

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 3, 2017 | Phoenix, Arizona

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ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure (the “Standing Committee”) held its spring meeting at the Sandra Day O’Connor United States Courthouse in Phoenix, Arizona, on January 3, 2017. The following members participated in the meeting:

Judge David G. Campbell, Chair	Professor William K. Kelley
Judge Jesse M. Furman	Judge Amy St. Eve
Gregory G. Garre, Esq.	Professor Larry D. Thompson
Daniel C. Girard, Esq.	Judge Richard C. Wesley (by telephone)
Judge Susan P. Graber	Chief Justice Robert P. Young
Judge Frank Mays Hull	Judge Jack Zouhary
Peter D. Keisler, Esq.	

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules – Judge Neil M. Gorsuch, Chair Professor Gregory E. Maggs, Reporter	Advisory Committee on Criminal Rules – Judge Donald W. Molloy, Chair Professor Sara Sun Beale, Reporter (by telephone) Professor Nancy J. King, Associate Reporter (by telephone)
Advisory Committee on Bankruptcy Rules – Judge Sandra Segal Ikuta, Chair Professor S. Elizabeth Gibson, Reporter Professor Michelle M. Harner, Associate Reporter	Advisory Committee on Evidence Rules – Judge William K. Sessions III, Chair Professor Daniel J. Capra, Reporter
Advisory Committee on Civil Rules – Judge John D. Bates, Chair Professor Edward H. Cooper, Reporter Professor Richard L. Marcus, Associate Reporter	

Elizabeth J. Shapiro, Deputy Director of the Department of Justice’s Civil Division, represented the Department on behalf of the Honorable Sally Q. Yates, Deputy Attorney General.

Other meeting attendees included: Judge Paul W. Grimm, former member of the Advisory Committee on Civil Rules and Chair of the Pilot Projects Working Group; Judge Robert Dow, Jr., Chair of the Rule 23 Subcommittee, Advisory Committee on Civil Rules; Zachary Porianda, Attorney Advisor to the Court Administration and Case Management (CACM) Committee; Professor Bryan A. Garner, Style Consultant; and Professor R. Joseph Kimble, Style Consultant.

Providing support to the Standing Committee:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Rebecca A. Womeldorf	Secretary, Standing Committee
Julie Wilson	Attorney Advisor, RCSO
Scott Myers	Attorney Advisor, RCSO
Bridget Healy (by telephone)	Attorney Advisor, RCSO
Hon. Jeremy D. Fogel	Director, Federal Judicial Center (FJC)
Dr. Emery G. Lee III	Senior Research Associate, FJC
Dr. Tim Reagan	Senior Research Associate, FJC
Lauren Gailey	Law Clerk, Standing Committee

OPENING BUSINESS

Welcome and Opening Remarks

Judge Campbell called the meeting to order. He introduced the Standing Committee’s new members, Judge Furman of the Southern District of New York, Judge Hull of the U.S. Court of Appeals for the Eleventh Circuit, attorney Peter Keisler of Sidley Austin, and Justice Young of the Michigan Supreme Court.

Judge Campbell discussed the timing and location of meetings. The Standing Committee holds a meeting in June, after the advisory committees’ spring meetings have been concluded, and in time to approve matters to be published in August. The Standing Committee’s winter meeting is held during the first week of January, after the advisory committees’ fall meetings (which run from September through November) and the holidays, but before the reporters’ spring semesters begin. Although it has been a tradition for the past few years to hold the winter meeting in Phoenix, Judge Campbell welcomed the members to suggest alternative locations.

In his previous role as Chair of the Advisory Committee on Civil Rules, Judge Campbell found the January meeting to be an invaluable opportunity to share proposals with the Standing Committee and solicit feedback from its members. Judge Campbell encouraged all to share their thoughts.

Report on Rules and Forms Effective December 1, 2016

The following Rules and Forms went into effect on December 1, 2016: Appellate Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, 6, new Form 7, and the new Appendix; Bankruptcy Rules 1010, 1011, 2002, 3002.1, 7008, 7012, 7016, 9006, 9027, 9033, new Rule 1012, and Official Forms 410S2, 420A, and 420B; Civil Rules 4, 6, and 82; and Criminal Rules 4, 41, and 45 (*see* Agenda Book Tab 1B).

Judge Molloy reported that Congress is considering possible legislative action that would undo the recent amendment to Criminal Rule 41. Judge Campbell added that the Department of Justice (DOJ) had been helpful in advising Congress of the intent behind the rule change. Discussion followed.

*Report on September 2016 Judicial Conference Session,
Proposed Amendments Transmitted to the Supreme Court, and
Rules and Forms Published for Public Comment*

Rebecca Womeldorf reported on the September 2016 session of the Judicial Conference. In its semiannual report to the Judicial Conference, the Standing Committee submitted several rules amendments for final approval and requested approval for publication of a number of other proposed rule amendments.

The Judicial Conference approved the proposed amendments to Bankruptcy Rules 1001, 1006(b), and 1015(b), and Evidence Rules 803(16) and 902. These amendments were submitted to the Supreme Court on September 28, 2016. The Court will review the package and, barring any objection, adopt it and transmit it to Congress by May 1, 2017. If Congress takes no action, the amendments will go into effect on December 1, 2017.

The Judicial Conference also approved the Mandatory Initial Discovery Pilot Project and the Expedited Procedures Pilot Project.

The Standing Committee previously approved for public comment proposed amendments to the following Rules: Appellate Rules 8, 11, 25, 28.1, 29, 31, 39, 41, and Form 4; Bankruptcy Rules 3002.1, 3015, 3015.1 (New), 5005, 8002, 8006, 8011, 8013, 8015, 8016, 8017, 8018.1 (New), 8022, and 8023, Part VIII Appendix (New), and Official Forms 309F, 417A, 417C, 425A, 425B, 425C, and 426; Civil Rules 5, 23, 62, and 65.1; and Criminal Rules 12.4, 45, and 49. These rules and forms were published for public comment in July and August 2016. Many of these changes are non-controversial. The proposal to amend Civil Rule 23 has generated the most interest at public hearings; other hearing testimony has pertained to electronic filing changes affecting all rule sets.

APPROVAL OF THE MINUTES OF THE PREVIOUS MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee approved the minutes of the June 6, 2016 meeting.**

INTER-COMMITTEE WORK

Coordination Efforts

Scott Myers of the RCSO delivered a report on coordination efforts regarding proposed rules amendments that affect more than one advisory committee. He described rules amendments currently out for public comment that have implications for more than one set of federal rules. The first example related to electronic filing, service, and signatures (proposed amendments to Appellate Rule 25, Bankruptcy Rule 5005, Civil Rule 5, and Criminal Rule 49). Mr. Myers noted that the advisory committees coordinated language prior to publication; any changes the advisory committees recommend when the rules are submitted to the Standing Committee for final approval will also go through the coordination process.

Mr. Myers explained that proposed amendments to Civil Rules 62 and 65.1 that would eliminate the term “supersedeas bond” also have inter-committee implications. The Appellate Rules Committee published proposed amendments to Appellate Rules 8, 11, and 39 that would eliminate the term, and that the Bankruptcy Rules Committee planned to do the same by recommending technical conforming amendments to Bankruptcy Rules 8007, 8010, and 8021. The advisory committees will need to coordinate any additional changes made as a result of comments received.

Proposed amendments published for comment to the criminal disclosure rule could impact the appellate, bankruptcy, and civil disclosure rules. As published, the criminal disclosure rule would change the timing for initial and supplemental corporate disclosure statements, and that parallel amendments to the appellate, bankruptcy, and civil disclosure rules would need to be made for consistency across the rules. A reporter to the Criminal Rules Committee said that this may be a case where factors specific to criminal procedure warrant a change that need not be adopted by the other advisory committees. Mr. Myers added that if parallel amendments are pursued by the Appellate, Bankruptcy, and Civil Rules Committees, the effective date of any changes to rules in those areas would trail the proposed criminal rule change by a year.

Finally, Mr. Myers noted that the Bankruptcy Rules Committee planned to address at its next meeting an amendment to its privacy rule to address redaction of personal identifying information from filed documents. The proposal responded to a suggestion from the CACM Committee after a national creditor sought assistance from the Administrative Office in efficiently removing personal identifying information from thousands of proof of claims it had filed across the country. The Civil and Criminal Rules Committees considered recommending similar amendments to their privacy rules, but both committees determined that courts have the tools needed to handle the relatively small number of documents filed on their dockets containing protected personal identifying information. Accordingly, the Civil and Criminal Rules Committees did not plan to follow the lead of the Bankruptcy Rules Committee in amending their privacy rules unless the Standing Committee believed amendments should be made to all the privacy rules in the interests of uniformity.

Judge Campbell solicited additional issues that will require or benefit from inter-committee coordination.

Five-Year Review of Committee Jurisdiction

Ms. Rebecca Womeldorf introduced discussion of the five-year review of committee jurisdiction required by the Judicial Conference. In 1987, the Judicial Conference established a requirement that “every five years, each committee must recommend to the Executive Committee, with a justification for the recommendation, either that the committee be maintained or that it be abolished.” In 2017, therefore, each Judicial Conference committee has been asked to complete a questionnaire to evaluate its mission, membership, operating procedures, and relationships with other committees in an effort to identify where improvements can be made.

As the Bankruptcy Rules Committee had completed a version of the Five-Year review, Judge Ikuta was invited to summarize its recommendations. Judge Ikuta discussed the Bankruptcy Rules Committee’s responses, focusing on three issues: (1) inter-committee coordination, (2) voting rights for non-member participants such as the representative from the DOJ and the bankruptcy clerk participant, and (3) background knowledge requirements for judge members.

With respect to the first issue of coordination, Judge Ikuta said she supported the addition of the coordination report to the Standing Committee’s agenda, but urged more coordination once overlap is identified, so that there is a clear process transparent to all, with perhaps one advisory committee leading the effort.

Judge Campbell asked Judge Ikuta what additional steps should be added to the Standing Committee’s current coordination efforts. Judge Ikuta suggested that the existing charts of overlapping rules could provide a starting point from which to identify overlap among rules. Once points of overlap are identified, the question becomes how best to proceed. Should one advisory committee take the lead? Should all of the committees discuss the issue first? Should the procedure vary, depending on the particular situation? Judge Ikuta took the position that a specific procedure for handling overlapping provisions should be adopted.

The stated goal of coordination is generally parallel language among identical rules provisions across rules sets, adopted during the same rules cycle. A reporter stated that a coordination procedure *is* currently in place—proposed changes with inter-committee implications are to be referred to a subcommittee of the Standing Committee—and that process was followed when the time counting amendments were made to all the rule sets. This procedure was not followed precisely with respect to the current round of amendments concerning electronic filing, service, and signatures, but the basic procedure of using a Standing Committee subcommittee to coordinate when necessary is available when needed.

Another reporter agreed and added that the structure of committee hierarchy can complicate coordination. Although the Standing Committee is charged with coordinating the work of the advisory committees, and suggesting proposals for them to study, it does not simply direct advisory committees to amend particular rules. Rather, proposed rule changes flow up from the advisory committees to the Standing Committee, and it is not always clear until an advisory committee presents a fully developed recommendation that coordination with other advisory committees is needed. Even so, the Standing Committee may—and has—set up subcommittees

for the purpose of persuading the advisory committees to cooperate regarding related rules changes.

A staff member asked what role the Standing Committee liaisons, as part of the coordination machinery, could be expected to play in the coordination process. A Standing Committee member agreed that, while liaison members do not have voting privileges, they could be helpful to the coordination efforts by alerting the Standing Committee to possible overlapping changes under consideration.

A third reporter said advisory committees need more information about the other advisory committees' agenda items. Specifically, beyond the general subject matter under discussion, what exact amendments are under consideration for a parallel rule? Armed with this information, the advisory committees could better consider parallel amendments in the same meeting cycle. A suggestion was made that the most effective way to disseminate this information is to ensure that each advisory committee's agenda book is shared with the chairs and reporters of all of the other advisory committees. There was agreement that sharing agenda books would benefit coordination. A reporter reiterated that more proactive use of subcommittees can go a long way toward solving coordination issues.

A reporter observed that the Bankruptcy Rules are more frequently affected by coordination issues because many of the rules either incorporate or are modeled on the Civil and Appellate Rules. A staff member added that often changes to Bankruptcy Rules have lagged by a year or more parallel Civil or Appellate Rules changes, without issue. It may sometimes be necessary to ask the other advisory committees to delay a change for a year if the Standing Committee wants parallel changes to go into effect at the same time, but the fact that a bankruptcy version of a change sometimes goes into effect a year later than a parallel appellate or civil rule change has not been a historical source of problems for courts or attorneys, if it has been noticed at all. A reporter pointed to the recent proposal dealing with payments to class-action objectors as one that required substantial coordination between the Civil and Appellate Rules Committees and the current system worked well. A Standing Committee member cited Civil Rules 62 and 65 as another example of a successful coordination effort.

Judge Campbell identified four actions to be taken to further the Standing Committee's coordination efforts: (1) the RCSO will continue to identify, track, and report on proposed rules amendments affecting multiple advisory committees; (2) agenda books will be shared by each advisory committee with the chairs and reporters of all of the other advisory committees; (3) the RCSO will assist in establishing coordination subcommittees when that seems appropriate; and (4) the Standing Committee will look for opportunities for coordination and future process improvements. A Standing Committee member added that advisory committees affected by a proposed rule change could send a member to participate in the proposing advisory committee's meeting. Judge Campbell agreed that this would be a good idea in appropriate circumstances.

Judge Ikuta's second bankruptcy-specific issue in the Five-Year review concerned whether the Bankruptcy Rules Committee's substantive experts – such as a recent Chapter 13 trustee invitee, the bankruptcy clerk advisor, and the representatives from the DOJ and the Office of the United States Trustees – should be made voting members, and whether Article III judges being

considered for membership on the Bankruptcy Rules Committee should be required to have some knowledge of the bankruptcy process. Judge Campbell asked why the Bankruptcy Rules Committee's expert members do not currently vote. One possible answer is that the Bankruptcy Rules Committee does not consider them full voting members because they were not appointed by the Chief Justice. Several Standing Committee members noted that the DOJ representative on other rules committees have always voted, though clerk representatives have not. It was observed that because the United States Trustee is an arm of the DOJ, the government would have two votes if voting rights were extended to both representatives on the Bankruptcy Rules Committee.

Providing additional historical perspective, a reporter explained that the DOJ is unique among the committees' membership because it represents the Executive Branch in addition to the interests of the justice system generally. To give all bankruptcy expert invitees a vote could set a problematic precedent as many interest groups would seek to join the rules committees to advance their views. The DOJ is deserving of an exception from advocacy, however, because it is an Executive Branch agency, and the other two branches of government are represented in the rulemaking process.

A Standing Committee member supported making the bankruptcy DOJ representative a voting member, as was the case on the other rules committees, but added that the United States Trustee and DOJ representatives should have only one vote between them because they are the same office. After further discussion, Judge Campbell suggested the Bankruptcy Rules Committee should be consistent with the other advisory committees in its treatment of its expert members; the DOJ member should vote, and any other expert advisors should be treated like the clerk members of the other committees, who play an informational role but do not vote. No member objected to this approach.

Judge Ikuta's third bankruptcy-specific item from the Five-Year review concerned whether Article III judges being considered for membership on the Bankruptcy Rules Committee should be required to have bankruptcy experience. Judge Campbell agreed that bankruptcy experience should be considered in recommending potential members to the Chief Justice.

After further discussion of the Five-Year review, it was agreed that the Standing Committee should submit a single report for the rules committees.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Marcus provided the report on behalf of the Civil Rules Committee, which met on November 3, 2016, in Washington, D.C. The Civil Rules Committee's single action item involved recommending to the Judicial Conference for approval a technical amendment to Rule 4(m).

Action Item

Technical Amendment to Rule 4(m) – Rule 4(m) establishes a time limit for serving the summons and complaint. The proposed rule text revises the final sentence of Rule 4(m), which was

amended on December 1, 2015, and again on December 1, 2016. The 2015 amendment shortened the time for service from 120 days to 90 days, and added to the list of exemptions to that time limit Rule 71.1(d)(3)(A), notices of a condemnation action. The 2016 amendment added to the list of exemptions Rule 4(h)(2) service on a corporation, partnership, or association at a place not within any judicial district of the United States. At the time the 2016 proposal was prepared, the advisory committee was working from Rule 4(m) as it was in 2014, because the 2015 amendment exempting service under Rule 71.1(d)(3)(A) had been proposed, but final action was more than a year in the future. For this reason, the part of the 2015 amendment adding Rule 71.1(d)(3)(A) was inadvertently omitted from the 2016 proposal. Therefore, that proposal, as published, recommended, and adopted, read:

This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

The Standing Committee explored with Congress's Office of the Law Revision Counsel (OLRC) the possibility of correcting the rule text as a scrivener's error. The OLRC declined to do so, but did place in an explanatory footnote the official print for the House of Representatives Committee on the Judiciary.

Because the OLRC declined to correct the omission of Rule 71.1(d)(3)(A), it must be corrected through the Rules Enabling Act process. Given that the provision has already been published, reviewed, and adopted, and because its omission was inadvertent, further publication is not required. The final sentence of Rule 4(m) should read:

This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1), or to service of a notice under Rule 71.1(d)(3)(A).

The Civil Rules Committee voted to recommend approval of this rule text for submission to the Judicial Conference in March 2017 as a technical amendment, looking toward adoption by the Supreme Court in the spring of 2017, for an effective date of December 1, 2017.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously voted to recommend the technical amendment to Rule 4(m) to the Judicial Conference for approval.**

Pilot Projects Working Group

Judge Bates, Judge Grimm, Judge Fogel, and Emery Lee of the FJC led the discussion of two pilot projects approved by the Judicial Conference in September 2016, both of which are intended to improve pre-trial case management and reduce the cost and delay of civil litigation: (1) the Expedited Procedures Pilot, which will utilize existing rules, practices, and procedures and is intended to confirm the merits of active case management under these existing rules and practices; and (2) the Mandatory Initial Discovery Pilot, which is intended to measure whether court-ordered, robust, mandatory discovery produced before traditional discovery will reduce cost, burden, and delay in civil litigation. It was noted that Chief Justice Roberts mentioned the pilot projects in his 2016 Year End Report.

Judge Bates advised that these projects are expected to be implemented beginning in the spring of 2017, likely with their starts staggered for administrative-convenience purposes. One key to the projects' success will be getting enough districts to participate.

To discuss these projects in more detail, Judge Bates called upon Judge Grimm, a former member of the Civil Rules Committee and Chair of the Pilot Projects Working Group. Judge Grimm noted that during the public comment period and in public hearings held on the 2015 Civil Rules Package, some practitioners questioned whether rule changes should be implemented absent empirical support. Other practitioners noted that active case management is essential to reducing the cost and delay of civil litigation. Both pilot projects are responsive to these concerns. The Mandatory Initial Discovery Pilot will provide empirical data regarding whether the procedures implemented in the pilot project are effective and warrant future rules amendments. The goal of the Expedited Procedures Pilot is to promote a culture change by confirming the benefits of active case management using existing procedural rules. The Pilot Projects Working Group is coordinating with the FJC to design the pilot projects to produce measurable markers that yield good data.

Judge Grimm reviewed the history of the Mandatory Initial Discovery Pilot. The concept of mandatory initial discovery was first introduced in the 1993 rules amendments. The idea was to create an obligation that parties exchange information relevant to claims and defenses underlying the litigation without a formal discovery request. "It was an idea whose time had perhaps not yet come." The 1993 amendments included opt-out provisions, and most opted out. As a result, mandatory initial discovery has been little-used, and there has been no opportunity to verify empirically whether such procedures would help to reduce the cost and length of litigation. Interestingly, approximately ten states have since adopted mandatory initial discovery, to great success.

The Mandatory Initial Discovery Pilot will be implemented through a standing order (*see* Agenda Book Tab 3B, Attachment 5). Participating courts will also have access to resources developed by the Pilot Projects Working Group, including a reference manual, model forms and orders, and additional educational materials.

Judge Grimm then turned to the Expedited Procedures Pilot, the goals of which include ensuring courts' compliance with the requirements of: a prompt Rule 16 conference; issuance of a scheduling order setting a definite period of discovery of no more than 180 days and allowing no more than one extension, and then only for good cause; the informal resolution of discovery disputes; a commitment on the part of judges to resolve dispositive motions within 60 days from the filing of a reply brief and a firm trial date. The trial date would be set either at the initial scheduling conference, after the filing of dispositive motions, or upon the resolution of those motions.

The Pilot Projects Working Group is continuing to develop and finalize the procedures and supporting materials for the pilot projects. Judge Grimm confirmed that the pilot projects will be staggered, with the Mandatory Initial Discovery Pilot beginning first. Once the pilot projects have begun, administrative support will be provided by RCSO and CACM. The pilots will last for three years, but data collection and analysis will continue for longer than three years.

Judge Grimm noted the need for additional recruitment of courts to participate. The original goal was to have at least five pilot courts participating in each project. The Pilot Projects Working Group sought diversity among participating courts, in terms of both size and geography, and had initially sought participation from all active and senior judges on each court. Recruitment efforts in the Northern District of Illinois resulted in a participation rate of approximately 75 percent, which will permit intra-district comparisons between participating and non-participating judges.

The District of Arizona will participate in the Mandatory Initial Discovery Pilot. Judge Campbell reported that because Arizona's state rules of civil procedure already include provisions similar to those the pilot projects are intended to test, the District of Arizona's judges have found the experiences of their state counterparts in handling these rules to be reassuring. Twenty years after the adoption of mandatory initial discovery in Arizona state court, a survey revealed that 74 percent of Arizona practitioners "prefer to be in state court" over federal court, as opposed to 41 percent nationally. When surveyed, lawyers in Arizona responded that they prefer state court because "[they] spend less money, and . . . cases [are] resolved more quickly." Judge St. Eve, whose Northern District of Illinois is confirmed to participate as well, suggested this information might be useful in helping judges to convince their colleagues to participate.

The District of Montana is also considering taking part. However, Judge Molloy expressed concerns about the standing order, which Judge Grimm confirmed was mandatory due to the need to ensure consistent measurement. Judge Molloy stated that the complexity of the standing order, and the bar's negative response to the attempt in the early 1990s to make initial discovery mandatory, were—although not dispositive—concerning to the District of Montana.

The Eastern District of Kentucky is confirmed to participate in the Expedited Procedures Pilot. Thanks to the efforts of Judges Diamond and Pratter in the Eastern District of Pennsylvania, that district remains a possibility, as do the Southern District of Texas, the District of Utah, and the District of New Mexico.

Judge Grimm shared several lessons learned as it has tried to recruit participating courts: the process takes time, success requires buy-in from multiple judges on a given court, and persuasion can be a challenge. Asked what percentage of a court's judges would constitute sufficient participation, Judge Grimm responded that 50 to 60 percent would provide a "center of gravity." A judge member requested clarification as to the term, "firm trial date," which Judge Grimm acknowledged had been an "area of concern" for some. He further acknowledged that the goal of disposing of 90 percent of cases within 14 months of either 90 days from service or 60 days from the entry of an appearance was "ambitious" by design.

Judge Fogel argued that "a culture change" is "quite difficult," but is necessary to drive up recruitment. Although the FJC has engaged in education methods such as webinars, receptivity to pilot project participation has largely been confined to so-called "baby judges," while "longer-tenured judges" seem "more comfortable with the status quo." Judge Fogel anticipated this topic would be discussed at the upcoming Chief District Judges meeting in March 2017. The FJC hopes to use adult education principles (specifically, by focusing training on certain areas of knowledge, skills, and abilities) to encourage judges to adopt active case management practices (*see* Agenda Book Tab 3B, Attachment 6). A judge member suggested the FJC consider

including a chambers staff member in the training, along with his or her judge. Judge Campbell also suggested including in the training process state judges who have experience with similar rules provisions.

Emery Lee then addressed the topic of data collection. He reviewed his November 29, 2016 memorandum to the Standing Committee, which addressed potential problems (*see* Agenda Book Tab 3B, Attachment 7). The first issue is whether and when to set the firm trial date. Available data from eight districts and 3,000 civil cases previously addressing this topic shows significant variance among district courts. In approximately forty-nine percent of cases, no trial date could be found. Second, the two pilot projects are very different from one another in terms of measures. The Expedited Procedures Pilot, which will require the tracking of motion practice and discovery disputes, is the easier of the two, although the lack of a definitive and consistent starting point for the “fourteen-month clock” is problematic.

Dr. Lee expressed interest in obtaining feedback through attorney surveys, which could be automated via the district’s CM/ECF system. When a “case-closing event” occurs in CM/ECF, it can trigger another “CM/ECF case event” directing attorneys to be noticed to a survey conducted by an outside vendor. Automation of the surveys in this manner will save significant time, but will require assistance from clerks’ offices.

A judge member asked whether, in addition to comparison among districts, the data collected would allow for a “before-and-after” comparison within a single district. The answer is yes by district and for individual judges, but the usefulness of the data can hinge on many factors over the next four to five years. Another judge member wondered whether “within-court data [was] *more* helpful” than data from a number of diverse districts, in that the former controls for more variables. Two other judges responded that the “self-selection bias” becomes an issue in that situation, as the judges opting in might already be using expedited procedures. In closing, another judge member pointed out the need to define the metrics: “What are we comparing?”

Information Items

Rules Published for Public Comment – Proposed amendments to Rules 5, 23, 62, and 65.1 were published for public comment in August 2016, and will be the subject of three hearings. The changes to Rule 23, which largely concern class-action settlements, have generated the most interest. Eleven witnesses testified at the November 3, 2016 hearing held in conjunction with the advisory committee’s fall 2016 meeting, and eleven more were scheduled to testify at the January 4, 2017 hearing. More than a dozen were already scheduled to testify at the February 16, 2017 hearing, which will be held by telephone.

Rule 30(b)(6) Subcommittee – The Civil Rules Committee has decided to explore whether it is feasible and useful to address some of the problems that bar groups have regularly identified with depositions of entities under Rule 30(b)(6). The Civil Rules Committee studied this issue ten years ago, but concluded that any problems were attributable to behavior that could not be effectively addressed by rule. When the question was reassessed a few years later, the advisory committee reached the same conclusion. Recently, certain members of the American Bar Association Section of Litigation submitted a suggestion reviving these concerns.

Judge Bates advised that a subcommittee has been formed, chaired by Judge Joan Ericksen, to consider possible amendments to Rule 30(b)(6). The Rule 30(b)(6) Subcommittee has begun to develop a tentative initial draft of a potential amendment to help to make the challenges of the process concrete, but it has not yet decided whether to recommend any amendments to the rule.

Redacting Improper Filings: Rule 5.2 – Court filings frequently include personal information that should have been redacted. Rule 5.2 (Privacy Protections for Filings Made with the Court) was designed to protect litigants’ privacy by permitting court filings to “include only: (1) the last four digits of the social-security number and taxpayer identification number; (2) the year of the individual’s birth; (3) the minor’s initials; and (4) the last four digits of the financial-account number.” The rule resulted from a coordinated process that led to the adoption of parallel provisions in the Appellate, Bankruptcy, and Criminal Rules.

The Bankruptcy Rules Committee intends to publish proposed new Bankruptcy Rule 9037(h), which would establish a procedure for replacing an improper filing with a properly-redacted filing, for public comment.

The Civil Rules Committee considered a parallel amendment to the Civil Rules that would have added a specific provision to Rule 5.2 for correcting papers that are filed without redacting personal identifying information in the manner that the rule requires. During its consideration of the proposed amendment at its fall 2016 meeting, the Civil Rules Committee determined that the district courts seem to be managing the problem well when it arises and, therefore, determined that there is no independent need for a national rule to correct improperly-redacted filings. The advisory committee decided to remove this item from its agenda.

Jury Trial Demand: Rules 38, 39, and 81(c)(3)(A) – Rule 81(c)(3) sets forth the procedure for demanding a jury trial in actions removed from state court. Specifically, Rule 81(c)(3)(A) provides that a party who demanded a jury trial in accordance with state law does not need to renew the demand after removal. Before the 2007 Style Project amendments, the rule provided that the party need not make a demand if state law “does not” require a demand (emphasis added). Recognizing that the Style Project amendments did not affect the substantive meaning of the rules, most courts continue to read Rule 81(c)(3)(A) as excusing a demand after removal only if state law does not require a demand at any point. However, as pointed out in a suggestion submitted in 2015 by Mark Wray, Esq. (Suggestion 15-CV-A), replacing “does” with “did” inadvertently created an ambiguity that may mislead a party who wants a jury trial to forgo a demand because state law, although requiring a demand at some point after the time of removal, did not require that the demand be made by the time of removal.

Discussion of this issue at the Standing Committee’s June 2016 meeting led Judges Gorsuch and Graber to suggest that the demand requirement in civil cases be reconsidered altogether (Suggestion 16-CV-F). Specifically, the suggestion would adopt the procedure currently used in criminal cases: a jury trial should be the default; a case would be tried without a jury only if all parties waive a jury trial, and the court must approve any waiver. The Civil Rules Committee has begun follow-up work on this suggestion. Preliminarily, the advisory committee surveyed local and state court rules and case law to determine how often parties who want a jury trial do not get one due to the failure to make a timely demand.

Service of Subpoenas: Rule 45(b)(1) – Under Rule 45(b)(1), a subpoena is served by “delivering a copy to the named person.” The majority of courts interpret this provision to require personal service, while some courts have recognized other means of delivery, most often by mail. The advisory committee will discuss at future meetings whether Rule 45 should expressly recognize other means of delivery.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Gorsuch and Professor Maggs provided the report on behalf of the Appellate Rules Committee, which met on October 18, 2016, in Washington, D.C. Judge Gorsuch succeeded Judge Steven M. Colloton as chair of the Appellate Rules Committee at the beginning of October 2016.

Judge Gorsuch reported that the Appellate Rules Committee had one action item, a proposed technical amendment, for which it sought the approval of the Standing Committee. The agenda also included five information items.

Action Item

Technical Amendment to Rule 4(a)(4)(B)(iii) – On December 14, 2016, OLRC informed the Appellate Rules Committee through RCSO that the published version of Appellate Rule 4 should not include subdivision (a)(4)(B)(iii), as that subsection had been inadvertently deleted in 2009. In 2009, Rules 4(a)(4)(B)(ii) and 4(a)(5) were amended as part of the Time Computation Project, but subsection (iii) was not amended. The redlined version of the proposed amendments, used during committee deliberations and published for public comment, included asterisks between subdivisions 4(a)(4)(B)(ii) and 4(a)(5) to show that the material between them—subdivision 4(a)(4)(B)(iii)—was not to be changed. However, the “clean version” combining the changes inadvertently omitted those asterisks, making it appear that subdivision 4(a)(4)(B)(iii) had been deleted. The Supreme Court’s order adopting the amendments to Rule 4(a) incorporated this version.

Accordingly, the OLRC deleted subdivision (iii) from its official document in 2009, but nonetheless the version from which the rules are printed did not include that change. For that reason, Rule 4(a)(4)(B)(iii) has continued to appear in the published version of the Appellate Rules. It was only recently that a publisher noticed the omission of subdivision (iii) from the 2009 Supreme Court order and inquired with the OLRC as to whether it was actually part of the Rule. The OLRC intends to publish Rule 4(a)(4)(B) without subdivision (iii), but include a footnote stating that the deletion was inadvertent.

Judge Gorsuch consulted with the members of the Appellate Rules Committee, who decided that the error was best remedied by a technical amendment restoring subdivision (a)(4)(B)(iii) to Rule 4. Because the change is non-substantive, publication is unnecessary. No member expressed objection or concern.

Judge Campbell added that if the Standing Committee approved the amendment, it could be approved by the Judicial Conference in March and transmitted to the Supreme Court, and

submitted to Congress by the first of May. It would then go into effect on December 1, 2017, assuming no action by Congress. There will be one year in which subdivision (a)(4)(B)(iii) will not be printed as part of Rule 4, but OLRC’s explanatory footnote will appear during that period.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the technical amendment to restore Rule 4(a)(4)(B)(iii).**

Information Items

Judge Gorsuch presented the Appellate Rules Committee’s information items: (1) Appellate Rule 3(d)’s references to “mailing” in the context of electronic filing; (2) the references to security instruments in Appellate Rule 8(b); (3) possible conforming amendments to Rule 26.1’s corporate disclosure requirements; (4) possible conforming amendments in light of the Civil Rules amendments regarding class action objectors, and (5) possible amendments to Rule 25 regarding electronic filing and pro se litigants.

Rule 3(d) – Rule 3(d) governs service of the notice of appeal. After proposed amendments to Rule 25 were published in August 2016, the Appellate Rules Committee realized that Rule 3 still contained references to “mail,” and that the term “mail” appears throughout the Appellate Rules. The Appellate Rules Committee has discussed using the term “send” in place of “mail,” but those discussions are preliminary. Judge Gorsuch noted that the term “mail” is used in other federal rules as well, particularly the Civil and Bankruptcy Rules. As such, any terminology change may require coordination with the other committees, and he solicited input on these points.

One member cautioned that the effort could be a big undertaking, particularly for the Civil Rules. A reporter agreed the project would be substantial in scope, as there are words used in addition to “mailing” (e.g., “sending” and “delivering”) that would need to be examined as well. These instances might require a case-by-case determination as to whether electronic service is acceptable under the circumstances. To date, the Civil Rules Committee has not determined to replace these types of phrases throughout the Civil Rules. This issue had been explored by the Subcommittee on Electronic Filing two years ago, and the Subcommittee had decided not to take action due to the complexity of the problem and the potential for unintended consequences. Judge Gorsuch concluded that the Appellate Rules Committee will continue to pursue how to avoid confusion in the Appellate Rules between the references to electronic filing and references to mail.

Rule 8(b) – The Appellate Rules Committee is considering an amendment to clarify the recently-published draft of Rule 8(b) regarding security instruments. The proposed amendments initially came to the attention of the advisory committee as a result of the proposed amendment to Civil Rule 62, which clarifies that an appellant may post a security other than a bond in order to obtain a stay of proceedings to enforce a judgment. In June 2016, the Standing Committee approved for publication amendments to Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3) to conform to the amendment to Civil Rule 62 by replacing the term “supersedeas bond.”

After the publication of these proposed amendments in August 2016, the Appellate Rules Committee became aware of an internal inconsistency in the language of the published draft of Rule 8(b). While the first clause of the first sentence of the proposed text includes four forms of security—“a bond, other security, a stipulation, or other undertaking”—the second clause mentions only two: “a bond or undertaking.” At the October 2016 meeting, the advisory committee tentatively decided to replace the first clause in Rule 8(b) with “a bond, a stipulation, an undertaking, or other security,” and the second clause in the rule with the term “security,” to encompass all prior iterations, explanations, or alternatives without repetition.

The Appellate Rules Committee also discussed the possibility of eliminating the reference to “stipulation,” which appears in the Appellate Rules but not in the Civil Rules. Although no published case touches upon the subject, the Appellate Rules Committee determined to retain the reference, and have consulted with the reporter for the Civil Rules Committee. The Appellate Rules Committee will wait to receive all public comments on the published version of Rule 8(b) before taking further action.

A reporter asked whether the suggested parallel amendments to Rule 8(b)’s language create an obligation on the part of the other committees to similarly conform. For example, the word “stipulation” is in the Appellate Rule but not in the corresponding Civil or Bankruptcy Rule. A member proposed that “stipulators” be treated as “other security providers,” as stipulations to the form and amount of security are routinely approved at the district court level, but expressly declined to suggest that the term be removed from Appellate Rule 8(b).

Judge Campbell noted that Appellate Rule 8 describes the person who provides the security in two different ways: once as “sureties or other security provider,” and twice as a “security provider,” and suggested a stylistic change from “surety” to “security provider.” Another member noticed that this would require amending the subsection’s title (“Proceeding Against a Surety”) as well. Professor Maggs explained that the Appellate Rules Committee had retained the term surety because the amendments to Civil Rule 62 retained the term “bond or other security,” and the “surety” referred to the security provider for the bond.

Judge Gorsuch thanked the other members for their comments, and reported that the Appellate Rules Committee expects to finalize the new text of Rule 8(b) before its next meeting.

Rule 26.1 and Corporate Disclosure Statements – Appellate Rule 26.1(a) currently provides that corporate parties must disclose their subsidiaries and affiliates so that judges can make assessments of their recusal obligations. For several years, the Appellate Rules Committee has discussed the possibility of expanding disclosure obligations to publicly-held non-corporate entities, and to require the disclosure, in addition to the information currently required by Rule 26.1(a), of the entity’s involvement in related federal, state, and administrative proceedings.

A careful study, including a memorandum by Professor Capra, revealed substantial variation among the circuits’ disclosure requirements. Despite the significant costs on counsel who must understand the different sets of rules in different jurisdictions, the Appellate Rules Committee concluded that it was not inclined to act because it was unable to devise a satisfying solution. Two major problems led to this decision: (1) the amount of information that is necessary and

helpful in evaluating recusal decisions varies significantly among judges, and (2) efforts to delineate which entities would be subject to the disclosure requirements were unsuccessful. Given these complicated issues, the Appellate Rules Committee decided to not go forward with a rule amendment.

The Appellate Rules Committee did, however, tentatively decide to recommend conforming amendments to Appellate Rule 26.1 in light of the proposed amendments to Criminal Rule 12.4, which requires the disclosure of nongovernmental corporate parties and organizational victims. These proposed changes to subdivisions (b) and (d) are more limited in scope. Rule 26.1(b) would be modified to replace the references to “supplemental” filings to “later” filings. This term is more precise and would include a party that was unaware of the need to make a disclosure at the time it filed its principal brief. Subdivision (d) would also be added to mirror the proposed revision of Criminal Rule 12.4(a)(2), which requires the government to “file a statement identifying any organizational victim of the alleged criminal activity” absent a showing of good cause.

The Appellate Rules Committee also tentatively approved a proposal to add a new subdivision (f) to Rule 26.1, which would impose a disclosure requirement on intervenors. Although it is rare to see a party intervene on appeal, most circuits have local rules similar to the proposed change. Judge Campbell pointed out that if the Appellate Rules Committee moves forward with the proposal to impose disclosure requirements upon intervenors, it should also consider amending Rule 15(d), which sets forth the requirements for a motion for leave to intervene. He suggested that Rule 15(d) could be amended to add procedures for making disclosures. Judge Gorsuch agreed to take this good point under consideration.

A more complicated issue is whether to expand the disclosure requirements in bankruptcy appeals. Bankruptcy cases tend to involve a much higher number of corporate entities because of the creditor entities. An ethics opinion indicates that, ideally, more detailed disclosure obligations would be required. The Appellate Rules Committee decided to consult with the Bankruptcy Rules Committee before proceeding further. Judge Ikuta confirmed that the Bankruptcy Rules do not contain a disclosure requirement, and that the Bankruptcy Rules Committee has referred the matter of corporate disclosures in bankruptcy cases to a subcommittee.

Class Action Settlement Objectors – In August 2016, a proposed amendment to Civil Rule 23 was published that intended to address perceived problems with objections to class action settlements. Specifically, revised Civil Rule 23(e)(5) would require objectors to state to whom the objection applies, require court approval for any payment for withdrawing an objection or dismissing an appeal, and require the indicative ruling procedure to be used in the event that an objector seeks approval of a payment for dismissing an appeal after the appeal has already been docketed. At its October 2016 meeting, the Appellate Rules Committee considered whether conforming amendments to the Appellate Rules are necessary in light of the proposed changes to Civil Rule 23. The Appellate Rules Committee concluded that the Civil Rules amendments currently out for publication adequately address the objector problem, and complementary Appellate Rules are unnecessary.

Electronic Filing by Pro Se Litigants – In August 2016, a proposed amendment to Rule 25 was published that addressed the prevalent use of electronic service and filing. Proposed subdivision (a)(2)(B)(ii) leaves in place the current requirement that *pro se* parties may file papers electronically only if allowed by court order or local rule. In response to several suggestions submitted by members of the public, at its October 2016 meeting the Appellate Rules Committee considered whether to reconsider the current rule on electronic filing by *pro se* parties. After discussion, the Appellate Rules Committee determined that it would not recommend any additional changes; however, no action will be taken as to the published revised version of Rule 25 until all public comments have been received.

Additional Issues – Judge Gorsuch also raised the topic of efficiency in the appellate process, an issue that has garnered increased attention in recent years. The 2016 amendments reducing Rule 32(a)(7)(B)'s presumptive word-count limit from 14,000 to 13,000 has led some to question whether all of the brief sections required under Rule 28(a), such as the summary of the argument and the components of the statement of the case, should continue to be mandatory. In addition, the Appellate Rules Committee is considering the issue of the publication of *en banc* appeals. It will continue to explore these issues in addition to the other information items discussed above.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta and Professors Gibson and Harner presented the report on behalf of the Bankruptcy Rules Committee, which met on November 14, 2016, in Washington, D.C. The Bankruptcy Rules Committee had three action items for which it sought approval, including technical amendments and the new Chapter 13 package. There were also two information items.

Action Items

Chapter 13 Official Plan Form and Related Rules Amendments – The Bankruptcy Rules Committee submitted proposed amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, new Rule 3015.1, and new Official Form 113, with a recommendation that they be approved and transmitted to the Judicial Conference.

The Bankruptcy Rules Committee first discussed the possibility of a national form for Chapter 13 plans at its spring 2011 meeting in response to two suggestions which criticized the variance among districts' plans and argued that a uniform plan structure would streamline the process for both creditors and judges. A working group was formed to draft an official form for Chapter 13 plans and any related rule amendments.

In August 2013, the proposed Chapter 13 plan form and proposed amendments to nine related rules were published for public comment. The Bankruptcy Rules Committee made significant changes to the rules and the form in response to the comments and republished the full package in August 2014. Because many of these comments from the second publication period strongly opposed a mandatory national form for Chapter 13 plans, the Bankruptcy Rules Committee explored the possibility of adding provisions that would allow districts to opt out under certain conditions. At its fall 2015 meeting, the advisory committee approved the proposed Chapter 13 plan form (Official Form 113) and related amendments to Rules 2002, 3002, 3007, 3012, 4003,

5009, 7001, and 9009, but deferred further action in order to continue to develop the opt-out “compromise proposal.”

At its spring 2016 meeting, the Bankruptcy Rules Committee decided to recommend publication of two rules that would implement the opt-out proposal, an amendment to Rule 3015 and proposed new Rule 3015.1. It also recommended a shortened comment period of three rather than six months, due to the two prior publications and the narrow focus of the revised rules. The Standing Committee approved this recommendation, and Rules 3015 and 3015.1 were published for public comment in July 2016. Despite some comments arguing that the form should be mandatory or, at the opposite end of the spectrum, opposing the requirement of any mandatory form, whether national or local, the advisory committee unanimously approved with minor changes Rules 3015 and 3015.1 at its fall 2016 meeting.

The Bankruptcy Rules Committee submitted Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009; new Rule 3015.1; and new Official Form 113 to the Standing Committee for approval. The Bankruptcy Rules Committee recommended that the entire package of rules and the Chapter 13 Official Plan Form be submitted to the Judicial Conference at its March 2017 session and, if approved, be sent to the Supreme Court immediately thereafter. The Court is expecting the early submission, and if it approves and sends the package to Congress by May 1, it would take effect on December 1, 2017 absent Congressional action.

A judge member proposed a minor change to the first sentence of amended Rule 3002(a), which states, “A secured creditor, unsecured creditor, or an equity security holder must file a proof of claim” The judge member suggested that indefinite articles be used consistently throughout that clause, either by deleting the word “an” before “equity security holder,” or inserting “an” before “unsecured creditor.” The Standing Committee agreed to remove “an.”

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee unanimously approved the following for submission to the Judicial Conference for approval: Rules 2002, 3002 (subject to the removal of “an” from subdivision (a)), 3007, 3012, 3015, 4003, 5009, 7001, and 9009; new Rule 3015.1; and new Official Form 113.**

Technical and Conforming Amendments to Rule 7004(a)(1) and Official Form 101 – Judge Ikuta introduced two technical and conforming amendments not requiring publication: (1) updating Rule 7004’s cross-reference to a subsection of Civil Rule 4(d), and (2) correcting an error in Question 11 of Official Form 101.

Rule 7004(a) was amended in 1996 to incorporate by reference then-Civil Rule 4(d)(1), which provided, “A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.” In 2007, a number of amendments to Civil Rule 4(d) changed the former Rule 4(d)(1), renumbering it as subsection (d)(5) and altering its language to read, “**Jurisdiction and Venue Not Waived.** Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.”

The cross-reference to Civil Rule 4(d)(1) in Bankruptcy Rule 7004(a) was not changed at that time. Accordingly, the Bankruptcy Rules Committee recommended to the Standing Committee an amendment to Rule 7004(a) to correct the cross-reference to Civil Rule 4(d)(5). Because the amendment is technical and conforming, the Bankruptcy Rules Committee recommended submitting it to the Judicial Conference for approval without prior publication.

The second proposed amendment involved a correction to Question 11 of Official Form 101, the form for voluntary petitions for individuals filing for bankruptcy. Under § 362(b)(22) of the Bankruptcy Code, the automatic stay will generally not halt an eviction where a landlord obtained a judgment of possession against a tenant before the tenant filed a bankruptcy petition. However, that exception is subject to § 362(l), which permits the automatic stay if a debtor meets certain procedural requirements. Under § 362(l)(5)(A), the debtor must indicate whether a landlord has obtained a judgment for possession and provide that landlord's name and address. Section 362(l)(1) also requires the debtor to file a certification requesting the bankruptcy court to stay the judgment.

As currently written, Official Form 101 requires only *debtors who wish to remain in their residences* to provide information about an eviction judgment. As such, it is inconsistent with the Code, which requires *all* debtors who have an eviction judgment against them to indicate that fact on the petition and to provide the landlord's name and address. To address this inconsistency, the Bankruptcy Rules Committee recommended changing Question 11 on the form to clarify that, whether or not a debtor wants to stay in the residence, he or she must provide the required information if the landlord obtained an eviction judgment before the petition was filed.

A judge member asked whether, even though the question whether the tenant wishes to stay in the residence is being removed from Question 11, that information would still be apparent from the certification, Official Form 101A (Initial Statement About an Eviction Judgment Against You), that the tenant would also file. Judge Ikuta responded that it would. No other questions or comments were offered.

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee unanimously approved the proposed technical and conforming amendments to Rule 7004(a)(1) and Official Form 101 for submission to the Judicial Conference for final approval.**

Judge Campbell said the Supreme Court had been alerted that the Chapter 13 package will be transmitted after the Judicial Conference in March, as the Court will have “only a short time”—until May 1—to approve it if it is to stay on track to become effective on December 1, 2017. The Court has agreed to this expedited timeline. The March 2017 submission to the Court will not include the technical amendments to Rules 7004(a)(1) and Official Form 101, which are unrelated to the Chapter 13 materials. Those technical amendments will be submitted in September 2017, which will minimize the amount of material the Court would be asked to consider on an expedited basis. No member expressed disagreement.

Information Items

Conforming Amendments to Rule 8011 – As part of the coordinated inter-committee effort to account for electronic filing, signatures, service, and proof of service, the Bankruptcy Rules Committee intends to recommend an amendment to Rule 8011. Rule 8011 is the bankruptcy appellate rule that tracks Rule 25 of the Federal Rules of Appellate Procedure. Amendments to Appellate Rule 25 published for comment in August 2016 would address electronic filing (FRAP 25(a)), electronic signatures, (FRAP 25(a)(2)(B)(iii)), electronic service (FRAP 25(c)(2)), and electronic proof of service (FRAP 25(d)). The proposed amendment to Bankruptcy Rule 8011 would add provisions to mirror the new electronic procedures proposed for Appellate Rule 25.

The Bankruptcy Rules Committee recommends that this amendment be considered without publication for a number of reasons. First, publication would delay approval, resulting in a one-year “gap period” between the effective dates of the parallel amendments to Appellate Rule 25 and Bankruptcy Rule 8011. This would result in inconsistent treatment of electronic filing, service, and proof of service in the bankruptcy and appellate arenas. Second, the proposed amendments to Rule 8011 are materially identical to the proposed amendments to Appellate Rule 25 and do not raise bankruptcy-specific issues. The comments on the amendments to Appellate Rule 25 are therefore sufficient to identify any concerns as to the amendments to Rule 8011. Judge Gorsuch noted that the Appellate Rules Committee had received no comments so far on the amendment to Appellate Rule 25. A judge member asked whether the bankruptcy community would have an adequate opportunity to consider the impact of these proposed changes to electronic procedures if there was no publication. Professor Gibson responded that a related proposed amendment to Bankruptcy Rule 5005(a) regarding electronic procedures for filing is out for public comment at this time; so the basic issue is currently before the bankruptcy community. She added that the proposed changes to Rule 5005(a) had so far not received any comments.

Judge Ikuta said that Bankruptcy Rules Committee will review the proposed amendments to Rule 8011 at its April 2017 meeting in light of any public comments to Appellate Rule 25 and any feedback from the Appellate Rules Committee. Because the Standing Committee is authorized to eliminate the comment period for technical amendments, she said that the Bankruptcy Rules Committee will request approval of Rule 8011 without publication at the Standing Committee’s June 2017 meeting. No member objected to this proposal.

Noticing project and electronic noticing issues – The Bankruptcy Rules Committee has been asked on a number of occasions spanning many years to review noticing issues in bankruptcy cases, i.e., how noticing and service (other than service of process) are effectuated, and which of the numerous parties often involved in bankruptcy cases are entitled to receive notices or service. Approximately 145 Bankruptcy Rules address noticing or service.

In the fall of 2015, the Bankruptcy Rules Committee approved a work plan to study these issues, but an extensive overhaul of the Bankruptcy Rules’ noticing provisions was deferred pending further study of specific suggestions. The advisory committee decided to focus on a specific suggestion aimed at businesses, financial institutions, and other non-individual parties holding claims or other rights against the debtor. Because these parties, such as credit reporting agencies

and utilities, are likely to receive numerous notices and papers in multiple bankruptcy cases, permitting them to be electronically noticed and served has the potential to avoid significant expenditures. These funds would then be more likely to be available for distribution to creditors. The advisory committee is currently exploring an amendment to the Bankruptcy Rules that would allow such non-individual parties who are not registered CM/ECF users to opt into electronic noticing and service. The Standing Committee had no questions or comments regarding the noticing project.

Coordination – The subject of coordination arose with respect to Bankruptcy Rule 9037(h), which governs the redaction of private information. Judge Bates reported that the Civil Rules Committee has decided not to propose an amendment to the Civil Rules that would impose privacy-redaction requirements similar to those of Rule 9037(h).

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Professor Capra delivered the report on behalf of the Evidence Rules Committee, which last met on October 21, 2016, at Pepperdine University School of Law. A symposium was held in conjunction with the meeting. Professor Capra presented several information items.

Information Items

Fall Symposium – The fall 2016 symposium focused the Evidence Rules Committee’s working drafts of possible amendments to Rules 801(d)(1)(A) and 807, and the developing case law regarding Rule 404(b). In addition to the members of the Evidence Rules Committee, attendees included prominent judges, practitioners, and professors. A transcript of the symposium will be included in the Fordham Law Review.

The Third and Seventh Circuits have issued several opinions interpreting Rule 404(b) in a non-traditional way. Among the symposium participants was Judge David Hamilton of the U.S. Court of Appeals for the Seventh Circuit, which in recent years has decided a number of important Rule 404(b) cases. After the symposium, the Evidence Rules Committee discussed several proposals for amendments to Rule 404(b). The potential changes to the rule include that: (1) courts find the probative value of evidence of uncharged misconduct to be independent of any propensity inference, (2) notice be provided earlier in the proceedings to give the court an opportunity to focus on whether the purpose is permissible and whether the path of inferences linking the purpose and the act is independent of any propensity for misconduct, (3) the government’s description of the evidence to be more specific than the “general nature,” and (4) the government to state in the notice the permissible purpose and also to state how—without relying on a propensity inference—the evidence is probative of that purpose. The application of Rule 404(b) is a controversial topic, and the DOJ has an interest in how the rule is applied as several of the suggestions would require a change in noticing practices by the government. Professor Capra stressed that any proposed amendments to Rule 404(b) are in very early stages of consideration, and will be considered further at the spring 2017 meeting.

One member asked about the application of Rule 404(b) to civil cases, and whether Rule 609 was implicated. Professor Capra responded that most of the recent case law developments have

been in criminal cases, but the impact on civil cases is under consideration as well. Another member asked whether some of the issues under consideration might be part of case management. The group also discussed the first of the proposed changes and the standard of “independent of any propensity inference” and the noticing requirements.

Rule 807 (“Residual Exception”) – A comprehensive review of Rule 807 case law over past decade shows that reliable hearsay has been excluded, leading the Evidence Rules Committee to consider possible amendments to expand Rule 807’s “residual exception” to the rule against hearsay. Discussion of this issue began with the symposium held in 2015. At that time, the practitioners in attendance opposed the idea of eliminating the categorical hearsay exceptions (e.g., excited utterances, dying declarations, etc.) in favor of expanding the residual hearsay exception. The Evidence Rules Committee agreed that the exceptions should not be eliminated. Instead, it has developed a working draft of amendments intended to refine and expand Rule 807 to admit reliable hearsay even absent “exceptional circumstances,” as well as streamline the court’s task of assessing trustworthiness.

In developing the draft amendments, the Evidence Rules Committee is studying the equivalence standard; i.e., that the court find trustworthiness “equivalent” to the circumstantial guarantees of the Rule 803 and 804 exceptions. This “equivalence standard” is problematic because it requires the court to make a comparison of other exceptions that share no common indicator of trustworthiness, and it does not seem to be working as it should. The idea would be to permit the court to use a totality of circumstances standard in place of the equivalence standard. Also, the Evidence Rules Committee suggests deleting the language referring to materiality and the interests of justice because both terms are repetitive of other rules. Finally, the Evidence Rules Committee determined that the requirement that the hearsay be “more probative” than any other evidence that the proponent can obtain should be retained in order to prevent overuse of the residual exception. Discussion of the working draft will continue.

A Standing Committee member asked whether a “presumption of trustworthiness” could be associated with statements admissible under Rule 807. Professor Capra responded that the Evidence Rules Committee considered this idea, but considered it unworkable because of the shifting of the burden of proof for trustworthiness. He compared Rule 807 and Rules 803 and 804 as an example of this issue.

Rule 801(d)(1)(A) (Testifying Witness’s Prior Inconsistent Statement) – The Evidence Rules Committee is considering an expansion beyond what Rule 801(d)(1)(A) currently allows: prior inconsistent statements made under oath during a formal proceeding. The expansion under consideration would permit the substantive use of video-recorded prior inconsistent statements. This proposal was received favorably at the symposium.

A member asked whether, under this potential amended version of Rule 801(d)(1)(A), the videotaped statement would need to have been made under oath in order to be admissible, and Professor Capra explained that it would not, and added that the advisory committee is considering a suggestion that the rule would include statements that the witness concedes were made in addition to videotaped statements. A reporter asked whether these statements should properly fall under Rule 803 rather than Rule 801. Professor Capra responded that such a

reclassification would not be appropriate because, unlike the Rule 803 exceptions, these prior inconsistent statements were not made under circumstances more likely to make them reliable. Judge Campbell noted that what constitutes a videotaped statement was discussed at the symposium, and advised that this question will need to be resolved in developing any rule amendments.

Professor Capra next presented updates on several ongoing projects, including a possible exception for “e-hearsay.” Professor Capra, Judge Grimm, and Gregory Joseph have authored an article that courts and litigants could reference in negotiating the difficulties of authenticating electronic evidence. The pamphlet, entitled “Best Practices for Authenticating Digital Evidence,” was published by West Academic, and will be included as an appendix to its yearly publication.

Rule 702 (Testimony by Expert Witness) – There have been suggestions to revisit Rule 702 based on developments in case law. The issue of whether weight or credibility should be examined is one of the things that the Evidence Rules Committee will consider. There are several other issues that have been raised, particularly regarding forensic science and language in the committee note. A symposium will be held regarding Rule 702 in connection with its fall 2017 meeting, bringing together judges, practitioners, and experts in the sciences. One member noted the fact that Rule 702 is very broad, sometimes making application of the rule difficult, particularly in cases involving analysis under *Daubert*. Another member raised the issue of the impact of disputed facts on the analysis.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy and Professors Beale and King provided the report for the Criminal Rules Committee, which met on September 19, 2016, in Missoula, Montana. Judge Molloy reviewed three pending items under consideration.

Information Items

Section 2255 Rule 5 Subcommittee – The Criminal Rules Committee has formed a subcommittee to consider a suggestion made by a member to amend Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts (The Answer and Reply). That rule—as well as Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts—provides that the petitioner/moving party “may submit a reply . . . within a time fixed by the judge.” While the committee note and history of the amendment demonstrate that this language was intended to give the inmate a right to file a reply, and courts have recognized this right, other courts have interpreted the rule as allowing a reply only if permitted by the court. The subcommittee presented its report to the Criminal Rules Committee at its fall 2016 meeting. The phrase “within a time fixed by the judge” was identified as the source of the ambiguity; several members read it to imply judicial discretion.

One factor weighing in favor of a rules-based solution is the limited reviewability of rulings denying reply briefs. Judge Molloy identified this scenario as an example of one “capable of repetition, but evading review.” Because appellate review is unlikely to address the issue—

most habeas petitioners are unrepresented and do not advance the argument, and a number of decisions denying the right to file a reply are several years old—the Criminal Rules Committee decided to consider an amendment. To assuage concerns that new language might add to rather than resolve the confusion, the reporters suggested language clarifying the rule’s intent that breaks the current text into two sentences.

The Criminal Rules Committee also discussed whether to add a time for filing. A RCSO survey of local rules and orders addressing this issue revealed significant variance among districts. No consensus has been reached as to whether to set a presumptive time limit or require judges or local rules to fix a time period. The subcommittee will discuss the issue further. The subcommittee will collaborate with the style consultants to draft an amendment, and aims to deliver the proposed text to the Criminal Rules Committee for consideration at the April 2017 meeting.

Rule 16 Subcommittee – The Criminal Rules Committee has also formed a subcommittee chaired by Judge Raymond Kethledge to consider two bar groups’ suggested amendments to Criminal Rule 16 (Discovery and Inspection), which would impose additional disclosure obligations upon the government in complex criminal cases. Although the subcommittee concluded that the groups’ proposed standard for defining a “complex case” and steps for creating reciprocal discovery were too broad, it decided to move forward with discussion of the problem and formulation of a possible solution. The subcommittee’s initial impression, however, was that the problems associated with complex discovery in criminal cases “were attributable to inexperience or indifference” that could not be addressed appropriately by rule.

The DOJ and members of the defense bar have developed a protocol for dealing with the discovery of electronically stored information, but practitioners still report problems, particularly when the judge has little experience handling discovery in complex criminal cases. The members of the Criminal Rules Committee agreed that judicial education and training materials would help to supplement an amendment, but would be insufficient on their own.

The subcommittee will hold a mini-conference on February 7, 2016 in Washington, D.C. to discuss whether an amendment to Rule 16 is warranted. Invited participants include criminal defense attorneys from large and small firms, public defenders, prosecutors, DOJ attorneys, discovery experts, and judges.

Cooperator Subcommittee – The Criminal Rules Committee’s Cooperator Subcommittee, chaired by Judge Lewis Kaplan, continues to consider rules amendments to address concerns regarding dangers to cooperating witnesses posed by access to information in case files. The subcommittee is currently studying several proposals, including the CACM proposal, and work is ongoing.

More recently, the Director of the Administrative Office has formed a Task Force on Protecting Cooperators to consider the CACM and Rules Committees’ conclusion that any rules amendments would be just one part of any solution to the cooperator problem. The Task Force is comprised of seven district judge members—including Judge Kaplan, who is serving as Chair of the Task Force, and Judge St. Eve of the Standing Committee—and will also

include key stakeholders from the DOJ, Bureau of Prisons (BOP), Sentencing Commission, Federal Public Defender, clerks of court, and U.S. Marshals Service. The Task Force is charged with taking a broad look at the issue of protecting cooperators and possible solutions, including possible rules amendments. It has held initial teleconferences and is developing working groups and a schedule. Judge St. Eve added that four working groups have been formed to address specific issues.

Judge Molloy emphasized his view that a problem exists. Because the BOP does not track the specific causes of harm to cooperators, further investigation is necessary to determine precisely what aspects of the system must be fixed and why. The Task Force's role is to determine *how* to address the issue. A national solution, uniformly applied in all districts and combining both rules and non-rules approaches, will be required.

The Criminal Rules Committee will complement the Task Force's work by drafting a proposed rule or rules to protect the privacy of cooperator information.

REPORT OF THE ADMINISTRATIVE OFFICE

Task Force on Protecting Cooperators

Julie Wilson of the RCSO provided additional information about the administrative status of the Task Force. The Task Force will report to the Director of the Administrative Office, and its charter is being drafted.

A judge member volunteered that his district court has already implemented its own local policy to protect cooperator information and is awaiting a uniform national policy. Judge St. Eve replied that local courts will play an important role in the Task Force's work; the Task Force is interested in learning more about local courts' practices with respect to cooperator information, and receiving feedback as to their experiences implementing the guidelines the Task Force develops.

A reporter raised two related issues with the potential to complicate the Task Force's efforts: "technological issues" and "First Amendment issues." The reporter explained that technology truly *is* the issue, as the availability of criminal docket documents online has given rise to both the cooperator problem and First Amendment implications regarding access to those documents. The reporter wondered whether, assuming the media would be affected by limitations on access to cooperator information, the Task Force might consider involving the media in the process of formulating the guidance. Judge Molloy noted that the reporters' analysis of the applicable First Amendment principles and the constitutional right to access by the media is already before the Task Force.

Another reporter suggested that data related to the cooperator problem be made available in the aggregate, as an objective showing of the extent of cooperator harm might mitigate the concerns of members of the criminal defense bar who oppose restrictions on access to cooperation information. Judge Molloy acknowledged that the bar's tendency to wear "two hats" as to this issue complicates matters: keeping the information away from those who would use it to harm a

cooperating defendant but having access for the purpose of evaluating the fairness of a given plea deal.

The Task Force will continue to work toward the development of a uniform, national approach to protecting cooperator information.

Legislative Report

Ms. Womeldorf reported that approximately twenty pieces of legislation introduced during the two years of the 114th Congress were very pertinent to the work of the rules committees in that they would have directly amended various rules. Discussion of specific legislation followed, including legislation introduced in the fall of 2016 that would have delayed the implementation of the 2016 amendments to Criminal Rule 41.

Judge Campbell discussed that direct channels of communication between the RCSO and Capitol Hill staff sometimes allow for opportunities to explain how legislation could have unintended consequences for the operation of the rules. Judge Campbell welcomed suggestions to preserve informed decision-making pursuant to the Rules Enabling Act process designated by Congress.

CONCLUDING REMARKS

Judge Campbell concluded the meeting by thanking the members and other attendees for their participation. The Standing Committee will next meet on June 13, 2017 in Washington, D.C.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee