides of the debate?

634 The 1998 experience with a cost-bearing proposal that
635 ultimately failed in the Judicial Conference is informative. The
636 Committee began by focusing on Rule 34 requests to produce as a
637 major source of expense. Document review has been said to be 75% of
638 discovery costs. Technology assisted review is being touted as a
639 way to save costs, but it is limited to ESI. The 1998 Committee
640 concluded that a cost-bearing provision would better be placed as
641 a general limit on discovery in Rule 26(b), as a lead-in sentence
642 to the proportionality factors.

643 Discussions since 1998 have suggested that a line should be
644 drawn between "core" discovery that can be requested without paying
645 the costs of responding and further discovery that is available
646 only if the requester pays.

647 Emery Lee is considering the question whether there is a way
648 to think about getting some sense of pervasiveness and types of
649 cases from the data gathered for the 2009 case study. Andrea
650 Kuperman will undertake to survey the literature on cost shifting.

November 27 version

651 Other sources also will be considered. There may be standing
652 orders. Another example is the Federal Circuit e-mail discovery
653 protocol, which among other provisions would start with presumptive
654 limits on the number of custodians whose records need be searched
655 and on the number of key words to be used in the search.

656 One of the empirical questions that is important but perhaps
657 elusive is framed by the distinction between "recall" and
658 "precision." Perfect recall would retrieve every responsive and
659 relevant document; it can be assured only if every document is
660 reviewed. Perfect precision would produce every responsive and
661 relevant document, and no others. Often there is a trade-off. Total
662 recall is totally imprecise. There is no reason to believe that
663 responses to discovery requests for documents, for example, ever
664 achieve perfect precision. But such measures as limiting requests
665 to 5 key words are likely to backfire – one of the requests will
666 use a word so broad as to yield total recall, and no precision.

667 Judge Grimm continued by describing his standard discovery
668 order as designed to focus discovery on the information the parties
669 most need. It notes that a party who wants to pursue discovery
670 further after completing the core discovery must be prepared to
671 discuss the possibility of allocating costs. This approach has not
672 created any problems. Case-specific orders work. For example, it
673 might be ordered that a party can impose 40 hours of search costs
674 for free, and then must be prepared to discuss cost allocation if
675 it wants more.

676 Although this approach works on a case-by-case basis,
677 "drafting a transsubstantive rule that defines core discovery would
678 be a real challenge."

679 The question is how vigorously the Subcommittee should
680 continue to pursue these questions.

681 Professor Marcus suggested that the "important policy issues
682 have not changed. Other things have changed." It will be important
683 to learn whether we can gather reliable data to illuminate the
684 issues.

685 Emery Lee sketched empirical research possibilities. Simply
686 asking lawyers and judges for their opinions is not likely to help
687 with a topic like this. It might be possible to search the CM/ECF
688 system for discovery disputes to identify the subjects of the
689 disputes and the kinds of cases involved. That would be pretty easy
690 to do. Beyond that, William Hubbard has pointed out that discovery
691 costs are probably distributed with a "very long tail of very
692 expensive cases." The 2009 Report provided information on the costs
693 of discovery. Extrapolating from the responses, it could be said

November 27 version

694 that the costs of discovery force settlement in about 6,000 cases
695 a year. That is a beginning, but no more. Interviewing lawyers to
696 get more refined explanations "presents a lot of issues." One
697 illustration is that we have had little success in attempts to
698 survey general counsel – they do not respond well, perhaps because
699 as a group they are frequently the subjects of surveys. A different
700 possibility would be to create a set of hypothetical cases and ask
701 lawyers what types of discovery they would request to compare to
702 the assumptions about core and non-core discovery made in
703 developing the cases. The questions could ask whether requester-
704 pays rules would make a difference in the types of discovery
705 pursued.

706 Discussion began with a Subcommittee member who has reflected
707 on these questions since the conference call and since the
708 testimony at the November 6 congressional hearing. Any proposal to
709 advance cost-bearing beyond the modest current proposal to amend
710 Rule 26(c) would draw stronger reactions than have been drawn by
711 the comments on the "Duke Package" proposals. "So we need data.
712 But what kind? What is the problem?" Simply learning how much
713 discovery costs does not tell us much. E-discovery is a large part
714 of costs. But expert witnesses also are a large part of costs. So
715 is hourly billing. But if the problems go beyond the cost of
716 discovery, what do we seek? Whether cost is in some sense
717 disproportionate, whether the same result could be achieved at
718 lower cost? How do we measure that? Would it be enough to find – if
719 we can find it – whether costs have increased over time? Then let
720 us suppose that we might find cost is a problem. Can rulemaking
721 solve it? And will a rule that addresses costs by some form of
722 requester pays impede access to the courts? There is a risk that if
723 we do not do it, Congress will do it for us. But it is so difficult
724 to grapple with these questions that we should wait a while to see
725 what may be the results of the current proposed amendments.

726 Another member said that these questions are very important.
727 "The time needed to consider, and to decide whether to advance a
728 proposal, is enormous." It took two years to plan the Duke
729 Conference, which was held in 2010. It took three years more to
730 advance the proposed amendments that were published this summer.
731 That is a lot of preparation. It is, however, not too early to
732 start now. Among the questions are these: Does discovery cost "too
733 much"? How would that be defined? Requester-pays rules could reduce
734 the incidence of settlements reached to avoid the costs of
735 discovery; in some cases that would unnecessarily discourage trial,
736 but there also are cases that probably should settle. A different
737 measure of excess cost is more direct – does discovery cost more
738 than necessary to resolve the case, resulting in wasted resources?
739 What data sources are available? We have not yet mined a lot of the
740 empirical information provided for the Duke Conference. The RAND

November 27 version

741 report reviewed corporate general counsel, assuring anonymity; its
742 results can be considered. We might enlist the FJC to interview
743 people who have experience with the protocol developed for
744 individual employment cases under the leadership of NELA – it would
745 be good to know what information they got by exchanges under the
746 protocol, and how much further information they gathered by
747 subsequent discovery. All of these things take time. The pilot
748 project for patent cases is designed for ten years. FJC study can
749 begin, but will take a long time to complete. And other pilot
750 projects will help, remembering that they depend on finding lawyers
751 who are willing to participate. All of this shows that it is
752 important to keep working on these questions, without expecting to
753 generate proposed rules amendments in the short-term future.

754 A member expressed great support for case management, but
755 asked how far it is feasible to approach these problems by general
756 national rules. "What is our jurisdiction"?

757 A partial response was provided by another member who agreed
758 that this is a very ambitious project. "Apart from 'jurisdiction,'
759 what is our capacity to do this?" Forty-one witnesses at the
760 hearing yesterday divided in describing the current proposals –
761 some found them modest, others found them a sea-change in discovery
762 as we know it. Requester-pays proposals are far more sensitive. A
763 literature search may be the best starting point. What is already
764 out there? And we can canvass and inventory the pilot projects.
765 That much work will provide a better foundation for deciding
766 whether to go further. If the current proposals are adopted – no
767 earlier than December 1, 2015 – they may work some real changes
768 that will affect any decisions about requester-pays proposals.

769 A lawyer member observed that Rule 26(b)(2)(B) provides for
770 cost shifting in ordering discovery of ESI that is difficult to
771 access. "There have been a number of orders. We could follow up
772 with experience." One anecdote: in one case a plaintiff seeking
773 discovery of 94 backup tapes, confronted by an order to pay 25% of
774 the search costs, reacted by reducing the request to 4 tapes.
775 Beyond that, Texas Rule 196.4 has long provided for requester
776 payment of extraordinary costs of retrieving ESI. We might learn
777 from experience. So, reacting to the Federal Circuit model order
778 for discovery in patent actions, the Eastern District of Texas has
779 raised the initial limit from 5 custodians to 8, and has omitted
780 the provision for cost-shifting if the limit is exceeded; it
781 prefers to address cost-shifting on a case-by-case basis. And we
782 should remember that "cloud" storage may have an impact on
783 discovery costs.

784 The Committee was reminded that if the proposed Rule 26(c)
785 amendment is adopted, experience in using it could provide a source

November 27 version

786 of data to support further study.

787 The discussion concluded by determining to keep this topic on
788 the agenda. The Duke data can be mined further. We can look for
789 cases that follow in the wake of the Supreme Court's recognition
790 that the presumption is that the responding party bears the expense
791 of response, *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358
792 (1978).

793 *CACM*

794 The agenda materials describe continuing exchanges with the
795 Committee on Court Administration and Case Management. The question
796 whether pro se filers should be required to provide social security
797 numbers to assist in identifying problem filers can be put off
798 because the current version of the "NextGen" CM/ECF system does not
799 include a field for this information. And CACM agrees that there is
800 no present need to consider rules amendments to address the
801 prospect that a judge in one district might, as part of accepting
802 assignment to help another district, conduct a bench trial by
803 videoconferencing.

804 The meeting concluded with thanks to all participants and
observers for their interest and hard work.

Respectfully submitted,

Edward H. Cooper
Reporter

November 27 version

THIS PAGE INTENTIONALLY BLANK