

**COMMITTEE ON RULES OF
PRACTICE AND PROCEDURE**

**Phoenix, AZ
January 3, 2019**

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**JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 3, 2019**

AGENDA

1. Opening Business

- A. Welcome and Opening Remarks – Judge David G. Campbell, Chair
- B. Status of Rules Amendments (p. 25)
 - Report on new rules amendments effective December 1, 2018
 - Report on rules approved by the Judicial Conference at its September 2018 session and transmitted to the Supreme Court on October 24, 2018 (potential effective date December 1, 2019)
 - Report on rules out for public comment, including schedule of upcoming public hearings (potential effective date December 1, 2020)
- C. **ACTION:** The Committee will be asked to approve the minutes of the June 12, 2018 Committee meeting (p. 69)

2. Report of the Advisory Committee on Appellate Rules – Judge Michael A. Chagares, Chair (p. 95)

Information items

- Proposed amendments to Rule 3 and the application of the merger rule
- Proposal to Amend Rule 42(b) and agreed dismissals
- Comprehensive review of Rules 35 and 40
- Possible amendments to Rule 4(a)(5)(C) in light of the Supreme Court’s decision in *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13 (2017)
- Consideration of memo from the Committee on Court Administration and Case Management regarding privacy concerns in Social Security and immigration opinions
- Consideration of suggestion regarding how to manage the vote of a judge who leaves the bench, whether by death, resignation, conviction at an impeachment trial, or expiration of a recess appointment

3. Report of the Advisory Committee on Bankruptcy Rules – Judge Dennis Dow, Chair (p. 133)

ACTION: The Committee will be asked to approve a recommendation to undertake restyling of the Federal Rules of Bankruptcy Procedure

Information items

- Expansion of the use of Electronic Noticing and Service
- Proposed amendment to Official Form 113 (Chapter 13 Plan Form)

4. Report of the Advisory Committee on Civil Rules – Judge John D. Bates, Chair (p. 157)

Information items

- Ongoing projects
 - Report on the work of the Subcommittee on Multidistrict Litigation
 - Consideration of suggestions related to disclosure of third party financing
 - Report on the work of the Subcommittee on Social Security Disability Review Actions
- Update on items considered and either retained for further study or removed from the agenda
 - Rule 73 (Magistrate Judges: Trial by Consent; Appeal) – consideration of suggestions related to consent to trial by a magistrate judge
 - Rule 7.1 (Disclosure Statement) – consideration of suggestions to expand the scope of required disclosure statements, including amending Rule 7.1 to include a nongovernmental corporation that seeks to intervene
 - *Hall v. Hall*, 138 S. Ct. 1118 (2018), and final judgment appeals in consolidated actions

5. Report of the Advisory Committee on Criminal Rules – Judge Donald W. Molloy, Chair (p. 243)

Information items

- Ongoing projects
 - Rule 16 (Discovery and Inspection) – consideration of suggestions to expand pretrial discovery of expert witnesses
 - Mini-conference planned for February 15, 2019 (Dallas, Texas)
 - Report on the work of the Cooperators Subcommittee and the Director’s Task Force on Protecting Cooperators
- Update on items considered and either retained for further study or removed from the agenda

- Rule 43(a) (Defendant’s Presence – When Required) – subcommittee formed to consider possible exception to the requirement of physical presence for plea or sentence in light of *United States v. Bethea*, 888 F.3d 864 (7th Cir. 2018)
- Time for ruling on habeas motions
- Disclosure of defendant’s full name and date of birth

6. Report of the Advisory Committee on Evidence Rules – Judge Debra Ann Livingston, Chair (p. 273)

Information items

- Roundtable discussion regarding: 1) Rule 702 and forensic evidence; 2) Rule 702 and sufficiency of basis and reliability of methodology under Rule 104(a); 3) Rule 106; and 4) Rule 615, the rule on excluding witnesses from trial until they testify, and possible amendments to each of these rules
- Proposed amendments to Rule 404(b) published for public comment in August 2018.
- Consideration of suggestion of a possible amendment to Rule 607 to incorporate portions of Maryland Rule of Evidence 616, which provides a “roadmap” to guide judges and practitioners on the rules that are pertinent to all forms of impeachment and rehabilitation, into the Federal Rules of Evidence
- Monitoring of case law developments after *Crawford v. Washington*

7. Other Committee Business

- A. Legislative Update – Julie Wilson, Counsel
- B. Judiciary Strategic Planning – The Committee will discuss a report of the September 12, 2018 long-range planning meeting of Judicial Conference committee chairs and members of the Executive Committee. (p. 301)
- C. Public Comment – The Committee will discuss procedures for consideration of public comments received at different stages of the Rules Enabling Act process. (p. 317)
- D. Next Meeting – June 25, 2019 (Washington, DC)

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To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

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| Robert J. Giuffra, Jr. | ESQ | New York | 2017 | 2020 |
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TAB 1

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TAB 1A

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Welcome and Opening Remarks

Item 1A will be an oral report.

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TAB 1B

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Effective December 1, 2017

REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2017); approved by Judicial Conference and transmitted to Supreme Court (Sept 2016)

| Rules | Summary of Proposal | Related or Coordinated Amendments |
|--|---|-----------------------------------|
| AP 4 | Corrective amendment to Rule 4(a)(4)(B) restoring subsection (iii) to correct an inadvertent deletion of that subsection in 2009. | |
| BK 1001 | Rule 1001 is the Bankruptcy Rules' counterpart to Civil Rule 1; the amendment incorporates changes made to Civil Rule 1 in 1993 and 2015. | CV 1 |
| BK 1006 | Amendment to Rule 1006(b)(1) clarifies that an individual debtor's petition must be accepted for filing so long as it is submitted with a signed application to pay the filing fee in installments, even absent contemporaneous payment of an initial installment required by local rule. | |
| BK 1015 | Amendment substitutes the word "spouses" for "husband and wife." | |
| BK 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, 9009, new rule 3015.1 | Implements a new official plan form, or a local plan form equivalent, for use in cases filed under chapter 13 of the bankruptcy code; changes the deadline for filing a proof of claim in chapter 7, 12 and 13; creates new restrictions on amendments or modifications to official bankruptcy forms. | |
| CV 4 | Corrective amendment that restores Rule 71.1(d)(3)(A) to the list of exemptions in Rule 4(m), the rule that addresses the time limit for service of a summons. | |
| EV 803(16) | Makes the hearsay exception for "ancient documents" applicable only to documents prepared before January 1, 1998. | |
| EV 902 | Adds two new subdivisions to the rule on self-authentication that would allow certain electronic evidence to be authenticated by a certification of a qualified person in lieu of that person's testimony at trial. | |

Revised December 2018

Effective December 1, 2018

REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to the Supreme Court (Oct 2017)

| Rules | Summary of Proposal | Related or Coordinated Amendments |
|------------------|--|-----------------------------------|
| AP 8, 11, 39 | The proposed amendments to Rules 8(a) and (b), 11(g), and 39(e) conform the Appellate Rules to a proposed change to Civil Rule 62(b) that eliminates the antiquated term “supersedeas bond” and makes plain an appellant may provide either “a bond or other security.” | CV 62, 65.1 |
| AP 25 | The proposed amendments to Rule 25 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. [NOTE: in March 2018, the Standing Committee withdrew the proposed amendment to Appellate Rule 25(d)(1) that would eliminate the requirement of proof of service when a party files a paper using the court's electronic filing system.] | BK 5005, CV 5, CR 45, 49 |
| AP 26 | "Computing and Extending Time." Technical, conforming changes. | AP 25 |
| AP 28.1, 31 | The proposed amendments to Rules 28.1(f)(4) and 31(a)(1) respond to the shortened time to file a reply brief effectuated by the elimination of the “three day rule.” | |
| AP 29 | "Brief of an Amicus Curiae." The proposed amendment adds an exception to Rule 29(a) providing “that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge’s disqualification.” | |
| AP 41 | "Mandate: Contents; Issuance and Effective Date; Stay" | |
| AP Form 4 | "Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis." Deletes the requirement in Question 12 for litigants to provide the last four digits of their social security numbers. | |
| AP Form 7 | "Declaration of Inmate Filing." Technical, conforming change. | AP 25 |
| BK 3002.1 | The proposed amendments to Rule 3002.1 would do three things: (1) create flexibility regarding a notice of payment change for home equity lines of credit; (2) create a procedure for objecting to a notice of payment change; and (3) expand the category of parties who can seek a determination of fees, expenses, and charges that are owed at the end of the case. | |
| BK 5005 and 8011 | The proposed amendments to Rule 5005 and 8011 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. | AP 25, CV 5, CR 45, 49 |
| BK 7004 | "Process; Service of Summons, Complaint." Technical, conforming amendment to update cross-reference to Civil Rule 4. | CV 4 |

Revised December 2018

Effective December 1, 2018

REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to the Supreme Court (Oct 2017)

| Rules | Summary of Proposal | Related or Coordinated Amendments |
|---|--|-----------------------------------|
| BK 7062, 8007, 8010, 8021, and 9025 | The amendments to Rules 7062, 8007, 8010, 8021, and 9025 conform these rules with pending amendments to Civil Rules 62 and 65.1, which lengthen the period of the automatic stay of a judgment and modernize the terminology “supersedeas bond” and “surety” by using “bond or other security.” | CV 62, 65.1 |
| BK 8002(a)(5) | The proposed amendment to 8002(a) would add a provision similar to FRAP 4(a)(7) defining entry of judgment. | FRAP 4 |
| BK 8002(b) | The proposed amendment to 8002(b) conforms to a 2016 amendment to FRAP 4(a)(4) concerning the timeliness of tolling motions. | FRAP 4 |
| BK 8002 (c), 8011, Official Forms 417A and 417C, Director's Form 4170 | The proposed amendments to the inmate filing provisions of Rules 8002 and 8011 conform them to similar amendments made in 2016 to FRAP 4(c) and FRAP 25(a)(2)(C). Conforming changes made to Official Forms 417A and 417C, and creation of Director's Form 4170 (Declaration of Inmate Filing) (Official Forms approved by Judicial Conference as noted above, which is the final step in approval process for forms). | FRAP 4, 25 |
| BK 8006 | The amendment to Rule 8006 (Certifying a Direct Appeal to the Court of Appeals) adds a new subdivision (c)(2) that authorizes the bankruptcy judge or the court where the appeal is then pending to file a statement on the merits of a certification for direct review by the court of appeals when the certification is made jointly by all the parties to the appeal. | |
| BK 8013, 8015, 8016, 8022, Part VIII Appendix | The proposed amendments to Rules 8013, 8015, 8016, 8022, Part VIII Appendix conform to the new length limits, generally converting page limits to word limits, made in 2016 to FRAP 5, 21, 27, 35, and 40. | FRAP 5, 21, 27, 35, and 40 |
| BK 8017 | The proposed amendments to Rule 8017 would conform the rule to a 2016 amendment to FRAP 29 that provides guidelines for timing and length amicus briefs allowed by a court in connection with petitions for panel rehearing or rehearing in banc, and a 2018 amendment to FRAP 29 that authorizes the court of appeals to strike an amicus brief if the filing would result in the disqualification of a judge. | AP 29 |
| BK 8018.1 (new) | The proposed rule would authorize a district court to treat a bankruptcy court's judgment as proposed findings of fact and conclusions of law if the district court determined that the bankruptcy court lacked constitutional authority to enter a final judgment. | |

Revised December 2018

Effective December 1, 2018

REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to the Supreme Court (Oct 2017)

| Rules | Summary of Proposal | Related or Coordinated Amendments |
|-----------------------------------|---|-----------------------------------|
| BK - Official Forms 411A and 411B | The bankruptcy general and special power of attorney forms, currently director's forms 4011A and 4011B, will be reissued as Official Forms 411A and 411B to conform to Bankruptcy Rule 9010(c). Approved by Standing Committee at June 2018 meeting; approved by Judicial Conference at its September 2018 session. | |
| CV 5 | The proposed amendments to Rule 5 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. | |
| CV 23 | "Class Actions." The proposed amendments to Rule 23: require that more information regarding a proposed class settlement be provided to the district court at the point when the court is asked to send notice of the proposed settlement to the class; clarify that a decision to send notice of a proposed settlement to the class under Rule 23(e)(1) is not appealable under Rule 23(f); clarify in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice triggers the opt-out period in Rule 23(b)(3) class actions; updates Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions; establishes procedures for dealing with class action objectors; refines standards for approval of proposed class settlements; and incorporates a proposal by the Department of Justice to include in Rule 23(f) a 45-day period in which to seek permission for an interlocutory appeal when the United States is a party. | |
| CV 62 | Proposed amendments extend the period of the automatic stay to 30 days; make clear that a party may obtain a stay by posting a bond or other security; eliminates the reference to "supersedeas bond"; rearranges subsections. | AP 8, 11, 39 |
| CV 65.1 | The proposed amendment to Rule 65.1 is intended to reflect the expansion of Rule 62 to include forms of security other than a bond and to conform the rule with the proposed amendments to Appellate Rule 8(b). | AP 8 |

Revised December 2018

Effective December 1, 2018

REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to the Supreme Court (Oct 2017)

| Rules | Summary of Proposal | Related or Coordinated Amendments |
|--------------|---|--|
| CR 12.4 | The proposed amendment to Rule 12.4(a)(2) – the subdivision that governs when the government is required to identify organizational victims – makes the scope of the required disclosures under Rule 12.4 consistent with the 2009 amendments to the Code of Conduct for United States Judges. Proposed amendments to Rule 12.4(b) – the subdivision that specifies the time for filing disclosure statements: provide that disclosures must be made within 28 days after the defendant’s initial appearance; revise the rule to refer to “later” rather than “supplemental” filings; and revise the text for clarity and to parallel Civil Rule 7.1(b)(2). | |
| CR 45, 49 | Proposed amendments to Rules 45 and 49 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. Currently, Criminal Rule 49 incorporates Civil Rule 5; the proposed amendments would make Criminal Rule 49 a stand-alone comprehensive criminal rule addressing service and filing by parties and nonparties, notice, and signatures. | AP 25, BK 5005, 8011, CV 5 |

Revised December 2018

Effective (no earlier than) December 1, 2019

Current Step in REA Process: transmitted to Supreme Court (Oct 2018)

REA History: approved by Judicial Conference (Sept 2018); approved by Standing Committee (June 2018); approved by Advisory Committees (Spring 2018); published for public comment (unless otherwise noted, Aug 2017-Feb 2018); approved by Standing Committee for publication (June 2017)

| Rules | Summary of Proposal | Related or Coordinated Amendments |
|---------------------|---|-----------------------------------|
| AP 3, 13 | Changes the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13. | |
| AP 26.1, 28, 32 | Rule 26.1 would be amended to change the disclosure requirements, and Rules 28 and 32 are amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in proposed amended Rule 26.1. | |
| AP 25(d)(1) | Eliminates unnecessary proofs of service in light of electronic filing. (Published in 2016-2017.) | |
| AP 5.21, 26, 32, 39 | Technical amendments to remove the term "proof of service." (Not published for comment.) | AP 25 |
| BK 9036 | The amendment to Rule 9036 would allow the clerk or any other person to notice or serve registered users by use of the court's electronic filing system and to serve or notice other persons by electronic means that the person consented to in writing. Related proposed amendments to Rule 2002(g) and Official Form 410 were not recommended for final approval by the Advisory Committee at its spring 2018 meeting. | |
| BK 4001 | The proposed amendment would make subdivision (c) of the rule, which governs the process for obtaining post-petition credit in a bankruptcy case, inapplicable to chapter 13 cases. | |
| BK 6007 | The proposed amendment to subsection (b) of Rule 6007 tracks the existing language of subsection (a) and clarifies the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code. | |
| BK 9037 | The proposed amendment would add a new subdivision (h) to the rule to provide a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements. | |
| CR 16.1 (new) | Proposed new rule regarding pretrial discovery and disclosure. Subsection (a) would require that, no more than 14 days after the arraignment, the attorneys are to confer and agree on the timing and procedures for disclosure in every case. Proposed subsection (b) emphasizes that the parties may seek a determination or modification from the court to facilitate preparation for trial. | |
| EV 807 | Residual exception to the hearsay rule and clarifying the standard of trustworthiness. | |
| 2254 R 5 | Makes clear that petitioner has an absolute right to file a reply. | |
| 2255 R 5 | Makes clear that movant has an absolute right to file a reply. | |

Revised December 2018

Effective (no earlier than) December 1, 2020

Current Step in REA Process: published for public comment (Aug 2018-Feb 2019)

REA History: approved by Standing Committee for publication (unless otherwise noted, June 2018)

| Rules | Summary of Proposal | Related or Coordinated Amendments |
|-----------|---|-----------------------------------|
| AP 35, 40 | Proposed amendments clarify that length limits apply to responses to petitions for rehearing plus minor wording changes. | |
| BK 2002 | Proposed amendments would (i) require giving notice of the entry of an order confirming a chapter 13 plan, (ii) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases, and (iii) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan. | |
| BK 2004 | Amends subdivision (c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016. | CV 45 |
| BK 8012 | Conforms Bankruptcy Rule 8012 to proposed amendments to Appellate Rule 26.1 that were published in Aug 2017. | AP 26.1 |
| CV 30 | Proposed amendments to subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, would require the parties to confer about (1) the number and descriptions of the matters for examination and (2) the identity of each witness the organization will designate to testify. | |
| EV 404 | Proposed amendments to subdivision (b) would expand the prosecutor's notice obligations by (1) requiring the prosecutor to "articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose," (2) deleting the requirement that the prosecutor must disclose only the "general nature" of the bad act, and (3) deleting the requirement that the defendant must request notice; the proposed amendments also replace the phrase "crimes, wrongs, or other acts" with the original "other crimes, wrongs, or acts." | |

Revised December 2018

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SUMMARY OF THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendments to Appellate Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39 as set forth in Appendix A and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 2-6

2. a. Approve the proposed amendments to Bankruptcy Rules 4001, 6007, 9036, and 9037 as set forth in Appendix B and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

b. Approve effective December 1, 2018 converting Director’s Forms 4011A and 4011B to Bankruptcy Official Forms 411A and 411B for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date. pp. 7-15

3. Approve proposed new Criminal Rule 16.1 and proposed amendments to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts as set forth in Appendix C and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law pp. 20-24

4. Approve the proposed amendments to Evidence Rule 807 as set forth in Appendix D and transmit them to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 25-26

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| <p>NOTICE NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.</p> |
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The remainder of this report is submitted for the record and includes the following for the information of the Judicial Conference:

- Federal Rules of Appellate Procedure pp. 6-7
- Federal Rules of Bankruptcy Procedure pp. 15-17
- Federal Rules of Civil Procedure pp. 17-19
- Federal Rules of Criminal Procedure.....p. 24
- Federal Rules of Evidence pp. 27-29
- Judiciary Strategic Planning pp. 29-30

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 12, 2018. All members were present.

Representing the advisory committees were: Judge Michael A. Chagares, Chair, and Professor Edward Hartnett, Reporter, of the Advisory Committee on Appellate Rules; Judge Dennis Dow, incoming Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura Bartell, Associate Reporter, of the Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Donald W. Molloy, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, of the Advisory Committee on Criminal Rules; and Judge Debra Ann Livingston, Chair, and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Rules of Evidence.

Also participating in the meeting were: Judge Jeffrey S. Sutton, former Chair of the Standing Committee; Professor Daniel R. Coquillette, the Standing Committee's Reporter; Professor Catherine T. Struve, the Standing Committee's Associate Reporter; Professor Joseph Kimble and Professor Bryan A. Garner, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Attorneys on the Rules Committee Staff; Patrick Tighe, Law Clerk to the Standing Committee;

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| <p>NOTICE NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.</p> |
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and Dr. Tim Reagan, of the Federal Judicial Center (FJC). Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice on behalf of the Honorable Rod J. Rosenstein, Deputy Attorney General.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39, with a recommendation that they be approved and transmitted to the Judicial Conference.

Rule 25 (Filing and Service)

The proposed amendment to Rule 25(d)(1) eliminates unnecessary proofs of service when electronic filing is used. Because electronic filing of a document results in a copy of the document being sent to all parties who use the court's electronic filing system, separate service of the document on those parties, and accompanying proofs of service, are not necessary. A previous version of the Rule 25(d)(1) amendment was approved by the Judicial Conference and submitted to the Supreme Court but was withdrawn by the Standing Committee to allow for minor revisions. The revised amendment approved at the Committee's June 2018 meeting includes changes previously approved, but also covers the possibility that a document might be filed electronically and yet still need to be served on a party (such as a pro se litigant) who does not participate in the court's electronic-filing system.

Under the proposed amendment to Rule 25(d)(1), proofs of service will frequently be unnecessary. Accordingly, the Advisory Committee proposed technical amendments to certain rules that reference proof of service requirements, including Rules 5, 21, 25, 26, 26.1, 32, and 39, to conform those rules to the proposed amendment to Rule 25(d)(1). Rule 25(d)(1) was

originally published for comment; the Advisory Committee did not seek additional public comment on the technical and conforming amendments.

Rule 5 (Appeal by Permission)

The proposed amendments to Rule 5(a)(1) revise the rule to no longer require that a petition for permission to appeal “be filed with the circuit clerk with proof of service.” Instead, it provides that “a party must file a petition with the circuit clerk and serve it on all other parties.”

Rule 21 (Writs of Mandamus and Prohibition, and Other Extraordinary Writs)

Under the proposed amendment to Rule 21, in addition to various stylistic changes, the phrase “with proof of service” in Rule 21(a) and (c) is deleted and replaced with the phrases “serve it” and “serving it.”

Rule 26 (Computing and Extending Time)

The proposed amendment to Rule 26 deletes the term “proof of service” from Rule 26(c). A stylistic change was also made to simplify the rule’s description for when three days are added to the time computation: “When a party may or must act within a specified time after being served, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a).”

Rule 39 (Costs)

The proposed amendment to Rule 39(d)(1) deletes the phrase “with proof of service” and replaces it with the phrase “and serve.”

Rule 3 (Appeal as of Right—How Taken) and Rule 13 (Appeals from the Tax Court)

The proposed amendments to Rules 3 and 13 – both of which deal with the notice of appeal – are also designed to reflect the move to electronic service. Rules 3(d)(1) and (d)(3)

currently require the district court clerk to serve notice of the filing of the notice of appeal by mail to counsel in all cases, and by mail or personal service on a criminal defendant. The proposed amendment changes the words “mailing” and “mails” to “sending” and “sends,” and deletes language requiring certain forms of service. Rule 13(a)(2) currently requires that a notice of appeal from the Tax Court be filed at the clerk’s office or mailed to the clerk. The proposed amendment allows the appellant to send a notice of appeal by means other than mail. There were no public comments on the proposed amendments to Rules 3 and 13.

Rule 26.1 (Corporate Disclosure Statement)

The proposed amendments to Rule 26.1 revise disclosure requirements designed to help judges decide if they must recuse themselves: subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene on appeal; new subdivision (b) corresponds to the amended disclosure requirement in Criminal Rule 12.4(a)(2) and requires the government to identify, except on a showing of good cause, organizational victims of the alleged criminal activity; new subdivision (c) requires disclosure of the names of all the debtors in bankruptcy cases, because the names of the debtors are not always included in the caption in appeals, and also imposes disclosure requirements concerning the ownership of corporate debtors.

There were four comments filed regarding the proposed amendments. One comment suggested that language be added to the committee note to help deter overuse of the government exception in the proposed subdivision (b) dealing with organizational victims in criminal cases. In response, the Advisory Committee revised the committee note to follow more closely the committee note for Criminal Rule 12.4.

Another comment suggested that language be added to Rule 26.1(c) to reference involuntary bankruptcy proceedings and that petitioning creditors be identified in disclosure statements. The Advisory Committee on Appellate Rules consulted with the reporter for the

Advisory Committee on Bankruptcy Rules and ultimately determined to not make any changes in response to the comment. In response to a potential gap in the operation of Rule 26.1 identified by the reporter to the Advisory Committee on Bankruptcy Rules, however, the Advisory Committee on Appellate Rules revised Rule 26.1(c) to require that certain parties “must file a statement that: (1) identifies each debtor not named in the caption; and (2) for each debtor in the bankruptcy case that is a corporation, discloses the information required by Rule 26.1(a).”

A third comment objected that the meaning of the proposed 26.1(d) was not clear from its text, and that reading the committee note was required to understand it. The final comment suggested language changes to eliminate any ambiguity about who must file a disclosure statement. In response to these comments and to clarify the proposed amendment, the Advisory Committee folded subparagraph 26.1(d) dealing with intervenors into a new last sentence of 26.1(a). In addition, the phrase “wants to intervene” was changed to “seeks to intervene” in recognition of proposed intervenors who may seek intervention because of a need to protect their interests, but who may not truly “want” to intervene. Other stylistic changes were made as well.

Rule 28 (Briefs) and Rule 32 (Form of Briefs, Appendices, and Other Papers)

The proposed amendments to Rules 28 and 32 change the term “corporate disclosure statement” to “disclosure statement” to conform with proposed amendments to Rule 26.1, as described above.

There were no public comments on the proposed amendments to Rules 28(a)(1) and 32(f). The Advisory Committee sought approval of Rule 28 as published. The Advisory Committee sought approval of Rule 32 as published, with additional technical edits to conform subsection (f) with the proposed amendment to Rule 25(d)(1) regarding references to proofs of service. Rule 32(f) lists the items that are excluded when computing length limits, and one such

item is “the proof of service.” To account for the frequent occasions in which there would be no such proof of service, the article “the” should be deleted. Given this change, the Advisory Committee agreed to delete all the articles in the list of items.

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendments to the Federal Rules of Appellate Procedure and committee notes are set forth in Appendix A, with an excerpt from the Advisory Committee’s report.

Recommendation: That the Judicial Conference approve the proposed amendments to Appellate Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39 as set forth in Appendix A and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Rehearing) with a request that they be published for public comment in August 2018. The Standing Committee unanimously approved the Advisory Committee’s request.

The proposed amendments to Rules 35 and 40 create length limits applicable to responses to petitions for rehearing. Under the existing rules, there are length limits applicable to petitions for rehearing, but not for responses to those petitions. In addition, the Advisory Committee observed that Rule 35 (which deals with en banc determinations) uses the term “response,” while Rule 40 (which deals with panel rehearing) uses the term “answer.” The proposed amendment changes the term in Rule 40 to “response.”

Information Items

The Advisory Committee’s consideration of length limits for responses to petitions for rehearing led it to consider a more comprehensive review of Rules 35 and 40, perhaps drawing

on the structure of Rule 21, and a subcommittee was formed to evaluate possible amendments. Another subcommittee will consider whether any amendments are appropriate following the Supreme Court’s decision in *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13 (2017), which distinguished between the statutory time for appeal (which is jurisdictional) and more stringent time limits in the Federal Rules of Appellate Procedure (which are not jurisdictional). The subcommittee will also consider whether to align the rule with the statute, correcting for divergence that has occurred over time.

A subcommittee continues to work on Rule 3(c)(1)(B) and the merger rule, focusing on a line of cases in the Eighth Circuit holding that if a notice of appeal specifically mentions some interlocutory orders, in addition to the final judgment, review is limited to the specified orders. A subcommittee also continues to examine Rule 42(b), which provides that a circuit clerk “may” dismiss an appeal on the filing of a stipulation signed by all parties. Some cases, relying on the word “may,” hold that the court has discretion to deny the dismissal, particularly if the court fears strategic behavior. The discretion found in Rule 42(b) can make settlement difficult, because litigants lack certainty, and it may result in a court issuing an advisory opinion.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Official Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 4001, 6007, 9036, 9037, and Official Forms 411A and 411B, with a recommendation that they be approved and transmitted to the Judicial Conference.

Rule 4001 (Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements)

The proposed amendment to Rule 4001(c), which applies to obtaining credit, makes that rule inapplicable to chapter 13 cases. Rule 4001(c) details the process for obtaining approval of postpetition credit in a bankruptcy case. The Advisory Committee proposed the amendment

after concluding that the rule’s provisions are designed to address the complex postpetition financing issues particular to business debtor chapter 11 cases. Most members agreed that Rule 4001(c) did not readily address the consumer financing issues common in chapter 13 cases, such as obtaining a loan to purchase an automobile for family use.

There were no public comments on the proposed amendment. In giving final approval to the amendment at its spring meeting, the Advisory Committee added a title to the new paragraph (4), “*Inapplicability in a Chapter 13 Case,*” and made stylistic changes to address suggestions from the style consultants.

Rule 6007 (Abandonment or Disposition of Property)

The amendments to Rule 6007(b) are designed to specify the parties to be served with a motion to compel the trustee to abandon property under § 554(b) of the Bankruptcy Code, and to make the rule consistent with Rule 6007(a) (dealing with abandonment by the trustee or debtor in possession).

Five public comments were submitted on the proposed amendments. Two comments addressed the last sentence of the proposed amendment, which stated that a court order granting a motion to compel abandonment “effects abandonment without further action by the court.” The comments stated that this would be inconsistent with § 554(b), which provides for abandonment of property by the bankruptcy trustee, not the court. In response, the Advisory Committee inserted the words “trustee’s or debtor in possession’s” immediately before the word “abandonment.” Two comments criticized as too burdensome the amendment language that requires both service and notice of the motion on all creditors. The Advisory Committee determined that ensuring all parties receive the notice of a motion to abandon property outweighed the concern of burdensomeness, and therefore made no change.

One comment noted that the 14-day period for parties to respond after *service* of a motion to compel abandonment under proposed Rule 6007(b) could be up to three days longer than the 14-day response period after a trustee voluntarily files *notice* of an intent to abandon property under Rule 6007(a). This is because of the extra time allowed for service of motions by mail. The comment suggested possible changes to Rule 6007(a) or Rule 9006(a) that would make the response periods under both subparts of Rule 6007 the same. The Advisory Committee declined to make any change at this time.

Rule 9036 (Notice by Electronic Transmission); Deferral of Action on Rule 2002(g) and Official Form 410.

Proposed amendments to Rules 2002(g), 9036, and Official Form 410 were published in 2017 as part of the Advisory Committee's ongoing study of noticing issues and were intended to expand the use of electronic noticing and service in the bankruptcy courts. Proposed amendments to Rule 2002(g) (Addressing Notices) allowed notices to be sent to email addresses designated on filed proofs of claims and proofs of interest, and a corresponding amendment to Official Form 410 (Proof of Claim) added a check box for opting into email service and noticing. Current Rule 9036 provides for electronic service and notice of certain documents by permission of the receiving party and court order. As amended, the rule would allow clerks and parties to provide notices or serve documents (other than those governed by Rule 7004) by means of the court's electronic-filing system on registered users of that system, without the need of a court order. The proposed amendments to Rule 9036 also allowed service or noticing on any person by any electronic means consented to in writing by that person.

Four sets of comments were submitted addressing the proposed amendments. Although the commenters were generally supportive of the effort to authorize greater use of electronic service and noticing, they raised implementation issues and therefore suggested a delayed

effective date of December 1, 2021 with respect to the proposed amendments to Rule 2002(g) and Official Form 410.

All four sets of comments stated that it is not currently feasible to implement the proposed email opt-in system. They said that without time-consuming software programming and testing, the Bankruptcy Noticing Center (BNC) would not be able to receive the email addresses that opting-in creditors would put on proofs of claim. Instead, this information would have to be manually retrieved and conveyed to the BNC by clerk's office personnel.

Three comments expressed concerns that conflicting addresses might be on file for a single creditor and that there needs to be clarity about how the proposed proof of claim email option fits into existing rules about which of the conflicting addresses should be used. This possibility exists because there are several provisions in the Bankruptcy Code and rules that allow a creditor to designate an address for notice and service. One comment suggested the following order of priorities: (a) CM/ECF email address for registered users; (b) BNC email address; and (c) proof of claim opt-in email address. This order of priorities was inconsistent, however, with the proposed committee note accompanying the amendments to Rule 2002(g), which stated that “[a] creditor’s election on the proof of claim, or an equity security holder’s election on the proof of interest, to receive notices in a particular case by electronic means supersedes a previous request to receive notices at a specified address in that particular case.”

The Advisory Committee discussed the comments during its spring meeting. Members accepted the views of the commenters and AO personnel that current CM/ECF and BNC software would be unable to implement the email opt-in proposal and that considerable time would be required to do the necessary reprogramming and testing. The idea of approving the rule and form amendments now but delaying their effective date until 2021 provoked concern

that technological advances during that three-year period might result in better means of employing electronic service and noticing than is currently proposed.

Members were also persuaded that the comments about determining priorities among conflicting creditor email addresses show a need for further coordination with other groups and AO personnel who are working on overlapping electronic noticing issues. Therefore, the Advisory Committee concluded that the proposed amendments to Rule 2002(g) and Official Form 410 should be deferred for now.

The comments supported immediate implementation of the proposed amendments to Rule 9036. Those amendments (a) allow both clerks and parties to serve and give notice through CM/ECF to registered users; (b) allow other means of electronic service and noticing to be used for parties that give written consent to such service and noticing; and (c) provide that electronic service is complete upon filing or sending unless the sender receives notice that the transmission was not successful. Those changes are consistent with amended Civil Rule 5 (Serving and Filing Pleadings and Other Papers), which Rule 7005 makes applicable in bankruptcy proceedings, and the amendments to Rule 8011 (Filing and Service; Signature), which are on track to go into effect on December 1, 2018. Thus, the Advisory Committee recommended final approval of the amendments to Rule 9036, with minor non-substantive wording changes to clarify applicability and in response to suggestions from the Standing Committee's style consultants, and with the addition of the following sentences to the committee note:

The rule does not make the court responsible for notifying a person who filed a paper with the court's electronic-filing system that an attempted transmission by the court's system failed. But a filer who receives notice that the transmission failed is responsible for making effective service.

Rule 9037 (Privacy Protection for Filings Made with the Court)

The proposed amendment to Rule 9037 adds a new subdivision (h) to address the procedure for redacting personal identifiers in previously filed documents that are not in

compliance with Rule 9037(a). The Advisory Committee proposed the amendment in response to a suggestion submitted by the Committee on Court Administration and Case Management.

Three comments were submitted. The first suggested that the proposed amendment be expanded to allow parties to submit a redacted document as an alternative to the designation of sealed documents to be included in the record on appeal under Rule 8009(f). The Advisory Committee decided this suggestion was beyond the scope of the situation it was attempting to address with proposed Rule 9037(h), and therefore declined to make any change in response to this comment.

The second comment recommended that the amendment be revised to clarify that no fee need be collected, or replacement document filed, from a party seeking to redact his or her protected information unless it is the party who filed the previous (unredacted) document. In addition, the second comment pointed out two instances of the phrase “unless the court orders otherwise” that created ambiguity.

Judicial Conference policy already addresses the assessment of a redaction fee on a debtor or other person whose personal identifiers have been exposed. JCUS-SEP 14, pp. 9-10. Section 325.90 of the *Guide to Judiciary Policy*, Vol. 10 (Public Access and Records) provides that “[t]he court may waive the redaction fee in appropriate circumstances. For example, if a debtor files a motion to redact personal identifiers from records that were filed by a creditor in the case, the court may determine it is appropriate to waive the fee for the debtor.” Because the judiciary policy already allows a waiver of the redaction fee in appropriate situations, the Advisory Committee concluded that there is no need for Rule 9037(h) to address the issue.

The Advisory Committee agreed that the rule was ambiguous concerning when a bankruptcy court may “order otherwise,” and revised the proposal to clarify that any part of the rule may be modified by court order.

The final comment suggested that proposed Rule 9037(h) contained an inadvertent gap because the rule did not require the filing of a redacted version of the original document as a condition of the restrictions upon public access. Under the rule as published, the only redacted version of the original document is the one attached to the motion itself and that copy, along with the entire motion, is restricted from public view upon filing and before the court rules on the motion. The suggestion recommended that the motion to redact not be restricted from public view until the court rules on it.

When the Advisory Committee initially considered how best to provide for the redaction of already-filed documents, it strove to avoid the possibility that a publicly available motion to redact would highlight the existence in court files of an unredacted document. Accordingly, the proposed rule requires immediate restriction of public access to the motion and the unredacted original document. Access to those documents remains restricted if the court grants the motion to redact. Although not expressly stated, the intent and implication of the rule was that if the motion is granted, the redacted document, which was filed with the motion, would be placed on the record as a substitute for the original document that remained protected from public view. As explained in the committee note: “If the court grants the motion to redact, the redacted document should be placed on the docket, and public access to the motion and the unredacted document should remain restricted.”

To eliminate any ambiguity, the Advisory Committee added language to the rule stating that “[i]f the court grants [the motion], the redacted document must be filed.” The Advisory

Committee did not accept the suggestion that a restriction on access to the motion and unredacted document be delayed until the court grants the motion to redact.

Finally, stylistic changes were made in response to suggestions from the style consultants, and the committee note was revised to reflect the changes made to the rule.

Official Form 411A (General Power of Attorney) and Official Form 411B (Special Power of Attorney)

As part of the Forms Modernization Project, the power of attorney forms, previously designated as Official Forms 11A and 11B, were changed to Director’s Forms 4011A (General Power of Attorney) and 4011B (Special Power of Attorney), the use of which is optional unless required by local rule. This change took effect on December 1, 2015. The Forms Modernization Project group recommended this change to allow greater flexibility in their use, in light of increased restrictions on making modifications to Official Forms under then pending amendments to Rule 9009 that became effective in 2017.

The Advisory Committee later realized, however, that using Director’s Forms for powers of attorney, rather than Official Forms, created a conflict with Rule 9010(c). That rule provides that “[t]he authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose . . . shall be evidenced by a power of attorney *conforming substantially to the appropriate Official Form*” (emphasis added). In revisiting this matter, the Advisory Committee concluded that its earlier decision to convert the forms to Director’s Forms was unnecessary. Rule 9009 allows modifications of Official Forms “as provided in these rules.” The relevant rule here – Rule 9010(c) – only requires substantial, not exact, conformity with the appropriate Official Form. Other rules requiring a document that “conforms substantially” to an Official Form have been interpreted to permit modifications of those forms and are included in the chart of Alterations Permitted by Bankruptcy Rules that was approved at the Advisory Committee’s fall 2017 meeting and is available on the AO website. Treating Rule 9010(c) as permitting

modifications of the power of attorney forms would be consistent with the interpretation of Rules 3001(a), 3007, 3016(d), 7010, 8003(a)(3), 8005(a)(1), and 8015(a)(7)(C)(ii). Accordingly, to bring the rule and forms into conformity, the Advisory Committee recommended designating the power of attorney forms as Official Forms 411A and 411B, in keeping with the new numbering system for forms, with an effective date of December 1, 2018.

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendments to the Federal Rules of Bankruptcy Procedure and the proposed revisions to the Official Bankruptcy Forms and committee notes are set forth in Appendix B, with an excerpt from the Advisory Committee's report.

Recommendation: That the Judicial Conference:

- a. Approve the proposed amendments to Bankruptcy Rules 4001, 6007, 9036, and 9037 as set forth in Appendix B and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.
- b. Approve effective December 1, 2018 converting Director's Forms 4011A and 4011B to Bankruptcy Official Forms 411A and 411B for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Rules Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rules 2002, 2004, and 8012 with a request that they be published for public comment in August 2018. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 2002 (Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee)

Rule 2002 specifies the timing and content of numerous notices that must be provided in a bankruptcy case. The Advisory Committee recommended publication for public comment of amendments to three of the rule's subdivisions. This package of amendments would (i) require

giving notice of the entry of an order confirming a chapter 13 plan, (ii) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases, and (iii) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.

Rule 2004 (Examination)

Rule 2004 provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case. Under subdivision (c) of the rule, the attendance of a witness and the production of documents may be compelled by means of a subpoena. The Business Law Section of the American Bar Association, on behalf of its Committee on Bankruptcy Court Structure and Insolvency Process, submitted a suggestion that Rule 2004(c) be amended to specifically impose a proportionality limitation on the scope of the production of documents and electronically stored information (ESI). The Advisory Committee discussed the suggestion at its fall 2017 and spring 2018 meetings. By a close vote, the Advisory Committee decided not to add a proportionality requirement to the rule, but it decided unanimously to propose amendments to Rule 2004(c) to refer specifically to ESI and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.

Rule 8012 (Corporate Disclosure Statement)

Rule 8012 sets forth the disclosure requirements for a nongovernmental corporate party to a bankruptcy appeal in the district court or bankruptcy appellate panel. It is modeled on Appellate Rule 26.1. The Advisory Committee on Appellate Rules has proposed amendments to Rule 26.1 that were published for comment in August 2017, including one that is specific to bankruptcy appeals. The Advisory Committee on Bankruptcy Rules therefore proposed publication of conforming amendments to Rule 8012 this summer.

Information Item

The Advisory Committee has created a Restyling Subcommittee and charged it with recommending whether to embark upon a project to restyle the Federal Rules of Bankruptcy Procedure, similar to the restyling projects that produced comprehensive amendments to the Federal Rules of Appellate Procedure in 1998, the Federal Rules of Criminal Procedure in 2002, the Federal Rules of Civil Procedure in 2005, and the Federal Rules of Evidence in 2011.

To inform its recommendation, the subcommittee is seeking input from those who would be affected by such a restyling. The subcommittee worked with the Standing Committee's style consultants to produce a draft restyled version of Rule 4001 that illustrates changes that would likely occur should the restyling project proceed.

At its spring meeting, the Advisory Committee decided to seek comment on one section of the restyled rule, Rule 4001(a), and it approved a cover memo and a set of survey questions to be distributed to interested parties, such as all bankruptcy judges and clerks and various professional bankruptcy organizations. The cover memo explains that the exemplar is not being proposed for adoption, nor is the Advisory Committee seeking substantive comments on its revisions, but rather that input is sought on the threshold issue of whether restyling should be undertaken. Additional language was added to emphasize that substance and "sacred words" will prevail over style rules. The deadline for making comments was set at June 15, 2018. The subcommittee will analyze the responses over the summer in preparation for making a recommendation to the Advisory Committee at its September meeting.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Civil Rules submitted proposed amendments to Rule 30(b)(6), the rule that addresses deposition notices or subpoenas directed to an

organization, with a request that they be published for comment in August 2018. The Standing Committee unanimously approved the Advisory Committee's recommendation.

The proposed amendments to Rule 30(b)(6) are the result of over two years of work by the Advisory Committee. In April 2016, a subcommittee was formed to consider a number of suggestions proposing amendments to the rule. By way of background, this is the third time in twelve years that Rule 30(b)(6) has been on the Advisory Committee's agenda. In the past, the Advisory Committee ultimately concluded that the problems reported by both plaintiffs' and defendants' counsel involve behavior that could not be effectively addressed by a court rule.

The initial task of the subcommittee formed in 2016 was to reconsider whether it is feasible (and useful) to address by rule amendment problems identified by bar groups. The subcommittee worked on initial drafts of more than a dozen possible amendments that might address the problems reported by practitioners and, in the summer of 2017, invited comment on a narrowed down list of six potential amendment ideas. More than 100 comments were received. In addition, members of the subcommittee participated in conferences around the country to receive input from the bar. The focus eventually narrowed on imposing a duty to confer in good faith between the parties. The Advisory Committee determined that such a requirement was the most promising way to improve practice under the rule. The proposed amendment requires the parties to confer about (1) the number and descriptions of the matters for examination and (2) the identity of each witness the organization will designate to testify.

As drafted, the duty to confer requirement is meant to be iterative and recognizes that a single interaction will often not suffice to satisfy the obligation to confer in good faith. The committee note also explicitly states that "[t]he duty to confer continues if needed to fulfill the requirement of good faith." The duty to confer is also bilateral – it applies to the responding organization as well as to the noticing party.

Information Items

The Advisory Committee met on April 10, 2018. Among the topics on the agenda were updates from two subcommittees tasked with long-term projects. As previously reported, a subcommittee has been formed to consider a suggestion by the Administrative Conference of the United States that the Judicial Conference develop uniform procedural rules “for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).” With input and insights from both claimant and government representatives, as well as the Advisory Committee and Standing Committee, the subcommittee has developed draft rules. The three draft rules are for discussion purposes only and do not represent any decision by the subcommittee to recommend adoption of these or any other rules.

Another subcommittee has been formed to consider three suggestions that the Advisory Committee develop specific rules for multidistrict litigation proceedings. Among the many proposals are early procedures to address plainly meritless cases and broadened mandatory interlocutory appellate review for important issues. This subcommittee will also consider a suggestion that initial disclosures be expanded to include third party litigation financing agreements, which are used in multidistrict litigation proceedings as well as other contexts. With assistance from the Judicial Panel on Multidistrict Litigation, the subcommittee has begun gathering information and identifying issues on which rules changes might focus. The subcommittee’s work is at a very early stage – the list of issues and topics for study is still being developed.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted a proposed new Criminal Rule 16.1, and amendments to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts, with a recommendation that they be approved and transmitted to the Judicial Conference.

New Rule 16.1 (Pretrial Discovery Conference; Request for Court Action)

The proposed new rule originated with a suggestion that Rule 16 (Discovery and Inspection) be amended to address disclosure and discovery in complex cases, including cases involving voluminous information and ESI. While the subcommittee formed to consider the suggestion determined that the original proposal was too broad, it determined that a need might exist for a narrower, targeted amendment. A mini-conference was held in Washington, D.C. on February 7, 2017. Participants included criminal defense attorneys from both large and small firms, public defenders, prosecutors, Department of Justice attorneys, discovery experts, and judges. Consensus developed during the mini-conference regarding what sort of rule was needed. First, the rule should be simple and place the principal responsibility for implementation on the lawyers. Second, it should encourage the use of the ESI Protocol.¹ Participants did not support a rule that would attempt to specify the type of case in which this attention was required. The prosecutors and Department of Justice attorneys also felt strongly that any rule must be flexible given the variation among cases.

¹The “ESI Protocol” is shorthand for the “Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases” published in 2012 by the Department of Justice and the Administrative Office in connection with the Joint Working Group on Electronic Technology in the Criminal Justice System.

Guided by the discussion and feedback received at the mini-conference, as well as examples of existing local rules and orders addressing ESI discovery, the subcommittee drafted proposed new Rule 16.1. Because it addresses activity that is to occur well in advance of discovery, shortly after arraignment, the subcommittee concluded it warrants a separate position in the rules. A separate rule will also draw attention to the new requirement.

The proposed rule has two sections. Subsection (a) requires that, no later than 14 days after the arraignment, the attorneys for the government and defense must confer and try to agree on the timing and procedures for disclosure. Subsection (b) states that after the discovery conference the parties may “ask the court to determine or modify the timing, manner, or other aspects of disclosure to facilitate preparation for trial.” The phrase “determine or modify” contemplates two possible situations. First, if there is no applicable order or rule governing the schedule or manner of discovery, the parties may ask the court to “determine” when and how disclosures should be made. Alternatively, if the parties wish to change the existing discovery schedule, they must seek a modification. In either situation, the request to “determine or modify” discovery may be made jointly if the parties have reached agreement, or by one party. The proposed rule does not require the court to accept the parties’ agreement or otherwise limit the court’s discretion. Courts retain the authority to establish standards for the schedule and manner of discovery both in individual cases and through local rules and standing orders.

Because technology changes rapidly, the proposed rule does not attempt to specify standards for the manner or timing of disclosure in cases involving ESI. The committee note draws attention to this point and states that counsel “should be aware of best practices” and cites the ESI Protocol.

Six public comments were submitted, and each comment supported the general approach of requiring the prosecution and defense to confer. The Advisory Committee made some

changes in response to concerns raised by the comments. First, the Advisory Committee agreed to revise proposed Rule 16.1(b)'s reference to "timing, manner, or other aspects of disclosure" to mirror Rule 16(d)(2)(A)'s reference to "time, place, or manner, or other terms and conditions of disclosure." Second, the Advisory Committee emphasized in the committee note that the proposed rule does not modify statutory safeguards. Finally, in response to two comments that addressed the applicability of the proposed rule to pro se parties, the Advisory Committee made two changes: amending the rule to make it clearer that government attorneys are not required to meet with pro se defendants; and adding to the committee note a statement about the courts' existing discretion to manage discovery and their responsibility to ensure that pro se defendants "have full access to discovery." The Advisory Committee also made several non-substantive changes recommended by the Committee's style consultants.

Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts (The Answer and Reply)

Proposed amendments to Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts make clear that the petitioner has an absolute right to file a reply.

As previously reported, a member of the Standing Committee drew the Advisory Committee's attention to a conflict in the case law regarding Rule 5(d) of the Rules Governing Section 2255 Proceedings. That rule – as well as Rule 5(e) of the Rules Governing Section 2254 Cases – provides that the petitioner/moving party "may submit a reply . . . within a time period fixed by the judge." Although the committee note and history of the rule make clear that this language was intended to give the petitioner a right to file a reply, the Advisory Committee determined that the text of the rule itself has contributed to a misreading of the rule by a

significant number of district courts. Some courts have interpreted the rule as affording a petitioner the absolute right to file a reply. Other courts have interpreted the reference to filing “within a time fixed by the judge” as allowing a petitioner to file a reply only if the judge determines a reply is warranted and sets a time for filing.

The proposed amendments confirm that the moving party has a right to file a reply by placing the provision concerning the time for filing in a separate sentence, providing that the moving party or petitioner “may file a reply to the respondent’s answer or other pleading. The judge must set the time to file, unless the time is already set by local rule.” The committee note states that the proposed amendment “retains the word ‘may,’ which is used throughout the federal rules to mean ‘is permitted to’ or ‘has a right to.’” The proposal does not set a presumptive time for filing, recognizing that practice varies by court, and the time for filing is sometimes set by local rule.

Three comments were submitted, two of which addressed issues fully considered before publication: the need for an amendment, and whether to replace “may” with a phrase such as “has a right to” or “is entitled to.” The Advisory Committee considered these two issues at length prior to publication and determined not to revisit the Advisory Committee’s resolution.

A third comment supported the proposal but suggested additional rule amendments that would require that inmates be informed about the reply and when it should be filed at the time the court orders the respondent to file a response. Although the Advisory Committee declined to expand the scope of the proposed amendments to the rules, it did approve the addition of the following sentence to the committee notes: “Adding a reference to the time for filing of any reply to the order requiring the government to file an answer or other pleading provides notice of that deadline to both parties.” In the Advisory Committee’s view, this additional language will serve as a helpful reinforcement of best practices.

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendments to the Federal Rules of Criminal Procedure, the Rules Governing Section 2254 Cases in the United States District Courts, and the Rules Governing Section 2255 Proceedings for the United States District Courts and committee notes are set forth in Appendix C, with an excerpt from the Advisory Committee's report.

Recommendation: That the Judicial Conference approve proposed new Criminal Rule 16.1 and proposed amendments to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts as set forth in Appendix C and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Information Item

The Advisory Committee met on April 24, 2018. At that meeting, the Advisory Committee added to its agenda two suggestions from district judges recommending that pretrial disclosure of expert testimony in Rule 16 (Discovery and Inspection) be amended to parallel Civil Rule 26. While there is consensus among members of the Advisory Committee that the scope of pretrial disclosure of expert testimony is an important issue that should be addressed, members also agree that there is no simple solution. There are many different types of experts, and criminal proceedings are of course not parallel in all respects to civil proceedings. Additionally, the DOJ has adopted new internal guidelines calling for significantly expanded disclosure of forensic expert testimony; it will take some time for the effects of those guidelines to be fully realized. The Advisory Committee will gather information from a wide variety of sources (including the Advisory Committee on Rules of Evidence) and also plans to hold a mini-conference.

FEDERAL RULES OF EVIDENCE

Rule Recommended for Approval and Transmission

The Advisory Committee on Rules of Evidence submitted proposed amendments to Rule 807, with a recommendation that they be approved and transmitted to the Judicial Conference.

The project to amend Rule 807 (Residual Exception) began with exploring the possibility of expanding it to admit more hearsay and to grant trial courts somewhat more discretion in admitting hearsay on a case-by-case basis. After extensive deliberation, the Advisory Committee determined that it would not seek to expand the breadth of the exception. But in conducting its review of cases decided under the residual exception, and in discussions with experts at a conference at Pepperdine Law School, the Advisory Committee determined that there are a number of problems in the application of the exception that could be improved by rule amendment. The problems addressed by the proposed amendment to Rule 807 are as follows:

1. The requirement that the court find trustworthiness “equivalent” to the circumstantial guarantees in the Rule 803 and 804 exceptions is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions.
2. Courts are in dispute about whether to consider corroborating evidence in determining whether a statement is trustworthy. The Advisory Committee determined that an amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception, and substantively, that amendment should specifically allow the court to consider corroborating evidence, because corroboration provides a guarantee of trustworthiness.
3. The requirements in Rule 807 that the hearsay must be proof of a “material fact” and that admission of the hearsay be in “the interests of justice” and consistent with the “purpose

of the rules” have not served any good purpose. The Advisory Committee determined that the rule will be improved by deleting the references to “material fact” and “interest of justice” and “purpose of the rules.”

4. The notice requirement in current Rule 807 is problematic because it does not contain a good cause exception, it does not require the notice to be provided in writing, and its requirements of disclosure of the “particulars” of the statement and the name and address of the declarant are difficult to implement.

Proposed amendments to Rule 807 were published for comment in August 2017. The Advisory Committee received nine public comments. It carefully considered those comments, most of which were positive, and made some changes. The Advisory Committee also implemented some of the suggestions made by members of the Standing Committee at its June 2017 meeting, including adding references to Rule 104(a) and to the Confrontation Clause to the committee note. Finally, the Advisory Committee addressed a dispute in the courts about whether the residual exception could be used when the hearsay is a “near-miss” of a standard exception. A change to the text and committee note as issued for public comment provides that a statement that nearly misses a standard exception can be admissible under Rule 807 so long as the court finds that there are sufficient guarantees of trustworthiness.

The Standing Committee voted unanimously to adopt the recommendation of the Advisory Committee. The proposed amendments to the Federal Rules of Evidence and committee note are set forth in Appendix D, with an excerpt from the Advisory Committee’s report.

Recommendation: That the Judicial Conference approve the proposed amendments to Evidence Rule 807 as set forth in Appendix D and transmit them to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Rule Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rule 404(b) (Crimes, Wrongs, or Other Acts) with a request that they be published for public comment in August 2018. The Standing Committee unanimously approved the Advisory Committee's recommendation.

The Advisory Committee has monitored significant developments in the case law on Rule 404(b), governing admissibility of other crimes, wrongs, or acts. Several circuits have suggested that the rule needs to be more carefully applied and have set forth criteria for that more careful application. The focus has been on three areas:

1. Requiring the prosecutor not only to articulate a proper purpose but to explain how the bad act evidence proves that purpose without relying on a propensity inference.
2. Limiting admissibility of bad acts offered to prove intent or knowledge where the defendant has not actively contested those elements.
3. Limiting the “inextricably intertwined” doctrine, under which bad act evidence is not covered by Rule 404(b) because it proves a fact that is inextricably intertwined with the charged crime.

Over several meetings, the Advisory Committee considered several textual changes to address these case law developments. At its April 2018 meeting the Advisory Committee decided against proposing extensive substantive amendments to Rule 404(b), based on its conclusion that such amendments would add complexity without rendering substantial improvement. The Advisory Committee did recognize that some protection for defendants in criminal cases could be promoted by expanding the prosecutor's notice obligations under Rule 404(b). The Department of Justice proffered language that would require the prosecutor to “articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the

evidence and the reasoning that supports the purpose.” In addition, the Advisory Committee determined that the current requirement that the prosecutor must disclose only the “general nature” of the bad act should be deleted, given the prosecution’s expanded notice obligations under the Department of Justice proposal. The Advisory Committee also unanimously agreed that the requirement that the defendant must request notice be deleted, as that requirement simply leads to boilerplate requests.

Finally, the Advisory Committee determined that the restyled phrase “crimes, wrongs, or other acts” should be restored to its original form: “other crimes, wrongs, or acts.” This would clarify that Rule 404(b) applies to other acts and not the acts charged.

Information Items

At its April 26-27, 2018 meeting, the Advisory Committee discussed the results of the symposium held at Boston College School of Law in October 2017 regarding Rule 702. The symposium consisted of two separate panels. The first panel included scientists, judges, academics, and practitioners, exploring whether the Advisory Committee could and should have a role in assuring that forensic expert testimony is valid, reliable, and not overstated in court. The second panel, of judges and practitioners, discussed the problems that courts and litigants have encountered in applying *Daubert* in both civil and criminal cases. The panels provided the Advisory Committee with extremely helpful insight, background, and suggestions for change.

The Advisory Committee is considering whether Rule 106, the rule of completeness, should be amended. Rule 106 provides that if a party introduces all or part of a written or recorded statement in such a way as to be misleading, the opponent may require admission of a completing statement that would correct the misimpression. Judge Paul Grimm submitted a suggestion that Rule 106 should be amended in two respects: 1) to provide that a completing

statement is admissible over a hearsay objection; and 2) to provide that the rule covers oral as well as written or recorded statements.

The Advisory Committee continues to consider the possibility of amending Rule 606(b) to reflect the Supreme Court’s 2017 holding in *Pena-Rodriguez v. Colorado*. The Court in *Pena-Rodriguez* held that application of Rule 606(b) barring testimony of jurors on deliberations violated the defendant’s Sixth Amendment right where the testimony concerned racist statements made about the defendant and one of the defendant’s witnesses during deliberations. When it first considered the issue in April 2017, the Advisory Committee at that time declined to pursue an amendment for the time being due to concern that any amendment to Rule 606(b) to allow for juror testimony to protect constitutional rights could be read to expand the *Pena-Rodriguez* holding. The Advisory Committee revisited the question at its April 2018 meeting and came to the same conclusion but will continue to monitor the case law applying *Pena-Rodriguez*.

The Advisory 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 cross-examine the declarant.

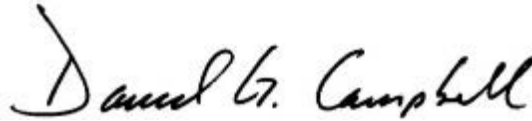
Finally, the Advisory Committee determined not to go forward with possible amendments to Rules 609(a), 611, and 801(d)(1)(A).

JUDICIARY STRATEGIC PLANNING

Chief Judge Carle E. Stewart, the judiciary’s planning coordinator, asked Judicial Conference committees to provide an update on the initiatives they are pursuing to implement the strategies and goals of the *Strategic Plan for the Federal Judiciary*. The judiciary’s long-range planning officer addressed the Committee on how its feedback on the *Strategic Plan* and reporting of its long-term initiatives helps foster communication between the Executive

Committee and Judicial Conference committees. The Committee will provide an update to Chief Judge Stewart on the rules committees' progress in implementing initiatives in support of the *Strategic Plan*.

Respectfully submitted,



David G. Campbell, Chair

| | |
|-----------------------|---------------------|
| Jesse M. Furman | William K. Kelley |
| Daniel C. Girard | Carolyn B. Kuhl |
| Robert J. Giuffra Jr. | Rod J. Rosenstein |
| Susan P. Graber | Amy J. St. Eve |
| Frank M. Hull | Srikanth Srinivasan |
| Peter D. Keisler | Jack Zouhary |

- Appendix A – Federal Rules of Appellate Procedure (proposed amendments and supporting report excerpt)
- Appendix B – Federal Rules of Bankruptcy Procedure and Official Bankruptcy Forms (proposed amendments and supporting report excerpts)
- Appendix C – Federal Rules of Criminal Procedure, Rules Governing Section 2254 Cases in the United States District Courts, and Rules Governing Section 2255 Proceedings for the United States District Courts (proposed amendments and supporting report excerpt)
- Appendix D – Federal Rules of Evidence (proposed amendments and supporting report excerpt)

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 12, 2018 | Washington, D.C.

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ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure (“Standing Committee” or “Committee”) held its spring meeting at the Thurgood Marshall Federal Judiciary Building in Washington, D.C., on June 12, 2018. The following members participated:

- | | |
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| <p>Judge David G. Campbell, Chair Judge Jesse M. Furman Daniel C. Girard, Esq. Robert J. Giuffra, Jr., Esq. Judge Susan P. Graber Judge Frank Mays Hull Peter D. Keisler, Esq.</p> | <p>Professor William K. Kelley Judge Carolyn B. Kuhl Elizabeth J. Shapiro, Esq.* Judge Amy St. Eve Judge Srikanth Srinivasan Judge Jack Zouhary</p> |
|--|--|

The advisory committees were represented by their chairs and reporters:

- | | |
|--|--|
| <p>Advisory Committee on Appellate Rules – Judge Michael A. Chagares, Chair Professor Edward Hartnett, Reporter</p> <p>Advisory Committee on Bankruptcy Rules – Judge Dennis R. Dow, Incoming Chair Professor S. Elizabeth Gibson, Reporter Professor Laura Bartell, Associate Reporter</p> <p>Advisory Committee on Civil Rules – Judge John D. Bates, Chair Professor Edward H. Cooper, Reporter Professor Richard L. Marcus, Associate Reporter</p> | <p>Advisory Committee on Criminal Rules – Judge Donald W. Molloy, Chair Professor Sara Sun Beale, Reporter Professor Nancy J. King, Associate Reporter</p> <p>Advisory Committee on Evidence Rules – Judge Debra Ann Livingston, Chair Professor Daniel J. Capra, Reporter</p> |
|--|--|

*Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice on behalf of the Honorable Rod J. Rosenstein, Deputy Attorney General.

Providing support to the Committee were:

| | |
|---------------------------------|--|
| Professor Daniel R. Coquillette | Reporter, Standing Committee |
| Professor Catherine T. Struve | Associate Reporter, Standing Committee |
| Rebecca A. Womeldorf | Secretary, Standing Committee |
| Professor Bryan A. Garner | Style Consultant, Standing Committee |
| Professor R. Joseph Kimble | Style Consultant, Standing Committee |
| Bridget M. Healy | Attorney Advisor, RCS |
| Scott Myers | Attorney Advisor, RCS |
| Julie Wilson | Attorney Advisor, RCS |
| Frances F. Skillman | Paralegal Specialist, RCS |
| Shelly Cox | Administrative Specialist, RCS |
| Dr. Tim Reagan | Senior Research Associate, FJC |
| Patrick Tighe | Law Clerk, Standing Committee |

OPENING BUSINESS

Judge Campbell called the meeting to order. He apologized to any Washington Capitals fans who would miss the Stanley Cup victory parade in D.C. because of the meeting.

He welcomed Judge Dennis Dow of the U.S. Bankruptcy Court for the Western District of Missouri, who will be the Chair of the Advisory Committee on Bankruptcy Rules beginning October 1, 2018. Because the current Chair, Judge Sandra Segal Ikuta, could not attend the meeting, Judge Dow is attending in her place. Judge Campbell also welcomed Professor Ed Hartnett who was recently appointed as Reporter to the Advisory Committee on Appellate Rules. He also noted that Chief Justice Roberts reappointed Judges Bates and Molloy as Chairs of their respective Advisory Committees for another year. Judge St. Eve was recently appointed to the U.S. Court of Appeals for the Seventh Circuit, and although Director Duff appointed Judge St. Eve to the Judicial Conference Committee on the Budget, Judge St. Eve graciously agreed to serve her remaining term on the Standing Committee.

Judge Campbell remarked that Judge Zouhary's tenure on the Standing Committee ends on September 30, 2018. Judge Zouhary will continue to help with the pilot projects going forward. He thanked Judge Zouhary for his service, noting that he is an innovator in district court case management.

In addition, Judge Campbell lamented the passing of Professor Geoffrey C. Hazard, Jr., a longtime member of and consultant to the Standing Committee. Professor Hazard passed shortly after the Committee's meeting in January 2018, and Judge Campbell said that he will be greatly missed.

Lastly, Judge Campbell discussed Professor Dan Coquillette's upcoming retirement from his role as Reporter to the Standing Committee in December 2018 but noted that Professor Coquillette will remain as a consultant thereafter. Chief Justice Roberts appointed Professor Catherine Struve as Associate Reporter, and we will ask the Chief Justice to appoint Professor Struve as Reporter while Dan transitions to a consulting role. Judge Campbell thanked Professor Coquillette for his service and looks forward to the celebration later this evening.

Rebecca Womeldorf directed the Committee to the chart summarizing the status of proposed rules amendments at each stage of the Rules Enabling Act process, which is included in the Agenda Book. Also included are the proposed rules approved by the Judicial Conference in September 2017, adopted by the Supreme Court, and transmitted to Congress in April 2018. If Congress takes no action, the rule package pending before Congress will become effective December 1, 2018.

APPROVAL OF THE MINUTES OF THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee approved the minutes of the January 4, 2018 meeting.**

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Hartnett provided the report of the Advisory Committee on Appellate Rules, which met on April 6, 2018, in Philadelphia, Pennsylvania. The Advisory Committee sought approval of five action items and presented a few information items.

Action Items

Appellate Rules 3 and 13 – Electronic Service. The Advisory Committee sought final approval for proposed amendments to Appellate Rules 3 and 13, both of which concern notices of appeal. The proposed amendments were published for public comment in August 2017 and received no comments.

The proposed amendments to Rules 3 and 13 reflect the increased reliance on electronic service in serving notice of filing notices of appeal. Rule 3 currently requires the district court clerk to serve notice of filing the notice of appeal by mail to counsel in all cases, and by mail or personal service on a criminal defendant. The proposed amendment changes the words "mailing" and "mails" to "sending" and "sends," and deletes language requiring certain forms of service. Similarly, Rule 13 currently requires that a notice of appeal from the Tax Court be filed at the clerk's office or mailed to the clerk. The proposed amendment allows the appellant to send a notice of appeal by means other than mail.

One Committee member remarked that use of "sends" and "sending" in Rule 3 seemed vague and inquired why more specific language was not used. Judge Chagares responded that a more general term was used to cover a variety of ways to serve notices of appeal, reflecting the various approaches courts use as they transition to electronic service.

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 proposed amendments to Rules 3 and 13.**

Appellate Rules 26.1, 28, and 32 – Disclosure Statements. The Advisory Committee sought final approval for proposed amendments to Appellate Rules 26.1, 28, and 32. The proposed amendment to Rule 26.1 changes the disclosure requirements in several respects designed to help judges decide whether they must recuse themselves. The proposed amendments to Rules 28 and 32 would change the term “corporate disclosure statement” to “disclosure statement.” These proposed amendments were published in August 2017. The proposed amendments to Rules 28 and 32 received no public comments whereas Rule 26.1 received a few.

The National Association of Criminal Defense Lawyers (“NACDL”) suggested that the Committee Note include additional language to help deter overuse of the government exception in 26.1(b) concerning organizational victims in criminal cases. In response, the Advisory Committee revised the Rule 26.1 Committee Note to more closely follow the Committee Note for Criminal Rule 12.4 and account for the NACDL comment. In addition, Charles Ivey suggested that Rule 26.1(c) include additional language referencing involuntary bankruptcy proceedings and requiring that petitioning creditors be identified in disclosure statements. The Advisory Committee consulted Professor Gibson, Reporter to the Bankruptcy Rules Committee, and accepted Professor Gibson’s suggestion that no change was needed. Finally, two commentators argued that the meaning of 26.1(d) regarding intervenors was ambiguous. In response, the Appellate Rules Committee folded language from 26.1(d) regarding intervenors into a new last sentence in 26.1(a) and changed the title of subsection (a) to reflect that intervenors are subject to the disclosure requirement.

One member asked what constitutes a “nongovernment corporation” and whether this term includes entities such as Fannie Mae and Freddie Mac, which are government-sponsored publicly traded companies. This member also questioned why Rule 26.1 was limited to corporations, noting that limited partnerships can raise similar issues as corporations. One Committee member stated that disclosures should be broader rather than narrower and did not see the harm in deleting “nongovernmental.” Another member questioned whether it is onerous to list governmental corporations. A different member reiterated that other types of entities can present similar problems as corporations.

Professor Struve noted that the goal of the proposed amendments to Rule 26.1 is to track the other disclosure provisions in the Civil, Criminal, and Bankruptcy Rules. Professor Cooper relayed the history of these disclosure statement rules, stating that the Civil Rules Committee decided to limit the disclosure statement to “nongovernment corporations” given the significant variation among local disclosure rules. Judge Chagares reiterated Professor Struve’s point that the purpose underlying the proposed change to Appellate Rule 26.1 is consistency with the other federal rules regarding disclosure statements. Professors Beale and King noted a memo by Neal Katyal exploring why the disclosure statement is limited to “nongovernmental corporations” and concluding that this limitation was not causing a practical problem.

A member noted the federal rules should be consistent with each other. However, a bigger problem is whether the newly consistent rules provide judges with adequate information for recusal. Judge Campbell said that there are two distinct issues: first, whether to approve Rule 26.1 to make it consistent with the other federal rules, and second, whether to change or revisit the current policy underlying the disclosure statement rules. He argued that the second question was not ripe for the Committee's consideration.

A member asked if 26.1(b)'s disclosure obligation is broader than 26.1(a). Judge Campbell responded that subsection (b) is parallel with Criminal Rule 12.4 whereas subsection (a) is parallel with Civil Rule 7.1. He reiterated that the scope of the disclosure obligation should perhaps be reconsidered at a later time.

A member suggested deleting "and intervenors" in Rule 26.1(a)'s title, and Judge Chagares concurred. For consistency with other subsection titles, another member recommended making "victim" and "criminal case" plural in Rule 26.1(b)'s title, as well as deleting the article "a" preceding "criminal case." The Committee's style consultants recommended making a few stylistic changes in subsection (c), including adding a semicolon after "and" as well as deleting "in the bankruptcy case" in item number (2).

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 proposed amendments to Rules 26.1, 28, and 32, subject to the revisions made to Rule 26.1 during the meeting.**

Appellate Rule 25(d) – Proof of Service. The Advisory Committee sought final approval for a proposed amendment to Appellate Rule 25(d), which is designed to eliminate unnecessary proofs of service in light of electronic filing. This proposed amendment had previously been approved by the Standing Committee and submitted to the Supreme Court. But after discussion at the January 2018 meeting, the previously submitted version was withdrawn for revision to address the possibility that a document might be filed electronically but still require service through means other than the court's electronic filing system on a party who does not participate in electronic filing. The Advisory Committee now seeks final approval of the revised language. Judge Campbell thanked Professor Struve for noting the potential issue. Judge Chagares also noted a few minor changes that should be made, including adding a hyphen between "electronic filing" in 25(d)(1) and deleting the words "filing and" in the Committee Note. Judge Chagares noted the Advisory Committee's view that the proposed revision to 25(d) was technical in nature, and did not require republication.

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 proposed amendments to Rule 25(d), subject to the revisions made during the meeting.**

Appellate Rules 5, 21, 26, 32, and 39 – Proof of Service. If the proposed amendment to Appellate Rule 25(d) is approved, proofs of service will frequently be unnecessary. Accordingly, the Advisory Committee sought final approval without public comment of what it views as technical and conforming amendments to Rules 5, 21, 26, 32, and 39. Proposed amendments to

Rules 5, 21(a)(1), and 21(c) delete the phrase “proof of service” and add “and serve it,” consistent with Rule 25(d)(1). Rule 26(c) eliminates the “proof of service” term and simplifies the current rule for when three days are added for certain kinds of service. Current Rule 32(f) lists the items that are excluded when computing length limits, including “the proof of service.” Given the frequent occasions in which there would be no proof of service, the article “the” should be deleted. Given this change, the Advisory Committee agreed to delete all of the articles in the list of items. Rule 39(d) removes the phrase “with proof of service” and replaces it with “and serve.” Judge Chagares explained that the Advisory Committee did not think public comment was necessary for these technical, conforming amendments.

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 proposed amendments to Rules 5, 21, 26, 32, and 39.**

Appellate Rule 35 – En Banc Determinations. The Advisory Committee sought approval for publication of proposed amendments to Appellate Rules 35 and 40, which would establish length limits applicable to responses to petitions for rehearing en banc. Also, Rule 40 uses the term “answer” whereas Rule 35 uses the term “response.” The proposed amendment would change Rule 40 to use the term “response” for consistency.

Some members noted other inconsistencies between the two rules. For instance, one member stated that Rule 35(e) just concerns the length limit whereas Rule 40 imposes additional requirements. Professor Hartnett responded that although the Advisory Committee has formed a subcommittee to examine Rules 35 and 40 more comprehensively, the committee felt it appropriate to move forward with this amendment in the interim. Judge Campbell asked if the Advisory Committee has a time table for when this review will conclude, and Judge Chagares stated they hope to finish this review in the fall. One Committee member noted that clarifying the length limits in the appellate rules is generally helpful and important.

One Committee member commented that the Committee Note to Rule 35 states “a court,” instead of “the court” like the text of rule. The Committee’s style consultants concurred that “a” should be changed to “the.”

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendments to Rules 35 and 40, subject to the revisions made during the meeting.**

Information Items

Judge Chagares announced the formation of three subcommittees to examine: (1) Rule 3(c)(1)(B) and the merger rule; (2) Rule 42(b) regarding voluntary dismissals, and; (3) whether any amendments are appropriate in light of the Supreme Court’s decision in *Hamer v. Neighborhood Hous. Servs. Of Chi.*, 138 S. Ct. 13 (2017). One member asked if the Rule 42(b) subcommittee will explore whether different rules regarding voluntary dismissals should exist for class actions, and Judge Chagares stated that the subcommittee is exploring why judicial discretion over voluntary dismissals may be necessary, including in the class action context.

In addition, Judge Chagares noted that the Advisory Committee examined the problem of appendices being too long and including too much irrelevant information, as well as how much the requirements vary by circuit. However, technology is changing quickly which may transform how appendices are done. Accordingly, the Advisory Committee decided to remove this matter from the agenda and to revisit it in three years. Judge Chagares stated that the Advisory Committee also removed from its agenda an item relating to Rule 29 and blanket consents to amicus briefs, and an item relating to whether “costs on appeal” in Rule 7 includes attorney’s fees. The Committee discussed the Supreme Court’s recent decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), but that discussion did not give rise to an agenda item.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Incoming Chair Dennis Dow and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which met on April 3, 2018, in San Diego, California. The Advisory Committee sought approval of eight action items and presented three information items.

Action Items

Bankruptcy Rule 4001(c) – Obtaining Credit. The Advisory Committee sought final approval for a proposed amendment to Bankruptcy Rule 4001(c), which details the process for obtaining approval of post-petition credit in a bankruptcy case. The proposed amendment would make this rule inapplicable to chapter 13 cases. The Advisory Committee received no comments on this proposed change. Some post-publication changes were made, such as adding a title and a few other stylistic changes. No Standing Committee members had any comments or questions about this proposed amendment.

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 proposed amendments to Rule 4001(c).**

Bankruptcy Rule 6007(b) – Abandonment or Disposition of Property. The Advisory Committee sought approval for a proposed amendment to Bankruptcy Rule 6007(b). The proposed amendments are designed to specify the parties to be served with a motion to compel the trustee to abandon property under § 554(b), and to make the rule consistent with the procedures set forth in Rule 6007(a). The Advisory Committee received some comments on this rule, some of which they accepted but others they declined to adopt. The Committee’s style consultants suggested changes to subpart (b) which would have improved the overall language. Because the purpose of the current amendment is simply to parallel the text of Rule 6007(a), the Advisory Committee declined to accept these suggestions, but will revisit the styling improvements if the restyling project goes forward.

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 proposed amendments to Rule 6007(b).**

Bankruptcy Rule 9036 – Notice and Service Generally; Deferral of Action on Rule 2002(g) and Official Form 410. These amendments are designed to expand the use of electronic noticing and service in bankruptcy courts. The proposed amendments to Rule 2002(g) would allow notices to be sent to email addresses designated on filed proofs of claims and proofs of interest. The published amendments to Rule 9036 allow not only clerks but also parties to provide notices or to serve documents through the court’s electronic-filing system. The proposed amendments to Official Form 410 add a check box for opting into email service and noticing.

The Advisory Committee received four comments, each raising concerns about the technological feasibility of the proposed changes and how conflicting email addresses supplied by creditors should be prioritized given the different mechanisms for supplying email addresses for service. The AO and technology specialists with whom the Advisory Committee consulted confirmed these concerns. Consequently, the Advisory Committee unanimously recommended deferring action on amendments to Rule 2002(g) and Official Form 410. By holding these amendments in abeyance, the Advisory Committee will have additional time to sort out these technological issues.

Nevertheless, the Advisory Committee recommends approving the amendments to Rule 9036. In Rule 9036, the word “has” in the second sentence of the Committee Note should be changed to “have.” One Committee member asked if the phrase “in either of these events” should be “in either of these cases,” and the Committee’s style consultants noted that they try not to use “case” unless referring to a lawsuit.

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 proposed amendments to Rule 9036, subject to the revision made during the meeting.**

Bankruptcy Rule 9037(h) – Motion to Redact a Previously Filed Document. The Advisory Committee sought approval for a proposed amendment to Bankruptcy Rule 9037, which adds a new subdivision (h) to address the procedure for redacting personal identifiers in previously filed documents that are not in compliance with Rule 9037(a). The Advisory Committee received comments on the proposed changes, including one seeking to expand the amendments to address how documents placed under seal by the bankruptcy court should be handled on appeal. The Advisory Committee rejected this concern as beyond the scope of the rule amendment.

Another comment suggested an explicit waiver of the filing fee if a party bringing the motion seeks to redact protected privacy information disclosed by a different party (i.e., a debtor motion to redact his or her social security number inappropriately revealed in an attachment to a creditor’s proof of claim). The Advisory Committee agreed with this sentiment but did not think that changing the rule was necessary because Judicial Conference guidelines already permit the court to waive the filing fee in this situation. A third commenter noted that nothing in the rule required filing the redacted document. In response, the Advisory Committee added language making it clear that the redacted document must be filed.

A final comment argued that restrictions on accessing the originally filed document should not go into effect until the redacted document is filed. The current rule as written imposes restrictions on the document once the motion to redact is filed. The Advisory Committee rejected this comment, finding such restrictions necessary and appropriate because other people will be made aware of this sensitive information when the motion to redact is filed.

Judge Campbell asked if the language of “promptly restrict” is sufficient to guide clerks and whether clerks know to restrict access to these documents upon the filing of a motion to redact. Judge Dow responded affirmatively and noted that the clerk member of the Advisory Committee advised that clerks already impose restrictions as a matter of course. Judge Chagares asked about the scope of the rule and whether it applies to an opinion, which is also a “document filed.” Judge Dow stated that it could, and Professor Bartell noted that the rule only applies to the protected privacy information listed in Rule 9037(a).

A member stated that he is generally supportive of the rule change and asked whether the rule should apply more broadly, including in the Civil and Criminal Rules. Professor Beale noted that the Advisory Committees on Civil and Criminal Rules, respectively, have considered this question and decided against a parallel rule change because outside the bankruptcy context, where the problem is more frequent, judges routinely and quickly handle these matters when they arise.

This same member also asked why the information is limited to the information listed in Rule 9037(a). Professors Gibson and Beale explained that Rule 9037(a) is the bankruptcy version of the privacy rules adopted by the advisory committees to limit certain information in court documents as required by the E-Government Act. Professor Capra noted that the E-Government Act does not prohibit going farther than the information listed and that the Committee could decide to prohibit disclosing additional information. He added that if the issue is taken up, it should apply across the federal rules and not just in bankruptcy.

A member questioned why the rule uses the term “entity.” Judge Dow explained that the term “entity” is a defined term in the Bankruptcy Code, and the broadly defined term even encompasses governmental entities.

This member also asked if the Advisory Committee considered any changes to 9037(g) regarding waiver. Professor Bartell explained that the waiver rule is still intact and that the Advisory Committee decided no change was needed. A member inquired about local court rules that address this waiver problem, and Professor Bartell noted that bankruptcy courts have such rules.

Another Committee member suggested adding language in the Committee Note stating that 9037(g) does not abrogate the “waiver” provision. Professor Gibson was reluctant to make that change absent discussion with the Advisory Committee. Judge Campbell stated that, under the current rule, a problem already exists. Parties are currently filing motions to redact, and in certain situations it is possible such a motion could conflict with the waiver provision. This rule just creates a formal procedure for filing a motion to redact. It does not affect the current case law regarding waiver.

Professor Hartnett asked what happens when the motion is granted and whether the court, not the party, is required to docket the redacted document. Professor Gibson noted that the filing party must attach the redacted document to its motion to redact and that the court has the responsibility to docket the redacted document. The Advisory Committee explored requiring the moving party to file the redacted document as a separate document, but rejected this approach.

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 proposed amendments to Rule 9037.**

Official Forms 411A and 411B – Power of Attorney. Proposed Official Forms 411A and 411B are used to execute power of attorney. As part of the Advisory Committee's Forms Modernization Project, prior versions of these forms were changed from Official Forms to Director's Forms 4011A and 4011B. However, Judge Dow explained that this created a problem because Bankruptcy Rule 9010(c) requires execution of a power of attorney on an Official Form, and these forms are no longer Official Forms. To rectify this problem, the Advisory Committee sought approval to re-designate Director's Forms 4011A and 4011B as Official Forms 411A and 411B. Because there would be no substantive changes for which comment would be helpful, the Advisory Committee sought final approval of the forms without publication.

Judge Campbell asked if the Judicial Conference can designate these forms as Official Forms, or if Supreme Court approval is required. Professor Gibson and Mr. Myers said that under the Rules Enabling Act, the Judicial Conference makes the final decision in approving Official Bankruptcy Forms, and that if it acts this September, the changes will become effective on December 1, 2018.

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 designation of Director's Forms 4011A and 4011B as Official Forms 411A and 411B effective December 1, 2018.**

Bankruptcy Rule 2002(f), (h), and (k) – Notices. Bankruptcy Rule 2002 specifies the timing and content of numerous notices that must be provided in a bankruptcy case. The Advisory Committee sought approval to publish amendments to three of the rule's subdivisions for public comment. These amendments would: 1) require giving notice of the entry of an order confirming a chapter 13 plan; 2) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and 3) add a cross-reference reflecting the relocation of the provision specifying the deadline for an objection to confirmation of a chapter 13 plan. The Standing Committee had no questions or comments about these proposed amendments.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendments to Rule 2002(f), (h), and (k).**

Bankruptcy Rule 2004(c) – Examinations. Rule 2004 provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case. The

Advisory Committee sought approval to publish an amendment to 2004(c) adding a reference to electronically stored information to the title and first sentence of the subdivision. The Standing Committee had no questions or comments about this proposed amendment.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendment to Rule 2004(c).**

Bankruptcy Rule 8012 – Corporate Disclosure Statement. The Advisory Committee sought approval to publish an amendment to Rule 8012 concerning corporate disclosure statements in bankruptcy appeals. The amendment adds a new subdivision (b) to Rule 8012 to require disclosing the names of any debtors in an underlying bankruptcy case that are not revealed by the caption in an appeal and, for any corporate debtors in the underlying bankruptcy case, disclosing the information required of corporations under subdivision (a) of the rule. Other amendments track Appellate Rule 26.1 by adding a provision to subdivision (a) requiring disclosure by corporations seeking to intervene in a bankruptcy appeal, and make stylistic changes to what would become subdivision (c) regarding supplemental disclosure statements.

Professor Gibson noted that the reference to subdivision (c) will be dropped from the Committee Note. A Committee member asked if the term “corporation appearing” already captures corporations seeking to intervene. Professor Gibson responded that it might be better to track the language used in FRAP 26.1. The first sentence should read: “Any nongovernmental corporation that is a party to a proceeding in the district court” She also noted that Rule 8012(b) will incorporate the language changes made to FRAP 26.1(c) at the meeting today, including adding a semicolon before “and” as well as deleting “in the bankruptcy case” in item number (2).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendment to Rule 8012, subject to the revisions made during the meeting.**

Information Items

Judge Dow stated that a Restyling Subcommittee is exploring whether to recommend that the Advisory Committee restyle the Federal Rules of Bankruptcy Procedure. To inform this recommendation, the Committee’s style consultants produced a draft of a restyled Rule 4001. In consultation with the FJC, the Subcommittee is conducting a survey of interested parties, including judges, clerks of courts, and other bankruptcy organizations, which will conclude on June 15, 2018. The survey uses a restyled example of 4001(a). The Subcommittee will analyze the survey responses and make a recommendation to the Advisory Committee at its September 2018 meeting. Although only preliminary results were available at the time of the meeting, Judge Dow said that responses from most bankruptcy judges and clerks were positive.

Professor Capra asked whether the Bankruptcy Rules could be restyled given that they track language in the Bankruptcy Code. Judge Dow noted that the parallels with the Code do not prohibit restyling; rather, they provide a reason for caution in undertaking that restyling effort. He

emphasized that no decision on restyling has been made. Informed by the survey of interested parties, the Advisory Committee will consider the advantages and disadvantages of restyling and determine how, if at all, to move forward.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which met on April 24, 2018, in Washington, D.C. The Advisory Committee sought approval of two action items and shared two information items.

Action Items

New Criminal Rule 16.1 – Pretrial Discovery Conference. Judge Molloy reviewed the history of the proposal, which originated as a suggestion by members of the defense bar to amend Rule 16 to address disclosure and discovery in complex criminal cases, including those involving voluminous information and electronically stored information. At Judge Campbell’s suggestion, a subcommittee held a mini-conference to gather information on the problem and potential solutions. Mini-conference participants included criminal defense attorneys from both large and small firms, public defenders, prosecutors, Department of Justice attorneys, discovery experts, and judges. This conference significantly helped the Advisory Committee develop the proposed new Rule 16.1 by, among other things, building consensus on what sort of rule was needed and whether the rule should apply to all criminal cases. One member echoed that the mini-conference was fantastic and helped the Advisory Committee reach consensus on this rule. Judge Campbell applauded the Advisory Committee for finding consensus.

The new rule has two new sections. The first section, Rule 16.1(a), requires that no later than 14 days after arraignment the attorneys for the government and defense must confer and try to agree on the timing and procedures for disclosure. The second section, Rule 16.1(b), states that after the discovery conference the parties may “ask the court to determine or modify the timing, manner, or other aspects of disclosure to facilitate preparation for trial.”

Publication of the rule produced six comments. One comment from the DOJ expressed concern that the new rule could be read to grant new discovery authorities that could undermine important legal protections. The Advisory Committee agreed and decided to conform the language of the proposed rule to the phrasing of Criminal Rule 16(d)(2)(A). Two comments addressed whether the rule required the government to confer with pro se litigants and the Advisory Committee, in turn, changed the rule’s language to “the government and the defendant’s attorney” reasoning that it would not be practical for the government to confer about discovery with each pro se defendant. Two commenters recommended relocating the rule, but the Advisory Committee rejected this suggestion. One commenter suggested adding “good faith” to the meet and confer requirement but the Advisory Committee had already explored and rejected this idea. Professor Beale noted that the words “try to agree” capture this idea of conferring in good faith.

Lastly, two comments concerned whether the new rule would displace local rules or orders imposing shorter times for discovery. As published, the Committee Note stated that the rule “does not displace local rules or standing orders that supplement its requirements or limit the authority

of the district court to determine the timetable and procedures for disclosure.” The Advisory Committee determined that the Committee Note affirms the district courts retain authority to impose additional discovery requirements by local rule or court order, and that no further clarification was needed.

Many Committee members expressed concern that the Committee Note did not address adequately the concern about displacing local rules. One member reads the note to authorize local rules that are inconsistent with Rule 16.1. Judge Bates said that this issue has come up in his court and he shares the same concern. Professor Capra stated that whether a local rule that supplements the Federal Rules is inconsistent remains an open question. Professor Marcus discussed the history of Civil Rule 83 dealing with local rules.

Judge Campbell proposed addressing this concern by adding the language “and are consistent with.” Professor Cooper suggested that it would be helpful to add a comment that the local rules must be consistent with the Federal Rules. He also proposed adding a citation to Rule 16 to ensure that Rule 16.1 is not interpreted as altering Rule 16’s discovery obligations. Judge Livingston echoed Professor Cooper’s concern that this last sentence is too freestanding and could benefit from a citation.

Professor Beale responded that this Committee Note language satisfied the interested parties and that she did not think that referencing other rules in the Committee Note is a good idea. Instead, she proposed adopting Judge Campbell’s proposal. A Committee member expressed similar sentiments asking why the Committee Note does not use the phrase “consistent with.” Judge Campbell reminded the Committee that the proposed language reflected an accord that had been carefully worked out among the interested parties.

After much discussion, consensus emerged to revise the last sentence in the third paragraph of the Committee Note as follows: “Moreover, the rule does not (1) modify statutory safeguards provided in security and privacy laws such as the Jencks Act or the Classified Information Procedures Act, (2) displace local rules or standing orders that supplement and are consistent with its requirements, or (3) limit the authority of the district court to determine the timetable and procedures for disclosure.”

Other Committee members raised stylistic concerns with Rule 16.1. In an email sent prior to the meeting, a Committee member raised some grammatical and stylistic comments about Rule 16.1, which Judge Molloy and the Reporters agree require revisions. First, the word “shortly” in the first sentence in the Committee Note should be replaced with “early in the process, no later than 14 days after arraignment,” to better track the language of the rule. Second, an errant underline between “it” and “displace” in the third paragraph of the Committee Note will be removed. Third, the phrase “determine or modify” will be added in the fifth paragraph of the Committee Note to more closely parallel the rule’s language. Lastly, this member also noted that the commas in Rule 16.1(b) should not be bolded.

Another Committee member proposed using words like “process” or “procedure” instead of “standard” in the third paragraph of the Committee Note reasoning that such terms better reflect that Rule 16.1 is instituting a new procedure. The Committee’s style consultants stated that the

word “procedure” would be appropriate to use. Judge Molloy and the Reporters agreed with this change.

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 proposed new Rule 16.1, subject to the revisions made during the meeting.**

Rule 5 of the Rules Governing Section 2254 Cases and Rule 5 of the Rules Governing Section 2255 Proceedings – Right to File a Reply. Judge Richard Wesley, a former member of the Standing Committee, raised this issue with the Advisory Committee, noting a conflict in the cases construing Rule 5(d) of the Rules Governing Section 2255 Proceedings. This rule currently states that “[t]he moving party may submit a reply to the respondent’s answer or other pleading within a time fixed by the judge.” Although the Committee Note and history of the rule make clear an intent to give the inmate a right to file a reply, some courts have held that the inmate has no right to file a reply, but may do so only if permitted by the court. Other courts do recognize this as a right. After reviewing the case law, the Advisory Committee concluded that the text of the current rule contributes to a misreading of the rule by a significant number of district courts. A similar problem was found with regard to parallel language in Rule 5(e) of the Rules Governing Section 2254 Cases. The Advisory Committee agreed to correct this problem by placing the provision concerning the time for filing in a separate sentence, thereby making clear in the text of each rule that the moving party (or petitioner in § 2254 cases) has a right to file a reply.

Three comments were received during publication. The Advisory Committee determined that the issues raised by the comments were considered at length prior to publication and no changes were required. No Standing Committee members raised any questions or comments about this proposed amendment.

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 proposed amendments to Rule 5 of the Rules Governing Section 2254 Cases and Rule 5 of the Rules Governing Section 2255 Proceedings.**

Information Items

Criminal Rule 16 – Pretrial Discovery Concerning Expert Witnesses. The Advisory Committee received two suggestions from district judges recommending that Rule 16’s provisions concerning pretrial discovery of expert testimony should be amended to provide expanded discovery similar to that under Civil Rule 26. Judge Molloy noted that there are many different kinds of experts, and criminal proceedings are not parallel in all respects to civil cases. Additionally, the DOJ has adopted new internal guidelines calling for significantly expanded discovery of forensic expert testimony. While there will not be a simple solution, there is consensus among the Advisory Committee members that the scope of pretrial disclosure of expert testimony is an important issue that should be addressed. The Advisory Committee will gather information from a wide variety of sources (including the Advisory Committee on Evidence Rules) and also plans to hold a mini-conference.

Task Force on Protecting Cooperators. Judge St. Eve updated the Committee on the efforts of the Task Force on Protecting Cooperators. In April 2018, Director Duff sent 18 recommendations identified by the Task Force for implementation by the Bureau of Prisons (“BOP”). A day before the Director’s scheduled meeting with the BOP, the BOP Director resigned, and that meeting did not occur. Since then, meetings have taken place with the BOP’s Acting Director, who had attended the Task Force meetings. He and his staff are preparing the BOP’s response, which they anticipate sending to Director Duff and the Task Force later this month. Some of the BOP Recommendations must be approved by the BOP union. Ms. Womeldorf has drafted the Task Force’s second and final report, which will be submitted sometime next month to Director Duff. Some of the Task Force’s recommendations may have to be considered by the Standing Committee and the Committee on Court Administration and Case Management. That said, Judge St. Eve stated that the Task Force’s work is coming to a close.

Judge Campbell noted that, last January, the Standing Committee reviewed the Advisory Committee’s decision not to recommend any rules implementing the CACM Interim Guidance or similar approaches to protecting cooperator information in case files and dockets based on the Task Force’s recommendations. The Advisory Committee on Criminal Rules will revisit this decision after the Task Force’s second and final report.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Marcus provided the report of the Advisory Committee on Civil Rules, which met on April 10, 2018, in Philadelphia, Pennsylvania. The Advisory Committee sought approval of one action item and presented four information items.

Action Item

Rule 30(b)(6) – Deposition of an Organization. The Advisory Committee sought approval for publication of proposed amendments to Rule 30(b)(6) which would impose a duty to confer. In April 2016, a subcommittee was formed to consider a number of suggestions proposing amendments to Rule 30(b)(6). In the summer of 2017, the subcommittee invited comment on a preliminary list of possible rule changes. Over 100 comments were received. Discussions eventually focused on imposing a duty on the noticing and responding parties to confer in good faith. The Advisory Committee determined that such a requirement was the most promising way to improve practice under the rule.

As drafted, the duty to confer is iterative, and the proposed language requires the parties to confer about (1) the number and descriptions of the matters for examination and (2) the identity of each person who will testify. The first topic has not proved controversial; however, the second topic – the identity of the witnesses – has generated more discussion. Some fear the rule might be interpreted to require that organizations obtain the noticing party’s approval of its selection of witnesses. Nevertheless, the Advisory Committee decided to keep the identity of witnesses as a topic of conferring, at least for the public comment process, because the proposal carries forward the present rule text stating that the named organization must designate the persons to testify on its behalf, and the Committee Note affirms that the choice of the designees is ultimately up to the organization.

Judge Bates noted that the Standing Committee received comments about the Advisory Committee's decision to include the identity of witnesses as a topic on which the parties must confer. Although these comments were addressed to the Standing Committee, he assured the Standing Committee that the Advisory Committee considered their substance when deciding to recommend publication. He noted that there is some force to the concerns stated in the comments, but that the Advisory Committee decided to include this topic because it is tied to the question of the matters for examination (the other question about which the parties must confer). Discussing what kind of person will have knowledge about a matter for examination may help avoid later disputes. Judge Bates also emphasized that the amendment only adds a requirement to confer; it does not require that the parties agree nor lessen the organization's ability to choose its witnesses.

Moreover, he cautioned that the comments to the Standing Committee are coming from only one segment of the bar, particularly from the defense bar and those who represent organizations who often must identify such witnesses. Interestingly, one letter from past, present, and upcoming Chairs of the ABA Section of Litigation did not raise concerns about the "identity" topic. That said, Judge Bates anticipates receiving many comments on this topic if the proposed amendment is approved for public comment, and he thinks comments from other groups will be informative. He guaranteed that these late submissions will be included as part of the Advisory Committee's broader assessment after public comment concludes.

Judge Campbell noted that the Standing Committee has received eight to ten last-minute comments about the proposed amendments to Rule 30(b)(6). This happens from time to time, but having received a number of them, he stated that the Standing Committee needs to clarify when it is appropriate to address comments directly to the Standing Committee. Clarification will help ensure that the public has fair notice of when to properly submit comments and that all commenters are treated equally. The Reporters discussed these questions at their lunch meeting today, and the Standing Committee will consider this procedural issue at its January 2019 meeting.

Many of these late comments noted by Judge Campbell expressed concern that the noticing party would have the ability to dictate the witnesses the organization must produce for deposition. In response, Judge Campbell stated that this is not the intent of the rule. Moreover, he noted that the rule also lists the matters for examination as a topic of conferring. Under the logic of the comments, it could be said that the organization now can dictate the matters for examination. Again, this is not the intent of the rule.

Lastly, Judge Bates reported that the Advisory Committee rejected adding a reference to Rule 30(b)(6)'s duty to confer in Rule 26(f) because Rule 26(f) conferences occur too early.

After this introduction, the Standing Committee engaged in a robust discussion about the Rule 30(b)(6) amendments. One member asked whether the conference must always occur and whether complex litigation concerns were driving this requirement. Professor Marcus responded that many complained about the inability to get the parties to productively engage on these matters and that the treatment here reflects repeat reports from the bar about issues with Rule 30(b)(6). This same member questioned whether the iterative nature of the confer requirement needs to be included in the rule. Judge Bates answered that it is important to signal in the rule the continuing

obligation to confer because the topics of the conference may not be resolved in an initial meeting. For example, the identity of the organization's witnesses may have to be decided once the matters for examination are confirmed. The member stated this is a helpful change to a real problem and that it avoids the "gotcha" element of Rule 30(b)(6) depositions by requiring more particularity.

Another member asked whether it may be wise to require parties to identify and produce documents they will use at the deposition. By providing all such documents in advance of the deposition, parties can better focus on the issues. Moreover, Rule 30(b)(6) notices often list the matters to be discussed and providing the documents to be used will enable parties to get more specific. Another member agreed, asserting that documents ought to be identified prior to the deposition. Professor Marcus noted that such a practice could help focus the issues, but it also could lead to parties dumping a bunch of documents they may not use.

One member suggested that identifying documents is a best practice and should be highlighted in the Committee Note to Rule 30(b)(6). Professor Coquillet responded that committee notes should not be used to discuss best practices but to illustrate what the rule means. A member noted that nothing in the proposed rule would prohibit providing the document in advance; in fact, it would not change what many lawyers already do. One member recommended deleting "at least some of" from the first paragraph of the Committee Note, which discusses how it may be productive to discuss other matters at the meet and confer such as the documents that will be used at the deposition.

Other members questioned why the rule does not address timing. One member proposed adding a provision requiring the parties to make such disclosures within a certain number of days before the deposition. Another member seconded this concern. Judge Bates stated that this is a rule about conferring, not about timing, and the Advisory Committee learned that timing is often not the real issue facing the bar.

Echoing a point raised in the letter from present, past, and incoming Chairs of the ABA Section of Litigation, one Committee member expressed concern about previous committee notes – the 1993 Committee Note stating that a Rule 30(b)(6) deposition counts as a single deposition (for purposes of the presumptive limit on the number of depositions), and the 2000 Committee Note indicating that, if multiple witnesses are identified, each witness may be deposed for seven hours. The member thought this approach could carry unintended consequences. Professor Marcus discussed the history of the seven-hour rule and stated that the Advisory Committee has twice studied this issue carefully, most recently when Judge Campbell served as Chair. Getting more specific seemed to generate more problems, and although the Advisory Committee considered this, they do not think there is a cure because any solution would lead to other problems. The Advisory Committee consequently concluded that a requirement to confer was a step in the right direction.

Committee members discussed at length the "identity" requirement. One member noted his agreement with the criticism that "identity" is unclear. He does not know if it is helpful to require conferencing about "identity." The member stated that he conducted an informal survey and said that this is not much of an issue, especially for good lawyers. Another member noted that she does not see Rule 30(b)(6) issues often unless they concern the scope of the deposition, which

the “matters for examination” topic addresses. She shared her colleague’s concern that “identity” is unclear.

Judge Bates noted that district court judges do not see many Rule 30(b)(6) issues, but the Advisory Committee heard from the practicing bar that problems do not always get to the judge. The proposal is responsive to the practicing bar’s concerns. Judge Campbell explained that they write rules for the weakest of lawyers and that the “identity” topic responds to the concerns of practitioners who complain that they cannot get organizations to identify the witnesses. Judge Bates reminded everyone that the proposed language is not final, but rather is the proposed language for public comment. The comments received thus far are from one constituency – members of the bar that primarily represent organizations – and comments have yet to be received from the rest of the bar.

Another Committee member remarked that the “identity” topic is important because it will inform the serving party whether the organization has no responsive witness and must identify a third party to depose. This member also suggested adding something encouraging the parties to ask the court for help in resolving their Rule 30(b)(6) disputes and to remind them of this practice’s efficacy. Judge Bates noted that committee notes typically do not remind parties to come to the court to resolve such disputes, and Professor Marcus noted that judicial members on the Advisory Committee objected to inclusion of this concept in an earlier draft.

Despite this conversation, a Committee member stated that he was still uncomfortable with the “identity” language. He proposed stating “and when reasonably available the identity of each person who will testify.” Another Committee member noted that such language would reinforce the iterative nature of the rule because organizations could identify witnesses shortly after conferring on the matters for examination.

Professor Cooper expressed skepticism about this Committee member’s proposal. After conferring with Judge Bates and Professor Marcus, Professor Cooper recommended adding “the organization will designate to” so that the topic for conferral will be “the identity of each person the organization will designate to testify.” The additional language – “the organization will designate to” – will reinforce that organizations maintain the right to choose who will testify and thus better respond to the concerns raised. If they make this change, they also recommended deleting the earlier use of “then.”

Another Committee member noted that the Committee Note’s use of the phrase “as necessary” was confusing and could be interpreted as requiring multiple conferences. He recommended instead: “The duty to confer continues if needed to fulfill the requirement of good faith.” Judge Bates liked this proposal, in part because it used fewer words and clarified the iterative nature of the rule.

After this discussion, Judge Campbell summarized the proposed modifications: (1) deleting “then” before the word “designate”; (2) deleting “who will” and adding “the organization will designate to”; (3) deleting “at least some of” from the first paragraph of the Committee Note; and (4) changing the wording of the penultimate sentence of the third paragraph of the Committee Note to read “The duty to confer continues if needed to fulfill the requirement of good faith.”

Judge Bates noted that they may need to explain the deletion of “then” in the Committee Note, and Judge Campbell said that he and Professors Cooper and Marcus can explore this after the meeting. If such language is needed, a proposal can be circulated to the Standing Committee for consideration and approval.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendment to Rule 30(b)(6), subject to the revisions made during the meeting.**

Information Items

Rules for Multidistrict Litigation. The subcommittee formed to consider creating rules for multidistrict litigation is still in the information gathering phase. Proposed legislation in Congress known as the Class Action Fairness Bill would affect procedures in MDL proceedings. Judge Bates noted that consideration of this subject will be a long process, and that the subcommittee is attending various conferences on MDLs. The subcommittee has identified eleven topics for consideration, including the scope of any rules and whether they would apply just to mass torts MDLs or all types of MDLs, the use of fact sheets and *Lone Pine* orders, rules regarding third-party litigation financing, appellate review, etc. He encouraged Committee members to provide the subcommittee their perspective on any of these topics. Judge Bates noted that the subcommittee has not decided if rules are necessary or whether a manual and increased education would be better alternatives.

Social Security Disability Review Cases. A subcommittee is considering a suggestion from the Administrative Conference of the United States to create rules governing Social Security disability appeals in federal courts. The subcommittee has not concluded its work, and whatever rules it may recommend, if any, still need to be considered by the Advisory Committee. The most significant issues concerning these types of proceedings are administrative delay within the Social Security Administration and the variation among districts both in local court practices and in rates of remand to the administrative process. Whatever court rules may be proposed will not address the administrative delay.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston and Professor Capra delivered the report of the Advisory Committee on Evidence Rules, which met on April 26-27, 2018, in Washington, D.C. The Advisory Committee presented two action items and seven information items.

Action Items

Evidence Rule 807 – Residual Exception. The Advisory Committee sought final approval for proposed amendments to Evidence Rule 807. Professor Capra reviewed the history of suggestions to amend the rule, noting that the Advisory Committee found that the rule was not working as well as it could. The proposal deletes the language requiring guarantees of trustworthiness “equivalent” to those in the Rule 803 and Rule 804 hearsay exceptions and instead

directs courts to determine whether a statement is supported by “sufficient” guarantees of trustworthiness in light of the totality of the circumstances of the statement’s making and any corroborating evidence. Subsections (a)(2) and (a)(4) are removed because they are at best redundant in light of other provisions in the Evidence Rules. The amendments also revise Rule 807(b)’s notice requirement, including by permitting the court, for good cause, to excuse a failure to provide notice prior to the trial or hearing.

One member asked if this proposal will increase the admissibility of hearsay evidence. Professor Capra noted that any increase will be marginal, perhaps in districts that adhere to a strict interpretation of the rule regarding “near miss” hearsay.

Ms. Shapiro noted the fantastic work Professor Capra did to help improve this rule and stated that the DOJ is incredibly grateful for his work.

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 proposed amendments to Rule 807.**

Evidence Rule 404(b) – “Bad Acts” Evidence. The Advisory Committee sought approval to publish proposed amendments to Evidence Rule 404(b). Professor Capra explained various Rule 404(b) amendments considered and rejected by the Advisory Committee. The Advisory Committee, however, accepted a proposed amendment from the DOJ requiring the prosecutor to provide notice of the non-propensity purpose of the evidence and the reasoning that supports that purpose. The Advisory Committee liked this suggestion because articulating the reasoning supporting the purpose for which the evidence is offered will give more notice to the defendant about the type of evidence the prosecutor will offer. The Advisory Committee also determined that the restyled phrase “crimes, wrongs, or other acts” should be restored to its original form: “*other* crimes, wrongs, or acts.” This would clarify that Rule 404(b) applies to other acts and not the acts charged.

Professor Bartell asked whether the Advisory Committee considered designating a specific time period for the prosecutor to provide notice. Professor Capra said the Advisory Committee considered this idea but thought it was too rigid.

One member inquired about implementing a notice requirement for civil cases. Professor Capra responded that notice was not necessary in civil cases because this information comes out during discovery. Judge Campbell also noted that lawyers in civil cases are not bashful about filing Rule 404 motions in limine.

Another member asked whether it would be better that subsection 404(b)(3) track the language of 404(b)(1) instead of stating “non-propensity purpose.” Professor Capra said the Advisory Committee will consider this idea during the public comment period.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendment to Rule 404(b).**

Information Items

Judge Livingston provided a brief update of the Advisory Committee's other work. First, the Advisory Committee decided not to proceed with rule changes to Evidence Rules 606(b) and 801(d)(1)(A).

Second, the Advisory Committee considered at its April 2018 meeting the results of the Symposium held at Boston College School of Law in October 2017 regarding forensic expert testimony, Rule 702, and *Daubert*. The Symposium proceedings are published in the Fordham Law Review. No formal amendments to Rule 702 have been considered yet but the Advisory Committee is exploring two possible changes: 1) an amendment focusing on forensic and other experts overstating their results and 2) an amendment that would address the fact that a fair number of courts have treated the reliability requirements of sufficient basis and reliable application in Rule 702 as questions of weight and not admissibility.

Lastly, Judge Grimm proposed amending Rule 106 regarding the rule of completeness to provide that: 1) a completing statement is admissible over a hearsay objection, and 2) the rule covers oral as well as written or recorded statements. The courts are not uniform in their treatment of Rule 106 issues, and the Advisory Committee decided to consider this proposal in more depth at its next meeting.

THREE DECADES OF THE RULES ENABLING ACT

To honor Professor Coquillette's thirty-four years of service to the Standing Committee and his upcoming retirement as Reporter to the Standing Committee, Judge Sutton – a former Chair of the Standing Committee – led a question and answer session with Professor Coquillette. The discussion was wide-ranging and provided current Committee members with helpful history on challenges faced by the rules committees over time. Professor Coquillette noted that the Rules Enabling Act ("REA") has been so successful in part because the Department of Justice played an integral role in the REA process. He thanked the DOJ for recognizing the value of the REA and for helping preserve its integrity. Although the Standing Committee must be sensitive to the political dynamics Congress faces, Professor Coquillette cautioned that the REA process should not become partisan football. He stated that the Committee must "check its guns at the door" and do the fair and just thing. It is so important that the Committee be seen as fair, Professor Coquillette explained, because the manner in which the Committee is perceived when reaching its decisions is vital to preserving the REA and faith in the rules process.

JUDICIARY STRATEGIC PLANNING

Brian Lynch, the Long-Range Planning Officer for the federal judiciary, discussed the strategic planning process and how the Standing Committee can provide feedback on the *Strategic Plan for the Federal Judiciary*. He emphasized that the Committee's reporting on long-term initiatives will help foster dialogue between the Executive Committee and other judicial committees.

Following Mr. Lynch’s presentation, Judge Campbell directed the Committee to a letter dated July 5, 2017, in which the Standing Committee provided an update on the rules committees’ progress in implementing initiatives in support of the *Strategic Plan for the Federal Judiciary*. Judge Campbell proposed updating this letter to reflect its ongoing initiatives that support the judiciary’s strategic plan. In 2019, the Committee will be asked to update the Executive Committee on its progress regarding these identified initiatives.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved authorizing Judge Campbell to update and forward to Chief Judge Carl Stewart correspondence reflecting the Committee’s long-term initiatives supporting the *Strategic Plan for the Federal Judiciary*.**

LEGISLATIVE REPORT

Julie Wilson of the Rules Committee Staff (“RCS”) briefly delivered the legislative report. She noted that two new pieces of legislation have been proposed since January 2018 – namely, H.R. 4927 regarding nationwide injunctions, and the Litigation Funding Transparency Act of 2018 (S. 2815) regarding the disclosure of third-party litigation funding in class actions and MDLs. Neither bill has advanced through Congress. Ms. Wilson indicated that the RCS will continue to monitor these bills as well as others identified in the Agenda Book and will keep the Committee updated.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Campbell thanked the Committee members and other attendees for their preparation and contributions to the discussion. The Standing Committee will next meet on January 3, 2019 in Phoenix, Arizona. He reminded the Committee that at this next meeting it will confer about its policy regarding comments on proposed rules addressed directly to the Standing Committee outside the typical public comment period.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

TAB 2

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TAB 2A

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

DAVID G. CAMPBELL
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

MICHAEL A. CHAGARES
APPELLATE RULES

DENNIS R. DOW
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

DEBRA ANN LIVINGSTON
EVIDENCE RULES

MEMORANDUM

TO: Honorable David G. Campbell, Chair
Committee on Rules of Practice and Procedure

FROM: Honorable Michael A. Chagares, Chair
Advisory Committee on Appellate Rules

RE: Report of the Advisory Committee on the Appellate Rules

DATE: December 5, 2018

I. Introduction

The Advisory Committee on the Appellate Rules met on Thursday, October 26, 2018, in Washington, DC. It discussed several matters, but did not take any formal action on proposed amendments to the Rules. It therefore does not seek any action by the Standing Committee at the January 2019 meeting of the Standing Committee. The draft minutes of the October 26, 2018 meeting are attached as Tab B.

The Committee anticipates that, at the June 2019 meeting of the Standing Committee, it will seek final approval of proposed amendments to Rules 35 and 40, dealing with the length limits for responses to petitions for rehearing (Part II of this report).

It also anticipates that, at the June 2019 meeting, it will seek approval for publication of a proposed amendment to Rule 3, dealing with the content of notices of appeal (Part III of this report).

Other matters under consideration are:

- a proposed amendment to Rule 42(b), dealing with agreed dismissals (Part IV of this report);
- possible amendments to Rules 35 and 40, dealing with en banc proceedings and rehearing petitions (Part V of this report); and
- a proposed addition to Rule 36 to create a Rule-based principle governing how to handle the vote of a judge who leaves the bench (Part VI of this report).

The Committee also considered two other items, removing one from its agenda and tabling another. These items are discussed in Part VII of this report.

II. Proposed Amendments Published for Public Comment

At the spring 2018 meeting, the Standing Committee approved for publication proposed amendments to Rules 35 and 40, dealing with the length limits for responses to petitions for rehearing. They were published in August. There have been no comments submitted, although some judges have informally noted that they are happy with these proposed amendments.

The Committee expects to seek final approval of these proposed amendments in the spring of 2019.

Rule 35. En Banc Determination

* * * * *

- (b) **Petition for Hearing or Rehearing En Banc.** A party may petition for a hearing or rehearing en banc.

* * * * *

- (2) Except by the court's permission:
- (A) a petition for an en banc hearing or rehearing produced using a computer must not exceed 3,900 words; and
 - (B) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages.

* * * * *

- (e) **Response.** No response may be filed to a petition for an en banc consideration unless the court orders a response. The length limits in Rule 35(b)(2) apply to a response.

* * * * *

Rule 40. Petition for Panel Rehearing

* * * * *

- (a) **Time to File; Contents; ~~Answer~~ Response; Action by the Court if Granted**

* * * * *

- (3) **~~Answer~~ Response.** Unless the court requests, no ~~answer response~~ to a petition for panel rehearing is permitted. ~~But~~ Ordinarily, rehearing will not be granted in the absence of such a request. If a response is requested, the requirements of Rule 40(b) apply to the response.

* * * * *

- (b) **Form of Petition; Length.** The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Except by the court's permission:

- (1) a petition for panel rehearing produced using a computer must not exceed 3,900 words; and
- (2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.

* * * * *

Tab C contains the text of the proposed amendments and the proposed Committee Notes to Rules 35 and 40 as published for public comment.

III. Proposed Amendment to Rule 3, Dealing with the Content of Notices of Appeal

The Committee has been considering a possible amendment to Rule 3, dealing with the content of notices of appeal, since the fall of 2017 when a letter from Neal Katyal and Sean Marotta brought to the Committee’s attention a troubling line of cases in one circuit. That line of cases, using an *expressio unius rationale*, would treat a notice of appeal from a final judgment that mentioned one interlocutory order but not others as limiting the appeal to that order, rather than reaching all of the interlocutory orders that merged into the judgment.

Research conducted since that time has revealed that the problem is not confined to a single circuit, but instead that there is substantial confusion both across and within circuits. In addition to a number of decisions that used an *expressio unius rationale* like the one pointed to in the Katyal and Marotta letter, there are also numerous decisions that would treat a notice of appeal that designated an order that disposed of all remaining claims in a case as limited to the claims disposed of in that order. Such an order should be followed by a separate document under Civil Rule 58, but that is often not done. If a party waits and no separate document is filed, the judgment is considered entered once 150 days have run, but a party can appeal without waiting for the separate document.

A subcommittee drafted a proposed amendment that would make three changes.

First, the word “appealable” would be inserted before the word “order” in Rule 3(c)(1)(B), thereby indicating that the Rule did not call for a notice of appeal to designate all of the orders that were reviewable on appeal. This change would highlight the key (but sometimes overlooked) distinction between the judgment or order on appeal—the one serving as the basis of the court’s appellate jurisdiction and from which time limits are calculated—and the various orders or decisions that may be reviewed on appeal because they merged into the judgment or order on appeal.

Second, a new rule of construction would be added to reject the *expressio unius* approach and provide that designation of additional orders does not limit the scope of the appeal.

Third, another rule of construction would be added to provide that a notice of appeal that designates an order that disposes of all remaining claims would be construed as designating the final judgment, whether or not that judgment is set out in a separate Civil Rule 58 document.

Below is the proposal discussed by the Committee. The Committee is not seeking approval of this draft, but will continue its discussions, focused on the matters discussed further in this Part (after the draft).

Rule 3. Appeal as of Right—How Taken

* * * * *

(c) Contents of the Notice of Appeal.

- (1) The notice of appeal must:
 - (A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as “all plaintiffs,” “the defendants,” “the plaintiffs A, B, et al.,” or “all defendants except X”;
 - (B) designate the judgment, appealable order, or part thereof being appealed; and
 - (C) name the court to which the appeal is taken.
- (2) A pro se notice of appeal is considered filed on behalf of the signer and the signer’s spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.
- (3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.
- (4) The designation of any additional judgment, order, or part thereof must not be construed to limit the scope of the notice of appeal.
- (5) In a civil case, the designation of an order that adjudicates all remaining claims and all remaining rights and liabilities of all parties must be construed as a designation of the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58.
- (4)6 An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

(§7) Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

Committee Note

Rule 3(c)(1) currently requires that the notice of appeal “designate the judgment, order, or part thereof being appealed.” Some have interpreted this language as an invitation, if not a requirement, to designate each and every order of the district court that the appellant may wish to challenge on appeal, despite the fundamental principle that designation of the final judgment confers appellate jurisdiction over prior interlocutory orders that merge into the final judgment. The merger principle is a corollary of the final judgment rule: a party cannot appeal from most interlocutory orders, but must await final judgment, and only then obtain review of interlocutory orders on appeal from the final judgment.

In an effort to avoid the misconception that it is necessary or desirable to designate each and every order of the district court that the appellant may wish to challenge on appeal, Rule 3(c)(1) is amended to require the designation of the “judgment, *appealable* order, or part thereof.” In most cases, because of the merger principle, it is appropriate to designate only the judgment. In other cases, particularly where an appeal from an interlocutory order is authorized, the notice of appeal must designate that appealable order. This amendment does not alter the requirement of Rule 4(a)(4)(B)(ii) (requiring a notice of appeal or an amended notice of appeal if a party intends to challenge an order disposing of certain motions).

Whether due to misunderstanding or a misguided attempt at caution, some notices of appeal designate both the judgment and some other order that the appellant wishes to challenge on appeal. A number of courts, using an *expressio unius rationale*, have held that such a designation of a particular order limits the scope of the notice of appeal to the particular order, and prevents the appellant from challenging other orders that would otherwise be reviewable, under the merger principle, on appeal from the final judgment. These decisions create a trap for the unwary. To remove this trap, a rule of construction is added to Rule 3(c): “The designation of any additional judgment, order, or part thereof must not be construed to limit the scope of the notice of appeal.”

A related problem arises when a case is decided by a series of orders, sometimes separated by a year or more. For example, some claims might be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), and then, after a considerable period for discovery, summary judgment under Federal Rule of Civil Procedure 56 is granted in favor of the defendant on the remaining claims. That second order, because it resolves all of the remaining claims, is a final judgment, and an appeal from that final judgment confers jurisdiction to review the earlier 12(b)(6) dismissal.

But if a notice of appeal describes the second order, not as a final judgment, but as an order granting summary judgment, some courts would limit appellate review to the summary judgment and refuse to consider a challenge to the earlier 12(b)(6) dismissal. Similarly, if the district court complies with the separate document requirement of Federal Rule of Civil Procedure 58, and enters both an order granting summary judgment as to the remaining claims and a separate document denying all relief, but the notice of appeal designates the order granting summary judgment rather than the separate document, some courts would likewise limit appellate review to the summary judgment and refuse to consider a challenge to the earlier 12(b)(6) dismissal. This creates a trap for all but the most wary, because at the time that the district court issues the order disposing of all remaining claims, a litigant may not know whether the district court will ever enter the separate document required by Federal Rule of Civil Procedure 58. To remove this trap, another rule of construction is added to Rule 3(c)(1): “In a civil case, the designation of an order that adjudicates all remaining claims and all remaining rights and liabilities of all parties must be construed as a designation of the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58.”

These rules of construction are added as Rules 3(c)(4) and 3(c)(5), with the existing Rules 3(c)(4) and 3(c)(5) renumbered.

The major issue that the Committee discussed and is continuing to discuss is whether Rule 3 itself should contain some statement of the merger rule, that is, the rule that earlier interlocutory orders merge into the final judgment. On the one hand, there are concerns that any attempt to codify the merger rule would risk missing nuances in that rule, resolving areas that are unclear, and freezing its development. On the other hand, there is a risk of increasing confusion if some mention of the merger rule isn’t made in the text of the Rule in some way. One possibility would be to discuss the merger rule more extensively in the Note. Another possibility would be to refer to the existence of the merger rule in the text of the Rule without attempting to codify its parameters.

Another aspect of the proposal under discussion is whether Rule 3(c)(1)(B) should continue to include the phrase “or part thereof.” This phrase seems to be a source of much of the difficulty, in that it can be read to suggest (particularly to less experienced appellate lawyers) the designation of each order sought to be reviewed. Eliminating this phrase might be of some real benefit. On the other hand, this phrase may serve a useful purpose in at least three circumstances: 1) cases where part of an order is appealable to one court and another part is appealable to another court; 2) cases where part of an order is appealable and part is not; and 3) cases where a party wants to appeal only the parts of an order that were adverse, without calling into question parts of an order that were not adverse. The first category may be sufficiently rare to be of scant concern. Similarly, cases in which a party has standing to appeal from a favorable ruling may be so rare (if not non-existent) that there may be no need to worry about the third category. Perhaps the issue could be

addressed by removing “or part thereof,” while adding a separate provision empowering an appellant who intends to appeal only from a part of a judgment or order to do so expressly.

The Committee discussed the suggestion by the style consultants that it consider placing the proposed new rules of construction immediately after the requirements for the content of a notice of appeal, as Rule 3(c)(2) and (3), rather than as 3(c)(4) and (5). The Committee is inclined not to adopt that suggestion, because the current Rules 3(c)(2) and (3) are rules of construction for Rule 3(c)(1)(A), and the proposed additions are rules of construction for Rule 3(c)(1)(B). For this reason, it seems to make sense to have the rules of construction for Rule 3(c)(1)(B) follow the rules of construction for Rule 3(c)(1)(A). An alternative would be to reorganize the Rule more substantially, so that 3(c)(1)(A) would go with 3(c)(2) and (3) and Rule 3(c)(1)(B) would go with the proposed 3(c)(4) and (5). That approach would produce a cleaner text, but might make legal research more difficult.

The Committee is also considering an amendment to Form 1 (the form notice of appeal) that would conform the Form to the proposed amended Rule.

Finally, the Committee is considering whether to address problems in appeals from orders denying reconsideration. On the one hand, there is a risk in attempting to do too much at once. On the other hand, perhaps a relatively simple rule of construction, similar to the ones already under discussion, might be able to address Rule 4(a)(4)(A) orders.

IV. Proposal to Amend Rule 42(b) – Agreed Dismissals

The Committee is considering a proposal to amend Rule 42(b). The current Rule provides that the circuit clerk “may” dismiss an appeal “if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that may be due.” The major question under consideration is whether a dismissal in these circumstances should be mandatory. Prior to restyling, the word “may” was “shall.”

The Rule also provides that “no mandate or other process may issue without a court order.” The Committee believes that the key distinction—not always obvious to readers of the Rule—is between 1) situations in which the parties seek nothing but a dismissal of the appeal and 2) situations in which the parties seek something more than that from the court.

Where the parties seek more than a simple dismissal of the appeal, judicial action would be required, and the parties could not control that judicial action. If a settlement must be judicially approved, a remand for that purpose might be appropriate, but a remand is judicial action that the parties cannot control.

However, where the parties seek nothing but a simple dismissal of the appeal, mandatory dismissal of the appeal might be appropriate, if not constitutionally compelled. And mandatory

dismissal avoids the problems facing counsel who are trying to settle a case but cannot assure clients that the appeal will be dismissed even if they agree to settle.

Mandatory dismissal is the approach of Supreme Court Rule 46, which provides:

Rule 46. Dismissing Cases

1. At any stage of the proceedings, whenever all parties file with the Clerk an agreement in writing that a case be dismissed, specifying the terms for payment of costs, and pay to the Clerk any fees then due, the Clerk, without further reference to the Court, will enter an order of dismissal.

2. (a) A petitioner or appellant may file a motion to dismiss the case, with proof of service as required by Rule 29, tendering to the Clerk any fees due and costs payable. No more than 15 days after service thereof, an adverse party may file an objection, limited to the amount of damages and costs in this Court alleged to be payable or to showing that the moving party does not represent all petitioners or appellants. The Clerk will not file any objection not so limited.

(b) When the objection asserts that the moving party does not represent all the petitioners or appellants, the party moving for dismissal may file a reply within 10 days, after which time the matter will be submitted to the Court for its determination.

(c) If no objection is filed—or if upon objection going only to the amount of damages and costs in this Court, the party moving for dismissal tenders the additional damages and costs in full within 10 days of the demand therefor—the Clerk, without further reference to the Court, will enter an order of dismissal. If,

after objection as to the amount of damages and costs in this Court, the moving party does not respond by a tender within 10 days, the Clerk will report the matter to the Court for its determination.

3. No mandate or other process will issue on a dismissal under this Rule without an order of the Court.

The Committee will continue to discuss reasons that it might be appropriate not to mandate dismissal. One reason offered is when a court's decision is ready to be filed. Another is a concern about manipulation if there are multiple cases, perhaps pending concurrently before different panels of the same court, that present the same issue.

If the Committee decides to recommend that dismissal be made mandatory, it would then address whether simply to change the existing word "may" in Rule 42(b) to "must" or "will," or to revise the Rule more thoroughly to mirror the Supreme Court Rule. In either event, it might be appropriate to clarify what is included in the "mandate or other process" that requires judicial action, particularly that any kind of vacatur or remand is included.

V. Comprehensive Review of Rules 35 and 40

As noted in part II of this report, proposed amendments to Rules 35 and 40 have been published for public comment. These amendments would create length limits applicable to responses to petitions for rehearing, and change the term "answer" in Rule 40 to "response" to make it consistent with Rule 35.

Both the Advisory Committee and the Standing Committee were well aware last spring that these modest proposed changes left other disparities between the two Rules, but approved these changes for publication with a plan to look more comprehensively at these Rules this year. There is no demonstrated problem, so it is important to balance the benefits of consistency against the harms of disruption.

The significant discrepancies between the two Rules are traceable to the time when parties could petition for panel rehearing (covered by Rule 40) but could not petition for rehearing en banc (covered by Rule 35), although they could "suggest" rehearing en banc. The Committee considered three basic approaches that could be taken in reconciling the two ways of petitioning for rehearing:

- 1) align the two Rules with each other;

- 2) revise both Rule 35 and Rule 40, drawing on Rule 21, which might provide a good model;
- 3) revise Rule 35 so that it addresses only initial hearing en banc, and revise Rule 40 so that it addresses both panel rehearing and rehearing en banc.

The third approach is the most radical but potentially the most valuable. Under the current Rules, a lawyer must consider both Rule 35 and Rule 40 when petitioning for rehearing. Most litigants requesting rehearing seek both panel rehearing and rehearing en banc, and while a litigant seeking only panel rehearing need only rely on Rule 40, it would be necessary even in that unusual instance to check both Rules. Reconciling the differences between the two current rules while combining petitions for panel rehearing and rehearing en banc in one rule would provide clear guidance.

But there was considerable resistance to this approach, particularly because devoting Rule 35 to only initial hearing en banc would draw more attention to the possibility of initial hearing en banc—a proceeding that is and should remain rare.

The Committee discussed two major aspects of the close relationship between panel rehearing and rehearing en banc.

First, current Rule 35(b)(3) allows circuits, by local rule, to require separate petitions for panel rehearing and rehearing en banc. Because most parties who petition for rehearing seek both panel rehearing and rehearing en banc, perhaps parties should be required, on a uniform basis, to file a single petition covering both requests.

Second, sometimes a panel makes some change in its decision in response to a petition seeking both panel rehearing and rehearing en banc. Depending on the nature of the change that the panel makes, the panel might determine whether or not a further petition for rehearing en banc may be filed.

Handling the relationship between panel rehearing and rehearing en banc is addressed by many local rules. The Committee will look at the relevant local rules to determine if there are local practices worth building into Rules 35 and 40.

VI. Counting of Votes by Departed Judges

The Committee began consideration of a new issue: how to handle the vote of a judge who leaves the bench, whether by death, resignation, conviction at an impeachment trial, or expiration of a recess appointment. The question arises when an opinion was drafted or a judge voted in conference, but no opinion had yet been sent to the clerk for filing before the judge leaves the bench. This is a recurrent issue, and practice in this area should be the same across the circuits.

The Committee discussed whether this is an appropriate matter for rulemaking or should be left to statute. The argument for rulemaking is that determining when a vote vests is a matter of practice or procedure under the Rules Enabling Act, although there may be a legal limit on the possible choices rulemaking could make. The proposal before the Committee would amend Rule 36 to treat the time that an order or opinion is delivered to the clerk as the relevant time.

There is a pending petition for certiorari presenting this question in *Yovino v. Rizzo*, 18-272, <http://www.scotusblog.com/case-files/cases/yovino-v-rizo/>. It is now fully briefed at the petition stage and scheduled for the consideration at the Supreme Court's December 7, 2018, conference. A subcommittee has been formed to consider this proposal if the petition is denied.

VII. Items Tabled or Removed

The Committee has been considering whether any amendments are appropriate in light of the Supreme Court's decision in *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017), which distinguished between the statutory time for appeal (which is jurisdictional) and more stringent time limits in the Federal Rules of Appellate Procedure (which are not jurisdictional).

The Committee is considering three options. First, delete the time limit in the Rule, so that the Rule tracks the statute. Second, do nothing, leaving the existing time limit in the Rule. Third, take an intermediate position, specifying some standard for allowing extensions beyond 30 days in limited circumstances.

There is, however, a case currently before the Supreme Court presenting the question of whether there are any equitable exceptions to the time limit set in Appellate Rule 23(f). *Nutraceutical Corp. v. Lambert*, 17-1094, <http://www.scotusblog.com/case-files/cases/nutraceutical-corp-v-lambert/>. The case was argued on November 27, 2018.

The Committee decided to table this matter for now.

The Committee also discussed a memo from Judge Hodges, the Chair of the Committee on Court Administration and Case Management, regarding privacy concerns in Social Security and immigration opinions. The Committee decided that because the relevant Federal Rule of Appellate Procedure piggybacks on Civil Rule 5.2, there was no need at this point for this Committee to take any action, and therefore removed this item from its agenda.

TAB 2B

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Minutes of the Fall 2018 Meeting of the
Advisory Committee on the Appellate Rules

October 26, 2018

Washington, DC

Judge Michael A. Chagares, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Thursday, October 26, 2018, at approximately 9:00 a.m., at the Thurgood Marshall Federal Judiciary Building in Washington, DC.

In addition to Judge Chagares, the following members of the Advisory Committee on the Appellate Rules were present: Christopher Landau, Judge Stephen Joseph Murphy III, Professor Stephen E. Sachs, and Danielle Spinelli. Solicitor General Noel Francisco was represented by H. Thomas Byron III. Judge Jay S. Bybee and Justice Judith L. French participated in the meeting by phone.

Also present were: Judge David G. Campbell, Chair, Standing Committee on the Rules of Practice and Procedure; Shelly Cox, Administrative Specialist, Rules Committee Support Office of the Administrative Office of the U.S. Courts (RCSO); Ahmed Al Dajani, Rules Law Clerk, RCSO; Patricia S. Dodszeit, Clerk of Court Representative, Advisory Committee on the Appellate Rules; Mark Freeman, Director of Appellate Staff, Department of Justice; Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules; Bridget M. Healy, Attorney Advisor, RCSO; Judge Frank Hull, Member, Standing Committee on the Rules of Practice and Procedure, and Liaison Member, Advisory Committee on the Appellate Rules; Marie Leary, Research Associate, Advisory Committee on the Appellate Rules; and Rebecca A. Womeldorf, Secretary, Standing Committee on the Rules of Practice and Procedure and Rules Committee Officer.

Professor Catherine T. Struve, Associate Reporter, Standing Committee on the Rules of Practice and Procedure, participated in the meeting by phone.

I. Introduction

Judge Chagares opened the meeting and greeted everyone, particularly Mark Freeman, Director of Appellate Staff, Department of Justice, and Ahmed Al Dajani, the new Rules Law Clerk. He thanked Rebecca Womeldorf, Shelly Cox, and the whole Rules team for organizing the meeting and the excellent dinner the night before. He noted that Justice Brett Kavanaugh, a former member of the Committee, can no longer serve on the Committee in light of his appointment to the Supreme Court. He

recognized Justice Kavanaugh’s contributions to the Committee, noting that he was brilliant and soft-spoken, and he added substance to the work of the Committee with his great judgment. Judge Chagares thanked Justice Kavanaugh for his service to the Committee.

Judge Chagares noted that the Committee is down two members, and thanked everyone for volunteering to work on the subcommittees.

II. Approval of the Minutes

The draft minutes of the April 6, 2018, Advisory Committee meeting were amended to correct the spelling of Judge Kevin Newsom’s name and a typographical error, and approved as amended.

III. Report on Actions Taken on Prior Proposals

Judge Chagares directed the Committee’s attention to the valuable Rules Tracking Chart. (Agenda Book page 21). The only change effective December 1, 2017, was to restore a provision that had previously been inadvertently deleted. Amendments scheduled to go into effect December 1, 2018, unless Congress intervenes, include the elimination of the antiquated term “supersedeas,” and the addition of a provision allowing an amicus brief to be stricken if it would lead to a judge’s disqualification.

The amendments finally approved by this Committee at the last meeting have been approved by the Standing Committee and the Judicial Conference, and received by the Supreme Court. If approved by the Supreme Court and not disapproved by Congress, they would take effect December 1, 2019. These amendments change the disclosure requirements of Rule 26.1 and update several rules to take account of electronic filing and the resulting reduced need for proofs of service.

Finally, the proposed amendments to Rules 35 and 40, dealing with the length limits for responses to petitions for rehearing, were approved for publication by the Standing Committee. There have been no comments submitted, although some judges have informally noted that they are happy with these proposed amendments. These proposed amendments are on track for an effective date no earlier than December 1, 2020.

IV. Discussion of Matters Before Subcommittees

A. Proposed Amendments to Rule 3 – Merger (06-AP-D)

Professor Sachs presented the subcommittee’s report regarding Rule 3. (Agenda Book page 143). He distinguished between the judgment or order on appeal—the one serving as the basis of the court’s appellate jurisdiction and from

which time limits are calculated—and the various orders or decisions (such as jury instructions) that may be reviewed on appeal because they merged into the judgment or order on appeal. He noted, however, that the distinction is sometimes confusing. This agenda item began with a letter from Neal Katyal and Sean Marotta that pointed to one circuit that, using an *expressio unius rationale*, would treat a notice of appeal from a final judgment that mentioned one interlocutory order but not others as limiting the appeal to that order, rather than reaching all of the interlocutory orders that merged into the judgment. (See Agenda Book page 155).

At the last meeting, the subcommittee offered a brief report suggesting that the concern had merit. After that meeting, the Rules Law Clerk, Patrick Tighe, researched and wrote a long and detailed memo that demonstrated that the problem was not confined to a single circuit, but instead that there was substantial confusion both across and within circuits. In addition to a number of decisions that used an *expressio unius rationale* like the one pointed to in the Katyal letter, this memo showed that there were also numerous decisions that would treat a notice of appeal that designated an order that disposed of all remaining claims in a case as limited to the claims disposed of in that order. Such an order should be followed by a separate document under Civil Rule 58, but that is often not done. If a party waits and no separate document is filed, the judgment is considered entered once 150 days have run, but a party can appeal without waiting for the separate document.

The subcommittee recommended three changes. First, the word “appealable” would be inserted before the word “order” in Rule 3(c)(1)(B), thereby indicating that the Rule did not call for the notice of appeal to designate all of the orders that were reviewable on appeal. (Agenda Book page 148). Second, a new rule of construction would be added to reject the *expressio unius* approach and provide that designation of additional orders does not limit the scope of the appeal. (Agenda Book page 149). Third, another rule of construction would be added to provide that a notice of appeal that designates an order that disposes of all remaining claims would be construed as designating the final judgment, whether or not that judgment is set out in a separate Civil Rule 58 document. (Agenda Book page 151). In addition, the subcommittee noted several other potential issues to consider further. (Agenda Book page 152).

Judge Chagares stated that he had initially been skeptical of the need to do anything, but that the extensive memo by Patrick Tighe convinced him that there is no consistency in the cases and that this is an issue that cries out for correction. The subcommittee proposal hits the three biggest areas. To the extent that one is concerned about providing sufficient notice of the issues on appeal, the issues are stated in the brief. He noted that the style consultants had suggested placing the proposed new rules of construction immediately after the requirements for the content of the notice of appeal, as Rule 3(c)(2) and (3), rather than as 3(c)(4) and (5). (See Agenda Book page 167).

The Reporter explained that the subcommittee had considered that placement, but realized that the current Rules 3(c)(2) and (3) are rules of construction for Rule 3(c)(1)(A), and that the proposed additions are rules of construction for Rule 3(c)(1)(B). For this reason, the subcommittee thought that it made sense to have the rules of construction for Rule 3(c)(1)(B) follow the rules of construction for Rule 3(c)(1)(A).

Professor Struve recommended against renumbering Rules 3(c)(2) and (3) unless and until someone checks to be sure that those subsections are not much cited in the case law. She noted that there was not much case law regarding the current Rules 3(c)(4) and (5), so renumbering them was not of concern.

Judge Campbell observed that he had initially had a similar reaction as the style consultants until he figured out what the Reporter explained about the ordering. If things are to be moved around, 3(c)(1)(A) would go with 3(c)(2) and (3) and Rule 3(c)(1)(B) would go with the proposed 3(c)(4) and (5). That would produce a cleaner text, but might mess up research. For now, the subcommittee's proposal is in a logical order as it stands.

A judge member expressed support for the proposal, but thought that there should be some affirmative statement of the merger rule, the largely uniform rule that earlier interlocutory orders merge into the final judgment. The Reporter explained that the subcommittee sought to avoid codifying the merger rule at the risk of missing nuances in that rule, leaving mention of the merger rule to the comment, but that it might work to simply point to the merger rule in the text of the Rule without trying to codify it. Mr. Byron added that there was not only the danger of not articulating the merger rule accurately, but also of freezing its development. A lawyer member noted that his initial reaction was the same as the judge's but that the merger rule has a number of asterisks and that there was good reason to avoid opening that can of worms. An academic member observed that Wright & Miller notes some areas that are unclear, such as appeals under Rule 54(b), and that the subcommittee did not want to exclude the application of the merger rule to appealable interlocutory orders, nor state a broader principle than accurate.

Judge Chagares noted that there was a breathtaking breadth of decisions in this area, and a lawyer member noted that there were a lot of bugs under this rock. The judge member who raised the issue stated that she was satisfied that there was a reason for the subcommittee's decision, and that as a lawyer, her practice was to designate just the final judgment.

A different judge member raised concerns with the phrase "part thereof." A lawyer member stated that he liked adding the word "appealable" because it makes clear that the notice is not supposed to designate all of the orders sought to be reviewed, but rather the order that triggers the notice of appeal. He also voiced concern about the "part thereof" language, because it suggests getting into the weeds

of each order sought to be reviewed, while a good appellate lawyer simply notes that the appeal is from the final judgment, period. The “part thereof” language is in the current rule, and the subcommittee intends to keep looking at the issue.

The Reporter explained that one reason for the subcommittee’s reluctance to delete “part thereof” was that sometimes a single district court order will be appealable to two different courts, such as one part appealable to the Supreme Court and one part appealable to the regional court of appeals. However, these cases may be sufficiently rare that the cost in confusion in other cases may not be worth it. Mr. Byron thought this concern could be met by the requirement of designating the court to which one is appealing. An academic member raised another concern, worrying about the impact on the district court’s jurisdiction if a notice of appeal is not limited to the appealable part of an interlocutory order that includes both appealable and non-appealable aspects.

A different lawyer member noted that she understood the reluctance to codify the merger rule, but thought that there was a risk of increasing confusion if some mention of the merger point wasn’t made in the text of the Rule in some way. Professor Struve added that if the merger rule is not understood, then there is a risk that litigants will designate the earlier interlocutory order, reasoning that it was not appealable at the time but then became appealable later, and invoke Rule 4(a)(2).

A judge member urged stating the merger rule in the affirmative in the comment and beefing up that part of the comment.

A different judge member sought to simplify the rule of construction designed to overcome the *expressio unius* approach by stating that the additional designation “does not limit” the scope of the appeal. Mr. Byron noted that the phrasing was directed to the court, and the Reporter noted that the focus was on responding to how courts were construing notices of appeal, but conceded, in response to Judge Campbell’s observation that the judge’s suggestion was more straightforward, that it did not defeat the proposal’s purpose.

Judge Campbell, echoed by Judge Chagares, stated that he viewed the “part thereof” language as designed for the situation where a party wins on some aspects of a judgment, but loses on others, and seeks to appeal from the latter without disturbing the former.

Discussion then turned to the other issues flagged for continued investigation by the subcommittee. (See Agenda Book page 152).

As for possible changes to Form 1, a lawyer member suggested perhaps tracking the proposed Rule and adding “appealable” before the word “order.” An academic member stated that the phrase “describing it” can lead litigants to list the underlying decisions. More than one lawyer member voiced opposition to requiring

the date of entry or statutory authority for appeal, as required for notices of appeal to the Supreme Court, contending that simpler was better, and that we shouldn't be making it more complicated. Judge Chagares expressed concern that it may pose a trap for pro se litigants.

A lawyer member voiced opposition to addressing the problems caused in appeals from orders denying reconsideration, fearing an attempt to do too much at once. The Reporter suggested that a relatively simple rule of construction, similar to the ones already under discussion, might be able to address Rule 4(a)(4)(A) orders, and urged keeping open that possibility. An academic member noted that it is impossible to fix everything, and a lawyer member suggested using some broader language in comments.

Judge Chagares stated that one rule can't solve everything, and urged the subcommittee to meet earlier rather than later to continue its discussions.

A judge member closed this discussion by noting the wonderful work done by Patrick Tighe.

B. Proposal to Amend Rule 42(b) – Agreed Dismissals (17-AP-G)

The Reporter presented the subcommittee's report regarding a proposal to amend Rule 42(b). (Agenda Book page 173). The current Rule provides that the circuit clerk "may" dismiss an appeal "if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that may be due." The major question is whether a dismissal in these circumstances should be mandatory. Prior to restyling, the "may" was "shall."

The Rule also provides that "no mandate or other process may issue without a court order." As the subcommittee sees it, the key distinction—not always obvious to readers of the Rule—is between 1) situations in which the parties seek nothing but a dismissal of the appeal and 2) situations in which the parties seek something more than that from the court. If the full Committee agrees that this is the key distinction, it would seem appropriate to mandate dismissal in the first circumstance, but not in the second. Where the parties seek more than a simple dismissal of the appeal, judicial action would be required, and the parties could not control that judicial action. It might be enough to amend the first sentence of the Rule to make dismissal of the appeal mandatory when the parties seek nothing more than dismissal. Alternatively, the Rule could be revamped along the lines of the similar Supreme Court Rule.

Judge Campbell asked if there was a problem here that needed to be addressed. A lawyer member explained that there have been cases where courts have refused to dismiss after oral argument, and that settlement can be inhibited when a lawyer cannot assure a client that an appeal will be dismissed. He noted that the change

from “shall” to “may” was stylistic, and that requiring dismissal would bring certainty to the courts and parties.

Judge Chagares asked Ms. Dodszeweit how common the problem was, and she responded that in her experience it was very rare, but did happen. She recalled a case where the court said no to a requested dismissal because the decision was ready to be filed.

Mr. Byron inquired about a possible contrast with the Civil Rules where a plaintiff can voluntarily dismiss a complaint unilaterally, but withdrew the concern after Judge Campbell pointed out that this was possible only before the defendant answers the complaint.

Judge Chagares raised a concern about the need for judicial approval of settlement in some instances, such as those involving a minor. A lawyer member responded that this would have been addressed in the district court, that there would have been no requirement to appeal in the first place, and that the court of appeals is not the right forum to approve a settlement. Ms. Dodszeweit noted that sometimes the court of appeals, when informed of a settlement, will issue a limited remand to the district court to effect the settlement. The Reporter noted that a remand is the sort of mandate or other process that the second sentence of the Rule states may not issue without a court order, and a lawyer member suggested fixing the language of that sentence to make the point clearer.

A different lawyer member voiced agreement with making the first sentence mandatory. Judge Chagares observed that judges generally don't like having their discretion taken away. A judge member responded that if the parties agree to dismissal, but the court persists in putting out an opinion, there is no controversy and the court is wrong in persisting.

Judge Chagares asked if anyone opposed making the first sentence mandatory. A judge member noted that judges invest time and energy in writing opinions. A lawyer member acknowledged that judges may push back, but that lawyers and clients don't know how close the court is to resolving a case. Another judge member noted frustration when an appeal is dismissed as an opinion is ready to go. Another judge member noted the possibility of manipulation of panels, if the same issue is before more than one panel, and other judges noted that panels are aware of the issues before other panels and, to promote collegiality, let the first panel decide overlapping issues first.

A lawyer member asked why manipulation would be a concern in situations where both sides agree. Mr. Byron suggested that perhaps a case would involve a repeat-player on one side and a one-off player on the other. A judge member pointed to immigration cases with the involvement of advocacy groups as an example. An academic member wondered about the government agreeing to dismissal in such

cases, and noted that a settlement could have been reached before an appeal was filed. If panel shopping is a real issue, it has to be balanced against the difficulty the current Rule presents to locking down a deal. A judge member added that the Constitution does not allow courts to exercise jurisdiction in order to prevent panel shopping.

With regard to the issue of whether to revamp the entire Rule along the lines of the Supreme Court Rule, or merely change the word “may,” a lawyer member observed that he usually thinks less is more, but is torn in this context.

A judge member voiced concern that a dismissal of an appeal be with prejudice and not subject to some contingency. Mr. Byron wondered what the distinction between with and without prejudice means in this context. The judge member referred to the possibility of an appeal from a preliminary injunction being dismissed and a later appeal from the final judgment in the same case, suggesting law of the case carryover from the initial appeal. An academic member suggested that a stipulated dismissal of an appeal—as opposed to some judicial decision—would create no law of the case, no prevailing party, etc.

The subcommittee will continue its discussion.

C. Rules 35 and 40 – Comprehensive Review (18-AP-A)

Mr. Byron reported on behalf of the subcommittee formed to consider a comprehensive review of Rules 35 and 40. (Agenda Book page 183). At the last meeting, the Committee picked the low-hanging fruit, making modest changes to these Rules. But now attention turns to the bigger picture questions. There are significant discrepancies between the two Rules, traceable to the time when parties could petition for panel rehearing (covered by Rule 40) but could not petition for rehearing en banc (covered by Rule 35), although they could “suggest” rehearing en banc. The subcommittee explored reconciling the two ways of petitioning for rehearing. There is no demonstrated problem, so it is important to balance the benefits of consistency against the harms of disruption.

The subcommittee considered three basic approaches: 1) align the two Rules with each other, thereby obtaining some benefit; 2) a broader approach that would revise both Rule 35 and Rule 40, drawing on Rule 21, which might provide a good model; 3) revise Rule 35 so that it addresses only initial hearing en banc, and revise Rule 40 so that it addresses both panel rehearing and rehearing en banc. The third approach is the most radical but potentially the most valuable. Under the current Rules, a lawyer must consider both Rule 35 and Rule 40 when petitioning for rehearing; reconciling the differences between the two current rules while combining petitions for panel rehearing and rehearing en banc in one rule would provide clear guidance.

In response to a question by Judge Campbell, Mr. Byron stated that a party seeking only panel rehearing would need to use only Rule 40, but would need to check both Rules. Ms. Dodszeit stated that petitions seeking only panel rehearing are pretty rare, and that in the majority of circuits, both are filed together. Mr. Byron added that most petitions for rehearing seek both.

An attorney member noted that as a practical matter, panel rehearing is a lesser-included request, and many local rules so provide. Perhaps that should be made uniform. He asked, what happens if a panel fixes something in response to the petition? Is it possible to seek en banc rehearing after that?

Judges Chagares said yes, and a judge member said that sometimes the panel will specify whether or not a further en banc petition may be filed. If the panel makes a substantive change, it will state that another petition for rehearing en banc may be filed. If the panel makes a minor correction, it will wait to see if a judge gives notice that the judge is considering calling for an en banc vote. If a judge has already given notice, that judge may say that the change addresses her concern, or that the change doesn't.

An academic member stated that if petitions for panel rehearing and rehearing en banc are treated as so intimately related, the Committee should consider treating them together.

Judge Chagares stated that he may be a minority voice, but he doesn't want to unite both petitions for rehearing in Rule 40, leaving Rule 35 to deal only with initial hearing en banc. Right now, the possibility of initial hearing en banc is buried in Rule 35, and he would not want to encourage such petitions by waving the flag and devoting Rule 35 solely to them. A judge member agreed, noting that there are lots of petitions for panel rehearing, and that initial hearing en banc should be rare; it's good that it's buried in Rule 35. This judge added that if the panel makes a substantive change, the time to petition for rehearing en banc is restarted, and that panels are reluctant to preclude such petitions. There are lots of relevant local rules.

Mr. Byron stated that if initial hearing en banc were dealt with separately, a particularly stringent standard could be set; having the identical standard for both initial hearing and rehearing en banc might encourage initial petitions.

Judge Chagares asked whether any change at all should be made. Perhaps parties should be required to file a single petition rather than separate petitions. A judge member noted that some circuits require separate petitions. Mr. Byron observed that Rule 35(b)(3) allows circuits, by local rule, to require separate petitions. We need to look at local rules.

Judge Campbell said that if it ain't broke, don't fix it. Lots of rules can be improved, but rules committees should resist the impulse to improve them unless there is a real problem.

Judge Chagares stated that we should look at local rules, particularly with regard to the issue of whether to require a single petition. A lawyer member added that we should ask around to learn if there is any problem with regard to panels circumventing the en banc process.

The subcommittee will look at local rules and continue its discussion.

D. Rule 4(a)(5)(C) and the *Hamer* Decision (no # yet)

Mr. Landau presented the report of the subcommittee regarding whether it would be appropriate to amend Rule 4(a)(5)(C) in light of the Supreme Court's decision in *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017). (Agenda Book page 187). That Rule used to match the statute governing the time to appeal, but the Rule has not been amended to match a subsequent statutory change. In particular, the Rule still provides that an extension may not exceed 30 days, but the statute no longer has that limitation.

In *Hamer*, the district court granted a 60 day extension, and the court of appeals dismissed the appeal as untimely. The Supreme Court, however, held that the time limit in the Rule—unlike the time limit in the statute—was not jurisdictional, but merely a mandatory claim processing provision. At first, Mr. Landau thought that the Rule had to be amended to match the statute, but is now convinced that it is permissible for a Rule to impose a time limit not in the statute, and the subcommittee reached a general consensus that there is something to be said for having such a Rule-based time limit.

The subcommittee report presented three options. (Agenda Book 188-91). First, delete the time limit in the Rule, so that the Rule tracks the statute. Second, do nothing, leaving the existing time limit in the Rule. Third, an intermediate position, specify some standard for allowing extensions beyond 30 days in limited circumstances.

There is currently a case before the Supreme Court presenting the question of whether there are any equitable exceptions to the time set in Appellate Rule 23(f). As a result, the background rule is in flux.

Judge Chagares stated that he would not want to have the Committee engage in a wheel-spinning exercise, and asked if the Committee should wait and see what the Supreme Court does.

An academic member recommended staying put. A lawyer recommended doing nothing, especially for now, but would also recommend doing nothing even if there weren't a pending Supreme Court case, because it is extremely rare for courts to grant extensions not within the Rule.

Judge Campbell asked how the limitation could really be mandatory, if he as a district judge could grant an extension beyond that provided in the Rule. The Reporter responded that the decision in *Hamer* merely meant that the time limit was not jurisdictional—a limit that the court was obligated to notice and enforce on its own—but was subject to waiver and forfeiture. If a party insisted on compliance with the Rule—that is, did not waive or forfeit compliance—a district court would be bound to enforce the time limit. A lawyer member added that a district judge would not be allowed to grant an extension beyond that provided in the Rule, and an academic member added that it would be legal error. The Reporter added that *Hamer* also left open a number of questions, including whether equitable exceptions, especially the “unique circumstances” doctrine—which applies when a judge misleads the litigant in a situation where the litigant could have and likely would have complied if not misled by the judge—were also permitted, and whether a litigant who objected to a district court's grant of an overlong extension would have to file a cross-appeal.

The Committee then discussed that the current Rule allows for some motions for an extension of time to be made *ex parte*. Ms. Dodszeit noted that the reason that the extension was needed might be confidential. The Reporter stated that one revision that the Committee might consider, now that it is clear that the time limit in the Rule is forfeitable, is to require that a motion for an extension be served on all parties, and state the length of an extension sought.

The Committee decided to table this matter for now.

V. Discussion of Recent Suggestions

A. Use of Names in Social Security & Immigration Opinions (18-AP-C)

Judge Chagares noted that Judge Hodges, the Chair of the Committee on Court Administration and Case Management, had sent a memo regarding privacy concerns in Social Security and immigration opinions. (Agenda Book page 197). He stated that the Reporter had prepared a memo observing that the relevant Federal Rule of Appellate Procedure piggybacks on the Civil Rule 5.2, and that there was no need at this point for this Committee to take any action. (Agenda Book page 203).

He asked if there was any dissent from this view, and there was none.

B. Counting of Votes by Departed Judges (18-AP-D)

Professor Sachs discussed an issue that he raised for the Committee's consideration: how to handle the vote of a judge who leaves the bench, whether by death, resignation, conviction at an impeachment trial, or expiration of a recess appointment. (Agenda Book page 207). This is a recurrent issue, and—unlike other issues before this Committee—received significant press coverage when Judges Reinhardt and Pregerson died. He added that the practice in this area should be the same across the circuits, rather than being ad hoc or manipulable.

A judge member asked how a dead judge could vote. Professor Sachs responded that the question arose when an opinion was drafted or a judge voted in conference, but no opinion had yet been sent to the clerk for filing before the judge died. Counting a vote in this situation forecloses a dissenting or concurring judge from convincing his colleagues, an option that would otherwise remain open. He proposed a Rule that would define when the court acted, and that the best definition is when the opinion is delivered to the clerk for publication; if in some circuits an opinion is delivered to the clerk for some work to be done before the opinion is finalized, the best definition may be when the judges give a final go-ahead to the clerk.

Judge Chagares noted that a petition for certiorari presenting this question is pending, and that if the petition is denied, the Committee should go forward with its consideration of this proposal.

A judge member asked if this is an appropriate matter for rulemaking, or should be left to statute. Professor Sachs responded that determining when a vote vests is a matter of practice or procedure under the Rules Enabling Act, although, as noted in the Reporter's memo, there may be a legal limit on the possible choices rulemaking could make. (Agenda Book page 219). The Reporter added that there was a somewhat analogous Civil Rule (Rule 63), which addresses what happens when a district judge is unable to proceed.

A lawyer member stated that this is an important issue that goes to the legitimacy of courts, and warrants further discussion.

Judge Chagares asked for volunteers for a subcommittee. The subcommittee consists of Judge Jay Bybee, Justice Judith French, Patricia S. Dodszeit, and Danielle Spinelli.

VI. New Business and Updates on Other Matters

Judge Chagares provided an update on one of the more controversial amendments to the Federal Rules of Appellate Procedure: the reduction in the length of briefs to 13,000 words, with a local opt-out. He reported that all circuits abide by

the new limit, except the Second, Seventh, and Federal. Mr. Byron added that he thought the Ninth also opted-out.

The Reporter provided an update regarding the Supreme Court decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), which held that cases consolidated under Fed. R. Civ. P. 42(a) retain their separate identities at least to the extent that a final decision in one is immediately appealable. At the last meeting, the Committee decided that any response to *Hall* would be best handled by the Civil Rules Committee. The Agenda Book for the Fall 2018 meeting of the Civil Rules Committee has material raising the possibility of amending either Civil Rule 42 (perhaps to specify the nature of an order of consolidation) or Civil Rule 54 (perhaps to treat consolidated cases the way separate claims joined in a single action are treated) or both. The Agenda Book also counsels coordination with this Committee. The Reporter noted that if the dispatching role performed by the district court under Rule 54(b) works well from the perspective of the courts of appeals, then this approach might also work well for consolidated actions. On the other hand, if there are problems with practice under the current Rule 54(b), then that would be a reason to shy away from this approach. The Reporter invited feedback on the issue.

Judge Chagares invited discussion of possible new matters for the Committee's consideration, and, in particular, matters that would promote the just, speedy, and inexpensive resolution of cases. A lawyer member asked about the practice in some circuits of presumptively requiring all parties on the same side of an appeal to join in one brief. Ms. Dodszeit stated that the practice in the Third Circuit is to encourage but not require joint briefs. Mr. Byron stated that the Fourth Circuit requires joint briefing, absent a court order permitting separate briefs, and the government resists jointly filing with others. Judge Chagares said that he was always satisfied with the way the Clerk handles it. Ms. Dodszeit stated that there are so many variants that a rule would be difficult, and that in mega cases, issues can be lined up and groupings required. The lawyer member responded that it seems to be working fine, no one is complaining, and if there is a problem in a particular circuit, it can be handled by a local rule.

Judge Campbell, relaying a suggestion from Professor Struve, advised including Ed Cooper, Co-reporter for the Civil Rules Committee, in discussions regarding Rule 3, either with the subcommittee or the Reporter. He also noted major projects in other committees: The Bankruptcy Committee is working on restyling, a project that had been postponed because of the close ties between the Bankruptcy Rules and statute. Response to a sample has been positive. The Criminal Rules and Evidence Rules Committees are working on forensic expert evidence, and considering expanding the scope of expert discovery under Criminal Rule 16 and whether a separate *Daubert* rule would be appropriate. A change to the residual exception to the hearsay rule is now before the Supreme Court. The Civil Rules Committee is considering MDL rules: some 40% of the entire docket of the country (except for pro se cases) is before 20 judges. Third-party litigation funding is also an issue. In

addition, rules for Social Security appeals are under consideration; there is a very wide range of reversal rates in different districts.

Judge Chagares called the Committee's attention to the list of pending legislation. (Agenda Book page 29).

A lawyer member observed that third-party litigation funding is relevant to recusal. Judge Campbell stated that if the Civil Rules Committee acts in this area, this Committee can piggyback.

VII. Adjournment

Judge Chagares again thanked Ms. Womeldorf and her team for organizing the dinner and the meeting. He thanked the members of the Committee for their participation, including in subcommittees, and their ideas. He announced that the next meeting would be held on April 5, 2019, in San Antonio, Texas.

The Committee adjourned at approximately 12:20 p.m.

TAB 2C

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**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE¹**

1 **Rule 35. En Banc Determination**

2 * * * * *

3 **(b) Petition for Hearing or Rehearing En Banc.** A party

4 may petition for a hearing or rehearing en banc.

5 * * * * *

6 (2) Except by the court's permission:

7 (A) a petition for an en banc hearing or rehearing

8 produced using a computer must not exceed

9 3,900 words; and

10 (B) a handwritten or typewritten petition for an

11 en banc hearing or rehearing must not

12 exceed 15 pages.

13 * * * * *

¹ New material is underlined in red; matter to be omitted is lined through.

2 FEDERAL RULES OF APPELLATE PROCEDURE

14 (e) **Response.** No response may be filed to a petition for
15 an en banc consideration unless the court orders a response.

16 The length limits in Rule 35(b)(2) apply to a response.

17 * * * * *

Committee Note

The amendment to Rule 35(e) clarifies that the length limits applicable to a petition for hearing or rehearing en banc also apply to a response to such a petition, if the court orders one.

1 **Rule 40. Petition for Panel Rehearing**

2 * * * * *

3 **(a) Time to File; Contents; ~~Answer~~Response; Action**
4 **by the Court if Granted.**

5 * * * * *

6 (3) ~~Answer~~Response. Unless the court requests, no
7 ~~answer~~response to a petition for panel rehearing is
8 permitted. ~~But ordinarily,~~ rehearing will not be
9 granted in the absence of such a request. If a
10 response is requested, the requirements of
11 Rule 40(b) apply to the response.

12 * * * * *

13 **(b) Form of Petition; Length.** The petition must comply
14 in form with Rule 32. Copies must be served and filed
15 as Rule 31 prescribes. Except by the court's
16 permission:

4 FEDERAL RULES OF APPELLATE PROCEDURE

- 17 (1) a petition for panel rehearing produced using a
18 computer must not exceed 3,900 words; and
19 (2) a handwritten or typewritten petition for panel
20 rehearing must not exceed 15 pages.

Committee Note

The amendment to Rule 40(a)(3) clarifies that the provisions of Rule 40(b) regarding a petition for panel rehearing also apply to a response to such a petition, if the court orders a response. The amendment also changes the language to refer to a “response,” rather than an “answer,” to make the terminology consistent with Rule 35; this change is intended to be stylistic only.

TAB 3

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TAB 3A

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

DAVID G. CAMPBELL
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

MICHAEL A. CHAGARES
APPELLATE RULES

DENNIS R. DOW
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

DEBRA ANN LIVINGSTON
EVIDENCE RULES

MEMORANDUM

TO: Hon. David G. Campbell, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Hon. Dennis R. Dow, Chair
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: December 3, 2018

I. Introduction

The Advisory Committee on Bankruptcy Rules met in Washington, D.C., on September 17, 2018. The draft minutes of that meeting are attached as Tab B.

At the meeting the Advisory Committee voted to seek publication of an amendment to Rule 3007(a)(2)(ii) (manner of service of claim objections on insured depository institutions). It also voted to seek final approval without publication of conforming technical amendments to Rules 8012, 8013, and 8015 to remove or qualify references to “proof of service.” These amendments will be presented at the Standing Committee’s June 2019 meeting.

A major topic of discussion at the September meeting was whether the Advisory Committee should engage in a restyling of the Federal Rules of Bankruptcy Procedure. Based in part on positive feedback from relevant constituencies, the Advisory Committee gave its conditional approval to undertaking such a project. Part II of the report discusses the considerations that the Advisory Committee took into account and the conditions under which it

supports a restyling. It seeks approval of a restyling under those conditions and presents a tentative work schedule for the project.

Part III of this report presents two information items. The first concerns the Advisory Committee's continuing consideration of amendments to expand the use of electronic service and noticing in the bankruptcy courts, including a proposal by the Committee on Court Administration and Case Management (CACM) to provide for mandatory electronic service on "high volume notice recipients." The second information item discusses the Advisory Committee's approval of an amendment to Official Form 113 (Chapter 13 Plan) and its decision to hold the proposed amendment in abeyance to see whether other changes are suggested as the recently adopted form gets greater use.

II. Action Item

Restyling of the Federal Rules of Bankruptcy Procedure

The Advisory Committee's Restyling Subcommittee was tasked with recommending to the Committee whether to embark upon a project to restyle the Federal Rules of Bankruptcy Procedure, similar to the restyling projects that produced comprehensive amendments to the Federal Rules of Appellate Procedure in 1998, the Federal Rules of Criminal Procedure in 2002, the Federal Rules of Civil Procedure in 2005, and the Federal Rules of Evidence in 2011.

In order to make that recommendation, the Subcommittee decided that it would be necessary to obtain input from those who would be affected by such a restyling. In preparation for doing so, the Subcommittee undertook two tasks.

First, the Subcommittee asked the style consultants to prepare a restyled version of Part IV of the Federal Rules of Bankruptcy Procedure, so that those asked for their views on the restyling process would have a concrete example of restyled rules to look at. The style consultants produced a draft of a restyled Rule 4001 in January. The reporters and the Subcommittee chair provided comments on the draft, and the style consultants sent a revised version in which they accepted some, but not all, of the comments. Second, the Associate Reporter and Dr. Molly Johnson of the Federal Judicial Center prepared a cover memo and survey to obtain comments on the possibility of restyling the Bankruptcy Rules.

At the spring meeting, the Advisory Committee decided to use as an exemplar only one subdivision of the restyled rule, Rule 4001(a), without any footnotes or comments from the style consultants. It also decided to eliminate from the draft any changes that the Committee found unacceptable or questionable. The Advisory Committee explained in the cover memo to the survey that the exemplar was not being proposed by the Committee for adoption, nor was the Committee seeking substantive comments on the rule. Additional language was added to emphasize that substance and "sacred words" will prevail over style rules.

The cover memo and survey were posted on the AO's rules website as an Invitation for Comments, and were also sent directly to bankruptcy judges and clerks of court, as well as interested organizations, such as the NCBJ, NACBA, CLLA, NABT, NACTT, ABI, ABA Business Law Section Bankruptcy Committee, American College of Bankruptcy, National Bankruptcy Conference, and AALS Debtor-Creditor Committee. The deadline for making comments was June 15. The FJC received and analyzed completed surveys from 307 respondents, including 142 bankruptcy judges, 40 bankruptcy clerks of court, 19 respondents to the organization survey, and 109 respondents to the website survey. More than two-thirds of all respondents in every category supported the idea of restyling the bankruptcy rules. Given the strong support voiced by survey respondents for the restyling project, the Advisory Committee recommended to the Standing Committee that the restyling project be authorized, but with one important qualification.

The Federal Rules of Bankruptcy Procedure have not been restyled before because all parties recognized that bankruptcy is unique, particularly rule and statute driven and subject to generally-understood terms, concepts, and procedures. It is a highly technical area, and the rules often track statutory language that itself is not restyled. The greatest concern expressed by those who responded to the survey was that any stylistic changes not create unintended consequences. To ensure consistency and clarity in the revised rules, the Advisory Committee believes that it is important to retain this linkage between the Code and the Rules, even if it may sometime be at the expense of restyling principles. Therefore, the Advisory Committee recommends that the Standing Committee authorize the Advisory Committee to begin restyling the Federal Rules of Bankruptcy Procedure with the understanding that the final decision on whether to recommend to the Standing Committee that any change be made to a Federal Rule of Bankruptcy Procedure rests with the Advisory Committee. A proposed set of procedures for the restyling process, and anticipated schedule, is attached as Tab C.

III. Information Items

A. Expansion of the Use of Electronic Noticing and Service

On the Advisory Committee's recommendation, the Standing Committee in August 2017 published for public comment proposed amendments to two rules and to one Official Form that were intended to expand the use of electronic noticing and service in the bankruptcy courts. The proposed amendments to Rule 2002(g) (Addressing Notices) allowed notices to be sent to email addresses designated on filed proofs of claims and proofs of interest. As published, the amendments to Rule 9036 (Notice or Service Generally) allowed clerks and parties to provide notices or serve documents (other than those governed by Rule 7004) by means of the court's electronic-filing system on registered users of that system. It also allowed service or noticing on any person by any electronic means consented to in writing by that person. Finally, the proposed amendment to Official Form 410 (Proof of Claim) added a check box for opting into email service and noticing. It instructed the creditor to check the box "if you would like to receive all notices and papers by email rather than regular mail."

In response to publication, four sets of comments were submitted that addressed the proposed amendments. Although the commenters were supportive of the effort to authorize greater use of electronic service and noticing, they raised several substantial issues about the published amendments. Those issues fell into three groups: (1) technological feasibility; (2) priorities if there are different email addresses for the same creditor; and (3) miscellaneous wording suggestions.

Based on its careful consideration of the comments and the logistics of implementing the proposed email opt-in procedure, the Advisory Committee voted at the spring 2018 meeting to hold back the amendments to Rule 2002(g) and Official Form 410, but it gave final approval to the amendments to Rule 9036, with some minor revisions. In June the Standing Committee gave final approval to the Rule 9036 amendments, and they were approved by the Judicial Conference in September.

After the spring 2018 Advisory Committee meeting, CACM submitted a suggestion (18-BK-D) that Rule 9036 be amended to provide for mandatory electronic service on “high volume notice recipients,” a category that would initially be composed of entities that each receive more than 100 court-generated paper notices from one or more courts in a calendar month. Judge Wm. Terrell Hodges, CACM chair, explained that the suggestion built upon a 2015 suggestion submitted by the Bankruptcy Judges Advisory Group, the Bankruptcy Clerks Advisory Group, and the Bankruptcy Noticing Working Group. The Advisory Committee had voted not to act on that suggestion for mandatory electronic service on high volume notice recipients because it concluded that § 342(e) and (f) of the Bankruptcy Code allow a chapter 7 or 13 creditor to insist upon receipt of notices at a particular physical address. Judge Hodges explained that the current suggestion takes account of that concern by making the mandatory electronic noticing program “subject to the right to file a notice of address pursuant to § 342(e) or (f) of the Code.”

In support of the CACM suggestion, Judge Hodges explained that for the 2019 fiscal year, the judiciary has budgeted \$14 million for bankruptcy noticing, and his committee has developed several proposals for reducing that expense. CACM strongly urged the adoption of the high-volume-notice-recipient program in order to achieve substantial savings. Administrative Office of the Courts (AO) staff members who work with noticing issues have estimated that the savings could equal \$3 million or more a year.

The Advisory Committee’s Subcommittee on Business Issues has considered several possible approaches for rule amendments to authorize greater use of electronic noticing and service in the bankruptcy courts, including the recognition of a high-volume-notice-recipient program. It presented for feedback a working draft of amendments to Rule 9036 at the fall Advisory Committee meeting and received support for continuing to develop a draft in coordination with CACM and AO staff. The Subcommittee hopes to be able to present a draft for Advisory Committee review at the spring 2019 meeting.

B. Proposed Amendment to Official Form 113 (Chapter 13 Plan)

As adopted in 2017, Part 1 of the national chapter 13 plan form contains a notice to creditors in which the debtor indicates whether the following provisions are or are not included in the plan:

- A limit on the amount of a secured claim, set out in Section 3.2, which may result in a partial payment or no payment at all to the secured creditor;
- Avoidance of a judicial lien or nonpossessory, nonpurchase-money security interest, set out in Section 3.4; and
- Nonstandard provisions, set out in Part 8.

In anticipation of the possibility that a debtor might fail to properly complete this section of the form, the instructions in Part 1 state in bold, **“Debtors must check one box on each line to state whether or not the plan includes each of the following items. If an item is checked as ‘Not Included’ or if both boxes are checked, the provision will be ineffective if set out later in the plan.”** The Advisory Committee included this provision in Official Form 113 in order to provide clear notice to creditors of plan provisions that significantly affect their interest or that deviate from the form provisions.

The Advisory Committee received a suggestion (18-BK-A) from attorney Alane A. Becket that pointed out that one possible scenario is missing from the bolded instructions—the failure of a debtor to check any box. In order to be complete and to leave no room for argument, she suggested that the second bolded sentence be amended as follows: **“If an item is checked as ‘Not Included,’ if no box is checked, or if both boxes are checked, the provision will be ineffective if set out later in the plan.”**

The Advisory Committee agreed that Ms. Becket’s point regarding Official Form 113 was valid. Even though Part 1 of that form requires the debtor to check a box on each of the three lines, it fails to state what the effect of not doing so is. While one might infer that a debtor cannot benefit from failing to comply, the absence of a no-boxes-checked possibility in the second bolded sentence raises some doubt. The Advisory Committee concluded that adding the language suggested by Ms. Becket would eliminate any possible uncertainty.

The Advisory Committee therefore voted to propose an amendment to Official Form 113 for publication that would make the suggested addition. It also voted to hold the amendment in abeyance until it can be determined whether other amendments need to be made to the form or related rules. Official Form 113, amended Rule 3015, and new Rule 3015.1 just went into effect in December 2017. It is possible that experience with the new form and rules will bring to light the need for additional modifications. Moreover, because of the considerable controversy that resulted from the proposal of a national chapter 13 plan form, the Advisory Committee thought it advisable to allow for a respite before introducing any changes.

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TAB 3B

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ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 17, 2018
Washington, D.C.

The following members attended the meeting:

Circuit Judge Sandra Segal Ikuta, Chair
Circuit Judge Amul R. Thapar
District Judge Marica S. Krieger
Bankruptcy Judge Stuart M. Bernstein
Bankruptcy Judge Dennis Dow
Bankruptcy Judge A. Benjamin Goldgar (by phone)
Bankruptcy Judge Melvin S. Hoffman
Jeffrey J. Hartley, Esq. (by phone)
David A. Hubbert, Esq.
Thomas Moers Mayer, Esq.
Jill Michaux, Esq.
Debra Miller, Chapter 13 trustee
Professor David Skeel

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Laura Bartell, associate reporter
District Judge David G. Campbell, Chair of the Committee on Rules of Practice and Procedure (the Standing Committee)
Professor Daniel Coquille, reporter to the Standing Committee (by phone)
Professor Catherine Struve, associate reporter to the Standing Committee (by phone)
Circuit Judge Susan Graber, liaison to the Standing Committee (by phone)
Bankruptcy Judge Mary Gorman
Professor Cathie Struve, associate reporter to the Standing Committee
Rebecca Womeldorf, Secretary, Standing Committee and Rules Committee Officer
Ramona D. Elliot, Esq., Deputy Director/General Counsel, Executive Office for U.S. Trustee
Vivian Jones, Executive Office for U.S. Trustee
Kenneth Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado
Molly Johnson, Senior Research Associate, Federal Judicial Center
Ahmad Al Dajani, Administrative Office
Bridget Healy, Esq., Administrative Office
Scott Myers, Esq., Administrative Office
Nancy Walle, National Association of Chapter 13 Trustees
Gary Seitz, representative of the National Association of Bankruptcy Trustees
Elizabeth Jones, Supreme Court fellow
Abigail Willie, Supreme Court fellow

Discussion Agenda

1. Greetings and introductions

Judge Sandra Ikuta welcomed the group and advised that this is her last meeting at chair of the Committee. Judge Dennis Dow will take over on October 1, 2018. She introduced Judge David Campbell, Professor Daniel Coquillette, and Professor Catherine Struve, the chair and reporters for the Standing Committee.

2. Approval of minutes of San Diego April 3, 2018 meeting

The minutes were approved by motion and vote.

3. Oral reports on meetings of other committees

(A) June 12, 2018 Standing Committee meeting

Professor Elizabeth Gibson provided the report. All proposed bankruptcy items were approved, including several items for final approval and publication. She reviewed the rule and form amendments that were approved by the Standing Committee, noting that those given final approval were just approved by the Judicial Conference. She advised that minor stylistic changes were made to the draft proposed Rule 8012 to conform with changes made to proposed Appellate Rule 26.1.

(B) April 10, 2018 Meeting of the Advisory Committee on Civil Rules

Judge Benjamin Goldgar provided the report. The Civil Rules Committee discussed many issues related to multi-district litigation, including interlocutory appeals, settlement, and third-party funding of litigation. There was a discussion of a recent Supreme Court decision *Hall v. Hall*, 138 S.Ct. 1118 (2018), in which the Court ruled that when originally independent cases are consolidated under Rule 42(a)(2), they remain separate actions for purposes of final-judgment appeal under 28 U.S.C. § 1291. The Court noted that changes in the meaning of final judgment should come from rulemaking rather than judicial decisions. The Civil Rules Committee determined to go forward with a study of the issue.

(C) April 6, 2018 Meeting of the Advisory Committee on Appellate Rules

No report.

(D) June 14-15, 2018 meeting of the Committee on the Administration of the Bankruptcy System

Judge Mary Gorman provided the report. She said the issue most relevant to this Committee was the discussion regarding unclaimed funds held by courts. The Bankruptcy Committee is considering submitting a suggestion for amendments to Rules 3011 and 9006 to

add a statute of limitations for unclaimed funds. Another possible solution is to reach out to larger claimants regarding the collection of unclaimed funds; however, there are practical issues with claiming the funds.

The Committee discussed the potential proposed rule changes, and whether a statute of limitations amendment is the proper solution to the issue of unclaimed funds.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Business Issues

- (A) Status report concerning proposed amendments to Rules 2002(g) and Official Form 410A (held back at spring 2018 meeting) and related suggestion 18-BK-D from the Committee on Court Administration and Case Management to require certain high-volume notice recipients to transition from paper to electronic notices

Professor Gibson provided the report, advising that that no rule changes are being proposed at this time and that the subcommittee seeks guidance from the Committee as to how to proceed. She reminded the Committee that proposed amendments to Rules 2002(g) and 9036, along with Official Form 410, were published in August 2017. The amendments were intended to expand the use of electronic noticing and service. Following several comments raising concerns regarding the technological implementation of the proposed changes, including the potential for conflicting priorities of email addresses for notice, the Committee determined to hold back the amendments to Rule 2002(g) and Official Form 410. The Committee went forward with the proposed amendments to Rule 9036, which would permit clerks and parties to provide notices or serve using a court's electronic filing system (CM/ECF) on registered users of CM/ECF. The proposed amendments to Rule 9036 were approved by the Standing Committee and Judicial Conference.

After the spring meeting, the Committee on Court Administration and Case Management (CACM) filed suggestion 18-BK-D to further amend Rule 9036 to impose a requirement for mandatory electronic notice for certain high-volume notice recipients. The suggestion related to a previous suggestion from the Bankruptcy Judges Advisory Group (BJAG) which was discussed by the Committee but not adopted because of potential conflicts with Bankruptcy Code § 342.

The subcommittee discussed CACM's suggestion, which was modified from BJAG's suggestion to account for any potential conflicts with Bankruptcy Code § 342. The subcommittee contacted Administrative Office (AO) technology staff to determine any possible technological issues. The current proposal is to amend Rule 9036 to add a carve-out for section 342(e) and (f) and to distinguish between types of filers, i.e., registered users, non-registered users, and high-volume notice recipients (as defined by the Director of the Administrative Office). A further issue that arose in the discussions with the AO technology staff is the monitoring of bounce back emails if the email address provided is not valid or no longer valid. Ken Gardner completed an informal survey of clerks' office and found that most courts responding (about fifty percent) do some type of monitoring of bounce back emails.

Professor Gibson advised that the subcommittee is seeking feedback about whether the Committee should propose rule amendments adopting a program that impacts high-volume notice recipients. The Committee agreed that the subcommittee should continue to work on a proposed draft amendment for Rule 9036, in consultation with AO technology staff.

Judge Campbell asked about the current proposed amendments to Rule 9036 that were given final approval by the Standing Committee and Judicial Conference this year and will be forwarded to the Supreme Court for approval. If the current proposed amendments to Rule 9036 go forward, they will be effective December 1, 2019. He raised whether the current proposed amendments should be removed from consideration by the Supreme Court, and the entire set of proposed changes to Rule 9036 presented together in the future. Professor Gibson and Judge Ikuta responded that it could be several years until other amendments are proposed, and that technology could change prior to any further amendment. For these reasons, the current proposed amendments to Rule 9036 should go forward. Judge Campbell agreed with this conclusion.

- (B) Recommendation to amend Rule 3007(a)(2)(ii) to eliminate the inclusion of credit unions from the heightened service requirements of Rule 7004(h).

Professor Gibson provided the report. The current version of Rule 3007 includes special requirements for serving insured depository institutions based on the congressionally enacted language in Rule 7004(h). At the spring meeting, the Committee determined not to expand Rule 7004(h) to include credit unions because of the limited definition of “insured depository institution” in that rule. However, Bankruptcy Code § 101 contains a definition of insured depository institution that is broader than the definition provided in Rule 7004, and that definition applies to Rule 3007. The Committee voted to propose for publication an amendment to Rule 3007(a)(2)(ii) to eliminate credit unions from the special service requirements of that rule.

5. Report by the Forms Subcommittee

- (A) Recommendation for amendment to Official Form 113 based on Suggestion 18-BK-A

Professor Gibson provided the report, explaining that the suggestion was to change to Official Form 113 to avoid a possible ambiguity. On the current version of the form, the debtor is required to check a box identifying whether certain provisions are included in the proposed plan, and the form states the consequences of checking that a provision is not included or checking both boxes for a particular provision. The form is silent, however, about the consequence of failing to check either box, resulting in ambiguity. A second part of the suggestion was based, in part, on an issue with a local form in one jurisdiction, and the subcommittee’s research shows that the local form at issue was amended to correct the mistake. The subcommittee agreed that the second part of the suggestion no longer required action, but it recommended accepting the first suggestion to amend the Official Form to include language to

address situations in which no box is checked. The Committee, by motion and vote, approved the amended language, and the approved amendment will be held pending other potential amendments to Form 113.

- (B) Recommendation in support of Suggestion 18-BK-B to amend Director's Form 3180W

Professor Bartell explained the suggestion regarding Director's Form 3180W is to change the language about non-dischargeable fines and penalties. A revised version of the form was included in the materials, and no additional approval is required to implement the amendment. The revised form was approved by motion and vote.

- (C) Recommendation of no action in response to Suggestion 18-BK-E to amend Official Forms 101A and 101B

Professor Bartell explained that the suggestion related to Official Forms 101A and 101B, which were both adopted as part of the Forms Modernization Project in December 2015. She explained that Bankruptcy Code § 362(b)(22) is the basis for the forms, but that Bankruptcy Code § 525(a) is the section at issue in the suggestion as it may preclude a debtor from being evicted from governmental housing. Professor Bartell noted that the law is not settled on the issue, so the subcommittee recommended that no action be taken on the suggestion at this time.

6. Report by the Restyling Subcommittee

- (A) Recommendation regarding restyling the Federal Rules of Bankruptcy Procedure

Judge Dow introduced the topic of restyling the Bankruptcy Rules. He advised the subcommittee recommends that the Committee proceed with the restyling project and that it would be similar to the restyling of the other federal rules.

He provided detail of the work completed by the subcommittee. Following the spring meeting, the subcommittee completed a survey of the bankruptcy community regarding interest in restyling of the Bankruptcy Rules. The survey was drafted by Dr. Molly Johnson of the Federal Judicial Center and Professor Bartell, and included a sample restyled version of Rule 4001(a). The subcommittee sent the survey to bankruptcy judges, clerks, and bankruptcy organizations, and posted it on uscourts.gov. More than 300 people responded to the survey, including forty percent of bankruptcy judges and about fifty percent of bankruptcy clerks. The survey respondents overwhelmingly supported the restyling effort, but there were significant concerns raised regarding the protection of certain terms of art used in bankruptcy and the danger of unintended consequences of restyling. In addition, the survey showed that respondents supported restyling all the rules rather than a subset.

Judge Dow stated that following the survey results, the subcommittee determined that the project to restyle the Bankruptcy Rules should go forward. A caveat to the subcommittee's

recommendation is that any final decisions on whether to recommend any change to the Bankruptcy Rules rest with the Committee. Judge Dow noted that if the Committee approves the recommendation, there are still open questions with regard to how to proceed with the restyling project, and that the subcommittee will continue to work on these issues.

Judge Campbell stated that it is a big task, and it will take several years, advising that it is likely unavoidable that problems will be introduced through restyling, as seen with the restyling of other federal rules. He expressed his view that the recommendation regarding the restyled rules comes from the Committee, and the Committee has the final say regarding whether something is of substance rather than stylistic, including terms of art and terms used in the Bankruptcy Code. The Standing Committee will defer to the Committee regarding whether something is substantive and not stylistic, as well as language approved by the Committee because bankruptcy is a specialty area. Several Committee members and Professor Dan Coquilette noted their approval of Judge Campbell's comments.

Professor David Skeel added that the Committee should be wary of unintended consequences of rules restyling, stating that mistakes can be introduced easily even with careful attention to detail. Professor Catherine Struve echoed his comments, although both offered their support for the project. The recommendation to approve the restyling project subject to the caveat was approved by motion and vote.

Information Items

7. Business Subcommittee Consideration of possible changes to Rule 5005.

Professor Bartell explained that she is working with Ramona Elliott to determine if changes are needed to Rule 5005 as a result of the proposed amendment to Rule 9036. A further update will be provided at the spring meeting.

8. Coordination Items.

Scott Myers provided a brief report on the coordination of pending rule amendments.

9. Future meetings:

The spring 2019 meeting will be in San Antonio, Texas, on April 4, 2019, and the fall 2019 meeting will be in Washington D.C.

10. Adjournment

The meeting was adjourned at 12:00 p.m.

Consent Agenda

The Chair and Reporters proposed the following items for study and consideration prior to the Advisory Committee's meeting. No objections were presented, and all recommendations were approved by acclamation at the meeting.

1. Subcommittee on Appellate Issues.
 - (A) Recommendation for conforming technical changes to Rules 8012, 8013, and 8015.
 - (B) Recommendation of no action in response to Suggestion 18-BK-C to amend Rule 9033.
2. Subcommittee on Business Issues.
 - (A) Recommendations to refer Suggestion 14-BK-E (from the National Bankruptcy Conference) to the Consumer Subcommittee, and to take no action with respect to informal suggestions from committee member Jill Michaux, and former committee member David Lander.

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TAB 3C

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PROPOSED PROCEDURES FOR RESTYLING FEDERAL RULES OF BANKRUPTCY PROCEDURE

I. Pacing of Restyling

The style consultants have suggested that we divide the project into “three big batches” of rules to pace our restyling efforts. We would contemplate that those batches would consist of:

- a. Parts I and II of the Rules
- b. Parts III, IV, V and VI of the Rules
- c. Parts VII, VIII¹ and IX of the Rules

Although we would restyle the rules in batches and would obtain public comment on each group as it is restyled, we contemplate that none of the restyled rules would become effective until all groups were finally approved. Although we are not adopting a rigid schedule, we would expect to receive an initial draft of the first batch of rules from the style consultants within four months of commissioning the project, and hope to have the first group ready for the August 2020 public comment period, and each subsequent group ready for publication one year after the prior group is finalized, with a target effective date for the full rule set of restyled rules of December 1, 2024. These dates are intended to be aspirational and may change as we get into the project.

II. Working with Style Consultants

We believe that the relationship with the style consultants should be a close and collaborative one. The style consultants would be tasked with producing an initial restyled version of the group of rules on which we are working, without changing the substance of the rules and without eliminating “terms of art” that are used in bankruptcy practice. Where the rules use words or phrases that are used in the Bankruptcy Code, there should be a presumption that those words or phrases will not be modified through restyling, although the Restyling Subcommittee will consider any proposals by the style consultants to the contrary. However, in all other respects the goal is to put the Bankruptcy Rules into the best possible form as reflected in the literature on rule-drafting and legal drafting generally, simplifying the style as much as possible without sacrificing meaning. Established style conventions should prevail on matters of pure style. Although the style consultants will have flexibility to change some subpart designations and even to reorganize subparts, such structural changes should be minimized, if possible.

¹ We think it unlikely that Part VIII will need many, if any, restyling revisions because it has been restyled recently and parallels the provisions of the Federal Rules of Appellate Procedure.

The initial draft (in Word format) would be shared with the reporters and placed on FileShare or a similar platform. This platform will allow the reporters, the style consultants and members of the Restyling Subcommittee and the Advisory Committee to review proposed changes, revisions and comments throughout the process. The reporters will respond to proposed edits and comments. The style consultants will have an opportunity to respond with additional suggestions and comments. All of this will result in a "first draft" to be reviewed by the Restyling Subcommittee. To the extent necessary and appropriate, the style consultants will be invited to participate in the Restyling Subcommittee's evaluation which will culminate in a "second draft." The style consultants will have an opportunity to further comment on the second draft. If the chair of the Restyling Subcommittee thinks it desirable, she may call a meeting of the Restyling Subcommittee at which the style consultants would be present to discuss any disagreements and the Restyling Subcommittee can give directions to the style consultants.² All comments will be considered by the Restyling Subcommittee and may result in submission of either a "third draft" that incorporates some or all of the recommendations of the style consultants, or the "second draft" with the comments of the style consultants, to the Advisory Committee to approve a request for publication. The Advisory Committee will have access to all drafts and comments on drafts. The request and approved draft will then be submitted to the Standing Committee.

After comments in response to publication are received for each group of rules, the style consultants will work with the Restyling Subcommittee to modify the draft restyled rules as appropriate to respond to those comments and prepare a final draft for approval by the Advisory Committee and the Standing Committee.

Throughout this process, it is understood that the decision whether any change is to be made to the Federal Rules of Bankruptcy Procedure through the restyling project rests initially with the Restyling Subcommittee, and then with the Advisory Committee, and ultimately with the Standing Committee. The Restyling Subcommittee expects to show great deference to the restyling experts on matters that are purely stylistic but expects that the restyling experts will accept the judgment of the Restyling Subcommittee with respect to matters of substance and terms of art unique to bankruptcy law and practice.

² If the Restyling Subcommittee deems it advisable, the Subcommittee may share the drafts with outside bankruptcy experts at any stage of the review proceedings to obtain additional views.

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TAB 4A

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

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EVIDENCE RULES

MEMORANDUM

TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. John D. Bates, Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: December 4, 2018

Introduction

1 The Civil Rules Advisory Committee met at the Administrative Office of the United States
2 Courts, Washington, DC, on November 1, 2018. Draft minutes of this meeting are attached as Tab B.

3 The Committee has no action items to report.

4 Amendments to Civil Rules 5, 23, 62, and 65.1 took effect on December 1.

5 A proposed amendment of Civil Rule 30(b)(6) was published for comment in August. Not
6 many written comments have been received, but the level of interest shown during the development
7 of these changes augurs a healthy level of public comment yet to come. Many witnesses have signed
8 up to testify at the hearings scheduled for January 4 and February 8.

9 The information items that form the balance of this Report begin with the work of two
10 subcommittees, the Subcommittee for MDL Litigation and the Subcommittee for Social Security
11 Disability Review cases. Added subjects include the procedure for consenting to referral of a case
12 to a magistrate judge for trial; proposals to expand the categories of interested nonparties to be
13 described in the Rule 7.1 disclosure statement; and the effect of consolidating originally independent
14 actions on final-judgment appeals.

15 **I. Subcommittee on Multidistrict Litigation**

16 The Advisory Committee received several proposals for rulemaking regarding MDL
17 proceedings, mainly focused on “mass tort” proceedings. Those MDL centralizations have grown
18 considerably in recent years, and now around one third of all pending civil cases in the federal court
19 system are subject to an MDL order.

20 No Civil Rules are focused specifically on MDL proceedings, and suggestions have been
21 made that some rules are needed to deal with these proceedings, which constitute a significant
22 segment of the courts’ civil docket.

23 At its November 2017 meeting the Advisory Committee formed its MDL Subcommittee.
24 During 2018, that Subcommittee has engaged in a substantial amount of fact gathering, in part with
25 valuable assistance from the Judicial Panel on Multidistrict Litigation. That outreach effort has
26 included participating in, attending, or listening to at least eight conferences, three of which have
27 included Standing Committee members as participants.¹

28 Meanwhile, two members of the Subcommittee completed their terms on the Advisory
29 Committee, and three new members have recently been appointed to the Subcommittee, which now
30 includes three MDL transferee judges.²

¹ The conferences involved included the following:

Duke Law Conference on Documenting and Seeking Solutions to Mass-Tort MDLs, April 26-27, 2018, Atlanta, GA.

Emory Law School Institute for Complex Litigation and Mass Claims Litigation Finance & State/Federal Coordination Roundtable and Conference, June 4-5, 2018, Berkeley, CA. (including Judge Carolyn Kuhl)

American Association for Justice Roundtable on MDL Practice, July 10, 2018, Denver, CO.

Emory Law School Institute for Complex Litigation and Mass Claims Litigation Conference on Issues Roundtable, Aug. 8-10, 2018, Atlanta, GA.

Lawyers for Civil Justice Conference on MDL Practice, Sept. 14, 2018, Washington, DC

New York University Conference on “MDL at 50,” Oct. 12-13, 2018, New York, NY (including Judge Amy St. Eve)

MDL Transferee Judges Conference, Oct. 29-31, 2018, Palm Beach, FL (including Judges Amy St. Eve and Jesse Furman)

George Washington University Law Center Roundtable on Third Party Litigation Funding, Nov. 2, 2018, Washington, DC

² The current membership of the Subcommittee includes Judge Robert Dow (N.D. Ill), Chair, Judge Joan Ericksen (D. Minn.), Judge Robin Rosenberg (S.D. Fla.), Virginia Seitz (Sidley & Austin), Ariana Tadler (Milberg Tadler), Helen Witt (Kirkland & Ellis), and Joseph Sellers (Cohen Milstein Sellers & Toll).

31 The Advisory Committee’s November 2018 meeting included an extended discussion of the
32 issues identified by the Subcommittee and possible rule responses to them, as reflected in the
33 minutes of that meeting in this agenda book. That discussion identified a number of further issues
34 that the Subcommittee will continue to pursue, with the assistance of the Federal Judicial Center.
35 Already the Subcommittee has received additional valuable material since the November meeting.
36 Further work is likely to involve surveying judges, and perhaps also lawyers.

37 Though much work has been done and more is under way, this project remains at an early
38 stage. As the questions posed in the remainder of this report show, the Subcommittee remains
39 uncertain about various issues that have been raised and also about whether useful rule responses
40 exist. This memorandum seeks to introduce the wide variety of concerns that have arisen. It also
41 invites Standing Committee input on the importance and appropriateness for rulemaking of the
42 topics on which the Subcommittee has focused:

- 43 A. Winnowing unsupportable claims
- 44 B. Interlocutory appellate review
- 45 C. PSC formation and funding
- 46 D. Trial
- 47 E. Settlement promotion/review
- 48 F. Third Party Litigation Funding

49 **A. Winnowing Unsupportable Claims**

50 There seems to be fairly widespread agreement among experienced counsel and judges that
51 in many MDL centralizations – perhaps particularly those involving claims of personal injuries
52 resulting from use of pharmaceutical products or medical devices – a significant number of
53 claimants ultimately (often at the settlement stage) turn out to have unsupportable claims, either
54 because the claimant did not use the product involved, or because the claimant had not suffered the
55 adverse consequence in suit, or because the pertinent statute of limitations had run before the
56 claimant filed suit. The reported proportion of claims falling into this category varies; the figure
57 most often used is 20% to 30%, but in some litigations it may be even higher.

58 Whether these problems have manageable rule-based solutions remains unclear, however.
59 Even if a rule-based solution could be devised, it might create an undue risk of intruding too much
60 on a transferee judge’s latitude to devise an appropriate treatment for a given MDL proceeding.

61 The source of these problems might be called the “Field of Dreams” problem, or “If you
62 build it, they will come.” The unfortunate reality that confronts experienced lawyers in MDL
63 proceedings is that a significant number of claimants in those proceedings turn out not to have
64 supportable claims. Were there no MDL centralization, arguably, this would not be a problem.
65 Defendants would have an opportunity to challenge individual claims one by one. Indeed, but for
66 the MDL centralization order, many of those claims might not have reached court at all.

67 The reasons offered to explain this phenomenon vary. One is the effect of “1-800” lawyers
68 and “claims generators” who support an atmosphere of “get a name, make a claim.” From the
69 perspective of some, these lawyers are not complying with Rule 11. Instead, they are taking a flier
70 in the expectation that there will be a settlement in the MDL transferee court in which they can get
71 “inventory value” for their claims. It may be that this reported inflation of the number of claims
72 results in part from the reality that most MDL cases settle before remand; were remand for

73 individualized litigation the normal result of filing a claim, the frequency of unsupported claims
74 might decline.

75 Another explanation offered is that amassing a large inventory of claims can support a
76 lawyer's quest for appointment to a leadership position in the MDL – "I've got 3,000 cases, so I
77 should be on the Plaintiffs' Steering Committee (PSC)."

78 Other reasons for the submission of unsupported claims have also been offered. One is
79 inability to get needed records. For example, when the question is whether a person has been
80 implanted with a certain medical device, it is usually not difficult to determine whether the device
81 in issue in the litigation is the same one. But in other instances it may be difficult to make a similar
82 determination. Determining which over-the-counter drug the client took may be a challenge. Even
83 with prescribed medications, it may be difficult to determine whether the client was exposed to the
84 challenged product. For example, in one litigation the problem turned out to be about a tainted batch
85 of otherwise good medicine, but it was very difficult for plaintiff's counsel to find out which batch
86 was the source of the medication used by a particular patient.

87 In some situations, it appears, the defendant may have records indicating whether given
88 individuals got the specific medical device or got medication from a given batch that the plaintiff's
89 attorney can obtain only with great difficulty.

90 Another frequently offered explanation is that the statute of limitations forces responsible
91 lawyers to make claims before they have completed a full examination of the client's circumstances.
92 What might be called protective filings can be a legitimate response to this sort of problem, though
93 such filings should be followed by prompt further investigation to verify that the claimant actually
94 used the product in question. Whether that further investigation routinely occurs is uncertain; some
95 assert that certain lawyers often make claims and do nothing more.

96 A variant of the limitations concern is that a given client has in fact used the product in
97 question but has so far not suffered a negative outcome from use of the product. Attorneys
98 representing the "healthy" user of the product may feel they must file promptly for fear failure to
99 do so will defeat the client's claim later should full-fledged disease or injury emerge. In that
100 situation, the very prominence of MDL orders might operate to trigger the statute of limitations even
101 though no serious disease or injury has occurred with this plaintiff. Perhaps limitations should not
102 start running until the client actually manifests the condition, but counsel may fear the running of
103 limitations will not be suspended.

104 A related reason that has been offered is that scientific or medical understanding of all the
105 adverse and actionable consequences from use of or exposure to a certain substance or device may
106 be revealed only over time. Thus, although the current litigation is about condition X, it is not clear
107 that there is such a claim for condition Y or Z. Failure to make a claim now on behalf of those
108 suffering from conditions Y and Z may, however, create a risk of being barred later if proof emerges
109 supporting such a claim based on condition Y or Z. So the solution is to make a claim now. Perhaps
110 the ideal solution to this problem would be a "split" cause of action, but the pertinent tort law may
111 not offer that solution.

112 Confronting this range of situations, defendants complain of what they perceive to be an
113 "MDL exception" to operation of the Civil Rules. In an individual litigation, they could challenge
114 the plaintiff's allegations as insufficiently specific about the medication/device used, or about the

115 resulting medical condition. Alternatively, they could rely on initial disclosure and prompt
116 discovery to support a summary judgment motion to knock out claims that can't be supported.

117 But in MDL mass tort litigation, those tools may be unavailable to defendants. The
118 transferee judge may focus at first on the common issues rather than the unique circumstances of
119 each claimant. That orientation seems consistent with the basic goal of the statute. Detailed
120 examination of the circumstances of each claimant might prove an enormous and potentially
121 unmanageable distraction to the judge.

122 That distraction might also appear to require unnecessary work as well. For example,
123 assume that the defendant has some sort of preemption defense that would be a "kill shot" with
124 regard to all the claims, no matter how supportable they might be in terms of having used the drug
125 in question and suffered the adverse consequence in issue. Would it not make sense for the court
126 then to begin with a focus on that possibly dispositive issue rather than undertaking an
127 individualized review of each plaintiff's circumstances?

128 This sort of concern underlies some resistance to any required early triage of individual
129 cases. Insisting on early triage, no matter what, may hamstring the transferee judge, who might
130 otherwise favor focusing early energies on issues of general causation, preemption, or other
131 dispositive matters.

132 More generally, questions have been raised about how important it is to deal early, even if
133 not first, with winnowing individual claims. Assume that it's likely 30% of the claims will prove
134 not to be supportable. (Note that the fact a given plaintiff ultimately loses does not mean this was
135 an "unsupportable" case, for many who have used the product involved and suffered the malady
136 involved in the litigation may nonetheless fail to prove causation.) Is it urgent to find out which
137 cases fall within the 30% up front?

138 One could say that, even if such sorting could be expeditiously done, the court and the parties
139 would still have to deal with the remaining 70% of the claims. So in terms of efficient use of the
140 court's and the parties' time and energy, it may be preferable to focus on all claims at the outset.
141 One could even argue that an effort to identify factually unsupportable claims is inconsistent with
142 the thrust of MDL centralization, which is designed to deal mainly with common issues rather than
143 individual circumstances of individual cases.

144 One reason for treating early screening as urgent that has been advanced has to do with the
145 adverse consequences of having what appear to be large numbers of claims when the numbers
146 should be considerably smaller. For some medical products, there is a requirement of making a
147 report for each reportedly adverse incident, and it appears that making a claim in litigation often is
148 treated as triggering a requirement to report.

149 Separately, the volume of claims may bear on what must be included in SEC filings and
150 reports to shareholders. Beyond that, it is reported that publicity about litigation can prompt patients
151 to stop taking their medications or to forgo needed treatment. It may also prompt doctors to stop
152 using the most effective treatment.

153 At least in the really large-volume MDL proceedings, however, it is not clear that winnowing
154 the 30% of claims that are not supported is likely to avoid these sorts of adverse consequences.
155 Maybe reducing the number by 30% will sometimes reduce the total below some sort of reporting

156 trigger, but it is not clear that is often true. Indeed, even if the 30% are dismissed with alacrity, the
157 deterrent impact on patients or doctors may already have occurred. Moreover, to the extent that
158 some of these concerns relate to lessening corporate reporting burdens, that may not be a legitimate
159 rulemaking objective.

160 Against this background, a number of specific responses have been suggested:

161 Heightened pleading requirements for mass tort plaintiffs: There have been suggestions that
162 some sort of heightened or particularized pleading requirement (like the one in Rule 9(b) for fraud
163 cases) should be applied to mass tort plaintiffs. This might be different from plaintiff fact sheets
164 (discussed below). Such a pleading requirement for these tort plaintiffs that does not apply to other
165 tort plaintiffs (much less plaintiffs with non-tort claims) may be difficult to justify unless there is
166 a way to focus it solely on meritless or doubtful claims drawn by what one might call the magnetic
167 pull of the MDL litigation.

168 At least some supporters of a pleading upgrade seem to be focused only on the claims
169 presumed to result from the MDL centralization; thus some submissions also emphasize the
170 activities of “claim generators” who may provide some lawyers with large inventories of claimant
171 names. Taken in this light, it seems that this effort is designed to counter the “MDL exception”
172 behavior that defendants may regard as depriving them of a meaningful opportunity to challenge
173 individual claims in MDL litigation and thereby inviting the filing of unsupported claims.

174 Focusing pleading changes only on post-centralization claims would presumably not provide
175 a basis for applying any such pleading requirements to cases already on file at the time of an MDL
176 transfer order, or perhaps any filed in a state court. Indeed, it seems that at least some plaintiffs’
177 lawyers file in state court partly to avoid the MDL transfer that would occur if their case were in
178 federal court; it is hard to see these state-court claimants as “free riders” in the MDL proceedings.
179 Applying different standards to different individual cases before the MDL transferee court could
180 complicate that court’s task. Moreover, prescribing pleading standards applicable only to tag-along
181 cases originally filed in federal court could conceivably complicate the task of the transferor court
182 after remand, when that occurs. To the extent the “MDL exception” attitude prevails among
183 transferee judges, it may be that pleadings challenges by defendants would occur after remand.

184 Plaintiff Fact Sheets (PFS): In many medical products litigations the court directs the
185 plaintiffs to fill out PFSs designed to determine whether each plaintiff has actually used the product
186 involved and manifested the condition on which the litigation is focused. Some of these documents
187 are quite elaborate, requiring time-consuming efforts to complete. Presumably defendants must then
188 spend time and effort analyzing the PFSs once they are completed.

189 These burdens on the parties may not impose significant burdens on the court. We have
190 heard that some MDL transferee courts have adopted administrative processes to screen out
191 claimants who don’t complete and return the PFSs; dismissal of those claims involves only a
192 modicum of work for the court.

193 Carefully scrutinizing the fact sheets that are completed could create burdens of quite another
194 dimension for both the court and the parties, however. It might lead to something like individualized
195 12(b)(6) motions or “mini” summary-judgment motions. That could lead to further exchanges
196 regarding “supplemental” PFSs from those whose fact sheets are initially challenged. In a way, such
197 motions could replicate what would happen in individual litigation, but as part of the MDL

198 proceeding. Whether this individualized decision-making would be worthwhile in the MDL context
199 could be debated, especially if remands become more common.

200 Another complication from the rulemaking perspective is that there likely is no “generic”
201 fact sheet suitable for all litigations, or even all pharmaceutical or medical product litigations.
202 Instead, it appears that case-specific fact sheets are the usual method of proceeding. So a rule likely
203 could not provide many specifics on what a fact sheet should address in a given case.

204 Future work should include gathering more specifics about actual experience of MDL
205 transferee judges with PFS procedures. This effort could shed light not only on whether a PFS
206 procedure is routine in MDL centralizations, but also about specifics of judicial experience with this
207 device, including when claimants are to submit information, whether they must submit “evidence”
208 to support their claims at that point, whether a PFS procedure imposes significant burdens on the
209 court, and whether such a procedure in fact has resulted in the dropping of a significant number of
210 claims. Additional topics may include the logistics of submitting and reviewing PFSs and the ways
211 in which this effort can support a “triage” of claims before the MDL court.

212 Defendant fact sheets: It appears that, in at least some litigations, defendants are also called
213 upon early to provide some specified information. If the PFS rulemaking idea is seriously pursued,
214 it might be even-handed also to consider a rule provision concerning information defendants should
215 provide. But as with PFSs, it seems that the specifics of any such early requirements for providing
216 information depend a great deal on the nature of a given litigation.

217 Expanded initial disclosure: Something along the lines of a PFS approach might be built into
218 Rule 26(a)(1). That rule already calls for every party to disclose information about witnesses and
219 documents it may use to support its claims or defenses. A clarification could possibly make more
220 specific disclosures mandatory in certain cases. It might also make uniform a practice now evidently
221 subject to divergent practices of individual transferee judges. One suggestion calls for adding a
222 requirement to the initial disclosure rule that, in MDL personal injury proceedings involving medical
223 products, plaintiffs specify the drug or medical implement they used (including its maker) and also
224 specify the harm they claim to have suffered, along with documentary or electronic evidence
225 supporting these assertions.

226 But at present the consequence prescribed in Rule 37(c)(1) for a failure to disclose is
227 different from what the proponents of this amendment seem to desire – something like immediate
228 dismissal for those plaintiffs who fail to provide the required information. So perhaps another
229 provision could be added to Rule 12(b) or 12(c) or perhaps Rule 56 to authorize an early motion
230 based on what the plaintiff disclosed (or failed to disclose).

231 Alternatively, it might be possible to build a mechanism directly into a Rule 26(a)(1)
232 amendment leading to dismissal. That may be somewhat out of step with the general cast of
233 Rules 26-37; ordinarily a merits sanction or other adverse court action in regard to discovery can
234 only occur after the court has ordered compliance and the party has failed to obey the order. Motion
235 practice is the norm. It may be that Rules 36 or 37(d) could provide a model for such a provision,
236 however.

237 Yet another possibility would resemble H.R. 985 – to impose on the court an obligation to
238 review and determine the adequacy of each such disclosure.³ Such a burden might ask too much of
239 the court, and might also be out of step with the usual “adversary system” requirement that the
240 parties seek relief from the court rather than requiring that the court undertake the review on its own.

241 Expanding the role of Rule 11: The proponents of early screening emphasize that the
242 unfounded claims they want winnowed out result from failures by some plaintiff’s counsel to satisfy
243 their Rule 11 obligations. Arguably, one could therefore focus on Rule 11 as a place to install a
244 screening mechanism. There certainly have been dramatic examples of using Rule 11 to respond
245 to unfounded claims. *See, e.g., In re Engle Cases*, 288 F.Supp.3d 1174 (M.D. Fla. 2017) (sanctions
246 of over \$9 million imposed on lawyers who were found to have filed 1250 unsupportable claims,
247 some of them on behalf of plaintiffs who did not even know the cases had been filed).

248 Such a provision might focus on lawyers who have filed more than a certain number of
249 claims and impose on them a duty to show that they have complied with Rule 11(b)(3). That idea
250 might be somewhat at odds with Rule 11(c)(2), which provides a safe harbor by requiring that a
251 motion for sanctions be served 21 days before it is filed, although amendment or dismissal could be
252 allowed before the time set for the showing, which could be 21 days or more after filing. (Note that
253 the Lawsuit Abuse Reduction Act, also passed by the House of Representatives in March 2017,
254 contains provisions that would change Rule 11 in all cases.) On the other hand, something along
255 this line might be regarded as consistent with Rule 11(c)(3), which already authorizes the court to
256 enter an order to show cause why “specifically described” conduct has not violated Rule 11(b). It
257 does not seem that a court would usually be justified in concluding that all claims by plaintiffs in
258 MDL mass tort litigation support such treatment under Rule 11(c)(3).

³ H.R. 985, the Fairness in Class Action Litigation Act of 2017, was passed by the House in March 2017, and remains pending in the Senate. Though the bill contains a number of provisions about class actions, Section 5 of the bill is about MDL proceedings and would add new provisions to 28 U.S.C. § 1407, the multidistrict litigation statute. Several of these additions bear on topics also under consideration by the MDL Subcommittee:

§ 1407(i), entitled “Allegations Verification,” would require that plaintiffs’ counsel submit to the transferee court, within 45 days, evidentiary support for each claim and that the transferee judge, within 30 days of submission, enter an order determining whether the submission is sufficient. If it is not, the court is to dismiss without prejudice and the plaintiff has 30 days to tender a sufficient submission, failing which the action is dismissed with prejudice.

§ 1407(j) would prohibit trial by the transferee judge unless all parties to the action consent to trial.

§ 1407(k) would require the court of appeals for the transferee district to accept an interlocutory appeal if an immediate appeal “may materially advance the ultimate termination of one or more civil actions in the proceedings.”

§ 1407(l) would direct that claimants in MDL proceedings “receive not less than 80 percent of any monetary recovery obtained,” and would grant the transferee judge jurisdiction to decide any disputes about compliance with this requirement.

259 Rule 11 litigation has not been viewed as a positive feature of most cases. Adopting this
260 approach would seem inconsistent with at least some comments at conferences during this year.
261 More than once, it has been stressed that an effective screening program should provide the affected
262 lawyers with an “exit strategy” that is not harmful or costly to them. Shifting to a sanctions mode
263 does not seem to move in that direction. And, as the \$9 million sanction mentioned above shows,
264 the present rule provides a basis for responding to flagrant failures to perform the investigation
265 required by Rule 11(b)(3).

266 Relying on the Plaintiffs’ Leadership Committee (PLC): Another theme that has emerged
267 is that leadership on the plaintiff side might be able to facilitate this winnowing. It is clear that the
268 plaintiff-side lawyers the Subcommittee has talked with recognize that other lawyers file cases
269 without adequate investigation and, sometimes, in hope of a free ride to a profitable settlement. At
270 least on occasion, leadership counsel on the plaintiff side may be able to prompt other lawyers to
271 remove those cases from the mix. One way that was mentioned was that leadership could say it was
272 not intending to prepare expert causation support for claims of plaintiffs with certain experiences
273 or certain conditions. In the California state courts, more generally, it has been said that the courts
274 expect the PLC members to perform this service.

275 Selection and appointment of the PLC is addressed below (Part C). Adding such a
276 responsibility to the others more often imposed on lead or liaison counsel could be considered.
277 Perhaps success in handling this responsibility could be a factor in determining fee awards from
278 common benefit funds. Perhaps it could be a factor in determining whether to reappoint originally
279 designated leadership in MDLs in which the members of the PLC are term-limited and subject to
280 reappointment.

281 Master complaints/answers: One aspect of the “MDL exception” objection is the use of
282 master complaints. The Manual for Complex Litigation contains an exemplar case management
283 order with such provisions. See Manual (4th) § 40.52 ¶ 6 at 774-75. Such documents are highly
284 likely to be written at a level of such generality that there is no way for defendants to challenge the
285 claims of individual plaintiffs. Some defendants urge that this generality permits claimants with
286 unsupportable claims to evade individualized attention. It appears that, at least in some instances,
287 MDL courts using master complaints may initially require nothing more of claimants than the
288 pleading equivalent of “count me in,” deferring individualized details until later. One could argue
289 that such pleadings do not comply with Rule 8(a)(2), which requires a “showing that the pleader is
290 entitled to relief.” The exemplar case management order in Manual (4th) instead says (at 777): “No
291 motion shall be filed under Rule 11, 12, or 56 without leave of court.”

292 Nonetheless, proposals to permit master complaints and answers have been made by many,
293 including those advocating defendants’ interests. The rules presently contain no reference to
294 “master complaints” or “master answers.” One suggestion has been to add references to these
295 documents to Rule 7(a). If Rule 7(a) were so amended, a provision in Rule 8 or Rule 12 might invite
296 motions to require submission of individual complaints. But such a provision might seem in tension
297 with the idea of a master complaint and answer, which might themselves be designed to deflect a
298 preoccupation with the specifics of individual cases and variations in individual allegations. Perhaps
299 a Rule 7(a) amendment could specify – perhaps in the Committee Note – that any plaintiff joining
300 a “master complaint” must also provide individualized specifics of the sort sometimes required in
301 a PFS. But that could make “master complaints” ungainly or tend to defeat a possible purpose for
302 them – to avoid immersing the court in those individual details and flooding the clerk’s office with
303 filings. Without such a requirement, it might be said that amending Rule 7(a) puts the rules’

304 imprimatur on exactly the sort of generalized pleading practices the proposal seems designed to
305 change.

306 Further work may shed light on the frequency of master complaints in MDL proceedings,
307 and the manner in which these documents are used. For example, it may be that individual plaintiffs
308 may “adopt” some but not other claims from the master complaint in individual filings or
309 submissions, and there may be experience with methods for screening such individual plaintiff
310 submissions.

311 Filing fees: Another idea that has been proposed is to require each plaintiff to pay a full
312 filing fee to deter unsupported claims. Rule 20 fairly flexibly permits joinder of plaintiffs, and the
313 federal filing fee statute presently requires that the fee be paid for each action, not for each plaintiff.
314 See 28 U.S.C. § 1914(a). Reportedly, when agreements permit “direct filing” of cases in the MDL
315 transferee court (avoiding the step of filing in a transferor court and becoming a tag-along action),
316 separate filings and fees are sometimes required. Perhaps a rule could somehow make a similar pay-
317 per-plaintiff approach mandatory in tag-along cases involving Rule 20 joinder of multiple plaintiffs
318 after MDL centralization has occurred, though that might require a statutory change. Further
319 investigation of whether MDL transferee judges are now requiring individual payment of filing fees
320 needs to occur.

321 Whether this approach would produce helpful results is uncertain. So also is the proper way
322 to handle it in removed actions. The current statute says that the court must “require the parties
323 instituting any civil action, whether by original process, *removal* or otherwise, to pay a filing fee of
324 \$350.” 28 U.S.C. § 1914(a). So it appears that the removing defendant must pay the fee. If all a
325 plaintiff lawyer has to do to avoid the federal filing fee is to file in state court (perhaps joining
326 dozens of plaintiffs in one suit, as allowed under state court rules), the state-court filing fee might
327 seem modest if divided among 50 or 60 plaintiffs, and the change would seem not to achieve much.
328 It might even mean that the removing defendant would have to pay a per-plaintiff fee to remove.
329 But perhaps filing in state court would create risks for plaintiff’s lawyers who *want* to be tag-alongs
330 in federal court, because defendants might not remove and instead leave them to litigate their cases
331 in state court.

332 Further work may shed light on the frequency of requiring each claimant to pay an individual
333 filing fee in MDL proceedings, and the effect of that requirement on the rate of unsupported claims
334 presented.

335 Adding screening as a mandatory topic in MDL cases to the 26(f) conference and 16(b)
336 order: A more flexible and promising approach might be to add discussion of a claim-screening
337 method like the PFS as something required in certain litigation under Rule 26(f) and also adding it
338 to Rule 16(b) as a matter for judicial attention in such cases.

339 This method could adapt to the specifics of individual cases. It would not be a requirement
340 that any judge use such screening, but could provide the transferee judge with sufficient information
341 to enable the judge to decide how best to address the concern with unfounded claims. Due to its
342 flexibility it might avoid many potential drawbacks of the other ideas discussed above while
343 introducing early consideration of these issues into the centralized proceeding.

344 On the other hand, it is likely that many cases enter the MDL proceeding only long after the
345 time for the Rule 26(f) conference and Rule 16 order have passed. Perhaps there is a way to adapt

346 the existing 26(f)/16(b) sequence to the MDL setting. Nothing in Rule 16(b) or (c) would stand in
347 the way of such orders, and Rule 16(c)(2)(L) seems to authorize such provisions. Perhaps the
348 screening idea could be added to that part of Rule 16(c).

349 **B. Immediate Appellate Review**

350 Although the ordinary starting point is that interlocutory appeal is not allowed in individual
351 cases, many urge that MDL proceedings should be treated differently because they involve so many
352 claims and parties, and last much longer than individual tort cases. Putting those factors together
353 suggests that some interlocutory rulings in MDL proceedings may be much more significant than
354 similar rulings in stand-alone litigation.

355 Nonetheless, a preliminary question is whether MDL proceedings are really so distinctive
356 that a special rule for interlocutory review would be appropriate. The model advanced is Rule 23(f),
357 added in 1998 to permit immediate review of class certification orders. The Committee Note
358 accompanying that amendment noted that other possible avenues for immediate review existed, but
359 added:

360 [S]everal concerns justify expansions of present opportunities to appeal. An order
361 denying certification may confront the plaintiff with a situation in which the only
362 sure path to appellate review is by proceeding to final judgment on the merits of an
363 individual claim that, standing alone, is far smaller than the cost of litigation. An
364 order granting certification, on the other hand, may force a defendant to settle rather
365 than run the risks of possibly ruinous liability.

366 Whether orders in MDL proceedings regularly raise similar issues is not clear. Class
367 certification has long been recognized as a central and critical decision in cases governed by
368 Rule 23. It is surely not true that all orders in MDL proceedings are similarly central. Among the
369 sorts of orders urged to justify immediate review are rulings on preemption, personal jurisdiction,
370 and admissibility of proposed expert testimony under the *Daubert* standard.

371 One concern regarding Rule 23(f) was a worry that, before it provided an avenue for review
372 of certification orders, the courts of appeals actually had insufficient opportunities to address these
373 Rule 23 issues and provide guidance to district courts. It is not clear that there is a similar problem
374 with the issues advanced as warranting interlocutory review in MDL proceedings. There seem
375 already to be many appellate rulings on the issues suggested for interlocutory review in MDL
376 proceedings, and accordingly less concern about facilitating “law-making” on these topics by the
377 courts of appeals. And at least some of these topics (*Daubert* is an example) seem to involve such
378 broad trial court discretion that appellate review is not likely to make new law or lead to many
379 reversals.

380 One objection to current practice is that there sometimes seems to be asymmetrical access
381 to immediate review. For example, if defendants prevail on preemption grounds or obtain an order
382 excluding expert testimony critical to plaintiffs’ cases, that may lead to entry of an appealable
383 judgment. But if plaintiffs prevail on such motions, appeal could not follow absent special
384 circumstances. Of course, that is generally true with motions to dismiss or for summary judgment
385 in all litigation, not just MDL proceedings.

386 Special circumstances might often support certification of such rulings for immediate review
387 under 28 U.S.C. § 1292(b). Review under that statute depends on a certification by the district judge
388 that the order “involves a controlling question of law as to which there is substantial ground for
389 difference of opinion and that an immediate appeal from the order may materially advance the
390 ultimate termination of the litigation.” Some who have spoken during events have urged that
391 § 1292(b) certification is not granted sufficiently frequently in MDL proceedings, but firm data are
392 as yet not available, nor easy to come by.⁴ It may be that the transferee judge is best positioned to
393 evaluate the utility of an immediate appeal (something one could view as inherent in the MDL
394 process), so that § 1292(b) could be an effective solution to the problems identified.

395 The proposals advanced so far, however, are premised on the idea that § 1292(b) has not
396 proved equal to the task, so that a rule should provide an additional avenue for appeal of at least
397 some rulings in MDL proceedings, as Rule 23(f) does regarding class certification decisions. Some
398 proposals seek to focus on district court rulings that would affect (perhaps resolve) a “substantial
399 portion” of all cases in the MDL proceeding, though devising a rule that would draw a workable line
400 of this sort could prove challenging.

401 One special feature of MDL proceedings that has been mentioned is that the absence of
402 immediate review may in some cases deter or hobble settlement efforts. For example, if the
403 defendant is convinced that the claims should be barred by preemption, it may refuse to consider
404 settling a multitude of claims on the basis of a district court decision without first obtaining appellate
405 review. Whether a court of appeals decision affirming the district judge’s ruling would materially
406 affect settlement prospects would depend on the case. As noted below, if there are circuit conflicts
407 on an issue addressed in such an appeal, and remand to a district in a different circuit is a possibility,
408 the decision of a given court of appeals may not be regarded as dispositive.

409 Besides the basic question whether there is a need for expanding opportunities for immediate
410 appellate review, several additional issues have emerged:

411 Mandatory v. discretionary review: During its recent review of Rule 23 issues, the
412 Committee received a number of submissions arguing that courts of appeals have not used their
413 discretion to grant review under Rule 23(f) sufficiently frequently. Some urged that Rule 23(f) be
414 rewritten to require immediate review of all orders granting or denying class certification. H.R. 985
415 has a provision requiring courts of appeals to grant such review, described in footnote 3 above. To
416 the extent immediate review is required for specified types of orders in MDL proceedings (as
417 discussed below regarding types of orders subject to mandatory review), one consequence of
418 mandatory review for certain types of orders may be to provide an incentive to those who wish to
419 trigger review to style their motions as falling within the enabled group.

420 Role for the district court: Proposals have been made that a new rule, like Rule 23(f),
421 authorize a direct petition to the court of appeals rather than (as in § 1292(b)) requiring or even
422 inviting the district court to opine on whether immediate review would contribute to effective
423 resolution of the pending cases. One response to these proposals is that it will be difficult for the

⁴ Since the November Advisory Committee meeting, the Subcommittee has received a very helpful report about § 1292(b) experience in MDL litigation. See letter from John Beisner, Nov. 21, 2018, no. 18-CV-BB, available at www.uscourts.gov. It remains to be seen, however, whether this report actually supports immediate appellate review.

424 court of appeals to determine whether to grant review, assuming that the “enabling” features of
425 immediate review are important to the appellate court. A suggestion, then, has been that any
426 appealability rule provide explicitly that the district court be invited to express views on the utility
427 of immediate review, or invite the court of appeals to solicit the district court’s views on the
428 desirability of immediate review. Either way, the court of appeals would benefit from the district
429 judge’s evaluation of the legal issues and the impact of an immediate appeal on further proceedings.
430 The court of appeals could retain discretion to accept an immediate appeal no matter what the
431 district court’s view.

432 Identifying orders by legal type or topic: Rule 23(f) deals only with class-certification
433 orders, which are a relatively discrete category. Class certification orders in MDL proceedings
434 would qualify. But the present proposal is to create new grounds for appeal of orders by type. The
435 types mentioned most frequently are *Daubert*, preemption, and personal jurisdiction orders.
436 Whether these types of orders regularly involve issues of such importance in MDL proceedings that
437 immediate review should be permitted or required is uncertain. Whether other orders (e.g., motions
438 to remand for lack of diversity jurisdiction) should be added is also unclear.

439 Identifying orders by focusing on how many cases are affected by them: An alternative (or
440 additional) way of identifying orders subject to a new rule would be to specify that they must affect
441 (be central to?) a specific number of cases. Such a standard might, however, be difficult to apply
442 (particularly for a court of appeals) and invite satellite litigation.

443 Focusing on orders that are subject to de novo review: At least some orders entered in MDL
444 proceedings, *Daubert* decisions, for example, are reviewed under an abuse of discretion standard.
445 In the abstract, the low likelihood of reversal might make these rulings unsuitable for immediate
446 review, while rulings on preemption and the legal aspects of personal jurisdiction, subject ordinarily
447 to de novo review, might be more suitable. But that does not distinguish *Daubert* rulings from
448 orders reviewable under Rule 23(f), since class certification decisions are also reviewed for abuse
449 of discretion, although the measure of discretion may be different.

450 Possible timing tension with early screening of unsupportable claims: Part I discussed
451 possible responses to the problem of unsupportable claims in MDL proceedings. As noted there,
452 any requirement that such screening be the transferee court’s first task may sometimes seem
453 unwarranted because another issue such as preemption might defeat all the claims, whether the
454 claimants used the product or not. In terms of advancing the MDL proceedings, then, a new
455 appellate review possibility and an early screening requirement might be incompatible.

456 Increasing delay in MDL proceedings: The proposals made so far do not call for staying
457 proceedings in the district court pending interlocutory review. But the more one stresses the
458 centrality of the orders involved to justify immediate review, the greater the tendency may be to
459 await the results of that review before investing very considerable additional time and effort in the
460 district court proceedings. The Subcommittee has been told that in states in which frequent
461 interlocutory review is available (e.g., New York and Louisiana), such review does produce
462 considerable delay in resolution of cases. Delays in the federal MDL forum may, in turn, affect the
463 willingness of state courts entertaining related litigation to await the results of, or even coordinate
464 with, the federal proceedings.

465 Coping with delay issues by directing the court of appeals to provide “expedited” review:
466 One reaction to the delay concern has been to urge that a rule direct the court of appeals to provide

467 “expedited” review. That seems an odd thing for a Civil Rule to do. Particularly since the courts
468 of appeals often have heavy dockets of criminal cases, it also seems odd to try to advance civil cases
469 in front of them.

470 Volume of appeals: The volume of appeals, were interlocutory review authorized by rule,
471 would surely depend in part on whether review is mandatory or discretionary. One estimate
472 presented to the Subcommittee is that creating this additional route for appellate review would
473 produce only about one or two additional appeals per year for each Circuit. But if the report that
474 there are 24 mega MDLs is accurate, the estimate may imply an appeal in each of them every year,
475 which may be high. Though it is impossible to predict with confidence what the caseload impact
476 would be, that may be an additional consideration.

477 “Binding” effect of appellate review: Orders for which immediate review has been urged
478 include issues (e.g., preemption, *Daubert*) on which there may be circuit conflicts, or parties may
479 argue that there are such conflicts. Given that cases are supposed to be returned to the transferor
480 court (and circuit) after the pretrial proceedings are completed by the MDL court, questions may be
481 raised about whether the appellate rulings of the court of appeals for the transferee court would be
482 binding upon remand. Would that “binding” effect mean that the transferor district court or circuit
483 court could not apply its own circuit law after remand of a case? Initial reactions have been that this
484 is not a problem due to the law of the case doctrine, but further attention may be necessary. For
485 discussion of these issues, see 18B Wright, Miller & Cooper, Fed. Prac. & Pro. § 4478.4 at 774-80;
486 Marcus, Conflicts Among Circuits and Transfers Within the Federal Judicial System, 93 Yale L.J.
487 677 (1984).

488 The possibility that interlocutory appellate rulings would not be binding after remand might
489 affect the impact of immediate review on settlement prospects. Even at present, at least in some
490 instances, there can be a dispute about whether cases should be remanded following the transferee
491 court’s exclusion of the testimony of plaintiffs’ expert witnesses. Cf. *In re Lipitor Marketing, Sales*
492 *Practices and Liability Litigation*, 892 F.3d 624, 647-49 (4th Cir. 2018) (rejecting plaintiffs’
493 argument in favor of returning cases to the transferor districts for resolution of the issue of specific
494 causation and upholding summary judgment against all plaintiffs).

495 Need to involve Advisory Committee on Appellate Rules: Any serious consideration of
496 providing by rule for immediate review of interlocutory orders in MDL proceedings would have to
497 be coordinated with the Appellate Rules Committee. This is not a reason not to proceed, but is
498 worth noting.

499 **C. Formation and Compensation of PSC**

500 In 2003, Rule 23(g) was added to provide guidance to courts in making the important choice
501 of class counsel. In part, that amendment drew on experience in appointing lead and liaison counsel
502 in MDL proceedings. But there is no rule saying Rule 23(g) criteria apply to selection of leadership
503 counsel in MDL proceedings.

504 In MDL litigation, the Manual for Complex Litigation (4th) (§§ 10.22-10.225) provides
505 guidance on appointment of lead and liaison counsel. Sections 14.221-14.224 of the Manual provide
506 guidance specifically about handling attorney fees and expenses for counsel involved in such
507 common benefit activities. That guidance includes recommendations that early and clear guidelines
508 be established for reporting to the court on the level of attorney activity, and for cost reimbursement.

509 The Subcommittee has been informed that many experienced MDL transferee judges have
510 developed sophisticated methods of guiding and monitoring counsel appointed to such positions.
511 One method is appointment of leadership counsel for a one-year term, with renewed appointment
512 frequent but not assured. Another technique is appointment of a Special Master delegated
513 responsibilities for monitoring both the amount of attorney time and the amount of attorney
514 expenditures on a regular basis.

515 Rule 23(g)(4) provides that class counsel have a duty to represent the best interests of the
516 class members (not only the class representative). It does not appear that in MDL proceedings a
517 similar Civil Rule applies (though Rule 23(g) would apply if class actions were included in the MDL
518 proceeding). Leadership counsel likely have their own clients and also may effectively act on behalf
519 of other plaintiffs who have their own lawyers (known sometimes as IRPAs – individually
520 represented plaintiffs’ attorneys). There may be a concern that leadership counsel are actually
521 “representing” the other lawyers more than other clients. Whether there is something like a
522 fiduciary obligation of leadership counsel to other plaintiffs has been debated. For a recent
523 discussion of these issues, *see* Herman, Duties Owed by Appointed Counsel to MDL Litigants
524 Whom They Do Not Formally Represent, 64 Loyola Law Review 1 (2018). It is not clear that civil
525 rules could usefully contribute to resolving such questions. Matters of professional responsibility
526 generally are left to regulation by the states. But court rules might properly define the role of court-
527 designated lead counsel in federal MDL proceedings.

528 Rule 23(h) provides guidance for attorney-fee awards in class actions. Somewhat similar
529 issues arise in MDL proceedings, with the added complication that attorney-fee payments can come
530 from numerous individual settlements (with the individual clients of IRPAs). “Common benefit
531 funds” address this issue, and have become commonplace. The Subcommittee has been told that
532 judges employ percentages from 2% to 12% of each settlement to fund the common benefit fund.
533 It seems that the contribution ordinarily comes from the IRPA’s “share” of the settlement. The
534 allocation of the common benefit funds, in turn, appears to be handled in a variety of ways, and may
535 also involve a special master’s assistance.

536 Going forward, a key question is whether there is any reason to consider rules or even
537 guidelines of some sort about these issues. If there are serious problems, it is not clear to the
538 Subcommittee how they might be solved by a rule.

539 One recurrent concern, however, is that there is something of an “inside baseball” aspect to
540 existing practices. *See* Burch & Williams, Repeat Players in Multidistrict Litigation: The Social
541 Network, 102 Cornell L. Rev. 1445 (2017) (describing and explaining the reappearance of a small
542 number of lawyers in a large number of MDL proceedings). The Subcommittee has been told that
543 transferee judges are aware of this concern, and are attempting to respond to it. Again, a rules-based
544 solution to this problem is not apparent.

545 A related concern is that members of a PSC are often expected to contribute considerable
546 sums to pay out-of-pocket costs of the litigation. That fiscal need may hamper efforts for diversity
547 in leadership roles. (One possible method for “new entrants” into leadership is to rely in part on
548 third party litigation funding, addressed in part F below.)

549

D. Trial Issues

550 It may seem odd that trial issues are included in a discussion of MDL practice, since the
551 statute limits transfer to “pretrial” management and requires remand once that process is complete.
552 For some time, transferee judges relied on 28 U.S.C. § 1404(a) to enable them to transfer cases for
553 all purposes (including trial), but the Supreme Court rejected that practice in *Lexecon, Inc. v.*
554 *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

555 Despite *Lexecon*, trials in MDL transferee districts have continued to occur, often by consent
556 when trial would not otherwise be possible. Consent can address such issues as personal jurisdiction
557 and venue. H.R. 985 includes a provision that would forbid trial in transferred cases unless all
558 parties consent. And there have been academic calls that early remand should become the norm.
559 *See Burch, Remanding Multidistrict Litigation*, 75 La. L. Rev. 399 (2014).

560 Bellwether trials: A recurrent effort in some MDL centralizations is to arrange bellwether
561 trials as a means of informing the parties about the strengths of cases, perhaps thereby to further
562 settlement negotiations. The Subcommittee has heard numerous expressions of skepticism about
563 the value of bellwether trials. One concern is that the process of selection may not yield
564 “representative” cases for trial. Another is that it may happen that cases selected for trial disappear
565 (perhaps due to voluntary dismissal of claims that turn out to be unsupported or settlement of strong
566 claims), thereby skewing those ultimately tried despite a satisfactory initial selection process.

567 Such trials in MDL proceedings have become expensive propositions. The Subcommittee
568 has been informed that – at least in pharmaceutical and medical device MDL litigation – it is unusual
569 to be able to try such cases for less than \$1 million in out-of-pocket costs (not including attorney
570 fees). Given the potential stakes, the attorney fees may be larger.

571 There have been few proposals for rule changes addressing such trials, however. One early
572 proposal was that transferee judges enlist other judges (perhaps in the same district) to preside over
573 such trials so that the entire burden of trial does not fall onto one judicial officer. In some instances,
574 transferee judges have assembled “trial packets” that other judges can use to become “trial ready”
575 for purposes of presiding at such trials. Though this practice may be salutary, particularly in large
576 districts, it does not seem suitable for inclusion in a rule.

577 Limiting joint trials to cases involving injuries to the same person or property: Lawyers for
578 Civil Justice has proposed an amendment to Rule 20(a) that would permit joinder of claims for
579 injury to person or property only when the parties’ claims are all based on an injury to the same
580 person or property. If applied rigorously in MDL cases, that joinder limitation would seem
581 consistent with the idea of requiring separate filing fees from each plaintiff.

582 But this proposal does not appear to be limited to MDL proceedings. Applied to the general
583 docket, this joinder limitation could affect many cases. Consider a bus accident in which many
584 passengers are injured and want to sue the bus company. Under Rule 20(a) as now written, they
585 could sue as co-plaintiffs because their claims all arise out of the same occurrence. As written, the
586 proposal seems to require that each file a separate suit. If that were required, it is likely the court
587 would nevertheless treat them as “related cases.”

588 It may be that a proposal could be directed to combined trials, not initial joinder. Something
589 along these lines might be added to Rule 20(b), which already addresses “an order for separate

590 trials.” This rule and Rule 42 could perhaps be amended to require separate trials as proposed by
591 LCJ, at least in MDL proceedings, although it is not clear what the benefit would be. But absolutely
592 prohibiting multi-plaintiff trials could hamstring the MDL transferee court.

593 Forbidding trial unless all parties consent: Another proposal is a rule forbidding an MDL
594 transferee court to hold a trial unless all parties consent. A similar provision appears in H.R. 985.
595 If that requirement required consent from all parties in any action before the MDL transferee court
596 – perhaps thousands – it would likely be unworkable; the focus seems to be on the parties to the
597 individual cases to be set for trial.

598 Before *Lexecon* was decided in 1998, MDL transferee judges frequently used § 1404(a) to
599 transfer cases in the MDL proceeding to themselves for all purposes, but the Supreme Court held
600 that such self-transfer was not authorized under the statute. More recently, a practice of “direct
601 filing” arose, under which cases that might have been filed in “home” districts around the country
602 and transferred as tag-along actions would instead be directly filed in the MDL transferee district.
603 Owing to jurisdictional and venue limitations, such direct filing is often possible only with the
604 consent of the defendants. More recently, *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct.
605 1773 (2017), may have raised further jurisdictional obstacles to filing in the MDL transfer district
606 by plaintiffs who are citizens of other states. As noted above (*see* Part A), the consent sometimes
607 requires payment of a filing fee by each plaintiff. It also often requires that these cases be
608 transferred to a designated “home” district once pretrial activities are completed unless the cases are
609 settled.

610 Together, these developments make it likely that many of the cases pending before the MDL
611 transferee judge can be set for trial – whether “bellwether” or not – only on party consent. The all-
612 party consent proposal thus might not change the current situation significantly.

613 But the proposal is that the transferee judge may not conduct a trial in any action in the
614 consolidated or coordinated proceedings without consent of all parties to that action. If that means
615 that the transferee judge could not, after a Panel centralization order, even try the cases she already
616 had before the order, or others properly filed in her “home” district, that would seem a curious result,
617 meaning that the Panel’s order would deprive the transferee judge of authority to try cases she
618 already had before the Panel acted.

619 On the other hand, if the proposed rule does not apply to cases directly filed in the MDL
620 transferee district, that would further limit its impact, though not likely in an important way if
621 consent to direct filing usually includes a requirement of transfer to the “home” district before trial.
622 Nonetheless, the seeming requirement of consent in direct filed cases is also curious.

623 It may be that a feature of the problem is that sometimes the parties consent to trial of a
624 tranche of “bellwether” cases that includes some that plaintiffs have selected as strong for the
625 plaintiffs and some that defendants have selected as strong for the defendants. Commentary
626 suggests that on occasion, as trial approaches, several of the cases that are strong for the defendants
627 are dismissed voluntarily by plaintiffs, thereby skewing the remaining cases in plaintiffs’ favor.
628 Similarly, defendants may settle cases that are strong for plaintiffs. Unless the consent is revocable
629 in these circumstances, it is not clear how a consent requirement would solve the problem. Perhaps
630 consents to trial in the MDL transferee court could include some sort of “opt out” provision to deal
631 with the skewing concern. Perhaps a rule could require trial to occur in all the selected cases, but
632 that might be unduly rigid, wasteful and unworkable.

633 Permitting MDL transferee judges to order live trial testimony by party witnesses: The
634 American Association for Justice has proposed that rule changes would improve trials in MDL
635 litigation by enabling judges to order that party witnesses (including employees of a party) appear
636 at trial to testify live. That proposal re-raises issues partly addressed during the Committee’s review
637 of proposed changes to Rule 45 during 2011-12.

638 Among the amendments to Rule 45 that the Committee proposed in mid-2011 was what is
639 now Rule 45(c) regarding the distance a subpoena can compel a witness to travel to testify at a
640 deposition, hearing, or trial. A conflict had emerged about interpretation of Rule 45 as then written.
641 Some courts had treated it as authorizing a subpoena for party witnesses to testify at trial even
642 though they would have to travel more than 100 miles from another state to do so. The most
643 prominent example of such an order was in an MDL proceeding – the *Vioxx* litigation. But it is
644 worth noting that the discussion in 2011-12 was not limited to MDL litigation, or particularly
645 focused on it. It was much more general.

646 The preliminary draft of amended Rule 45 published for public comment in August 2011
647 included a new Rule 45(c) that rejected the *Vioxx* interpretation that a subpoena could compel a
648 party witness to attend trial more than 100 miles from the place of his or her residence or
649 employment. But it also included an Appendix inviting comment on whether a new Rule 45(c)(3)
650 should be added to the amendment package:

651 (3) **Order to a party to testify at trial or to produce officer to testify at trial.**
652 Notwithstanding the limitations of Rule 45(c)(1)(A), for good cause the court may
653 order a party to appear and testify at trial, or to produce an officer to appear and
654 testify at trial. In determining whether to enter such an order, the court must
655 consider the alternative of an audiovisual deposition under Rule 30 or testimony by
656 contemporaneous transmission under Rule 43(a), and may order that the party or
657 officer be reasonably compensated for expenses incurred in attending the trial. The
658 court may impose the sanctions authorized by Rule 37(b) on the party subject to the
659 order if the order is not obeyed.

660 After the public comment period, the Committee decided not to include this amendment in the
661 package recommended for adoption.

662 This proposal could be revisited. It might be that such a provision could be expanded beyond
663 party officers to include others associated with a party. (Note that Rule 37(d)(1)(A)(i) authorizes
664 sanctions against a party when a party’s “officer, director, or managing agent” – or a person
665 designated under Rule 30(b)(6) – fails to appear for a properly noticed deposition.)

666 As a contrast, it might be noted that courts do have authority to order party attendance at
667 other events. For example, a deposition notice may direct a party to appear for deposition in the
668 forum district, and may order a party to attend a settlement conference in the forum. But the
669 question whether the justification for such orders also applies to attendance to testify live at trial
670 would have to be evaluated.

671 **E. Settlement Promotion/Review/Approval**

672 The Committee has just completed a thorough review of Rule 23(e)’s procedures for judicial
673 review of class-action settlements; those rule changes went into effect on Dec. 1, 2018. By rule,

674 such settlements are binding on class members unless they opt out, a feature that substantially
675 explains the requirement of judicial review of the merits of proposed settlements.

676 There is no similar rule authorizing or requiring judicial review of settlements in MDL
677 proceedings for fairness, or authorizing the court to bind parties in MDL proceedings to the terms
678 of a collective settlement, as Rule 23(e)(3) authorizes in class actions. But settlement in MDL
679 proceedings might be said to be the de facto equivalent of class action settlements governed by
680 Rule 23(e). Transferee judges have invested considerable efforts in achieving settlements –
681 sometimes “global” – and some appear to regard achieving resolution without the need for remand
682 as an important goal. On occasion, courts have invoked the idea of a “quasi class action” to support
683 some orders in MDL proceedings (often regarding attorney fee common fund arrangements and
684 “caps” on contingent fees). Certainly, traditionally at least, the experience has been that remands
685 are the exception rather than the rule. Probably settlements after centralization are an important
686 explanation for the low rate of remands. Perhaps the analogy to class actions is strong enough to
687 support rulemaking about some settlements in MDL litigation. One difference, of course, is that in
688 MDL proceedings each plaintiff has his/her own individual lawyer to review and advise on any
689 settlement proposal.

690 As noted in § 13.14 of Manual (4th), there are other situations in which court approval of
691 proposed settlements is required (e.g., shareholder derivative actions, actions in which a receiver has
692 been appointed, consent judgments involving antitrust actions initiated by the U.S., other specialized
693 representative actions). The sort of mass tort actions that have been the focus of discussions with
694 the Subcommittee about MDL procedures do not require such approval, and it is unclear whether
695 the Enabling Act would permit rules to mandate judicial approval. On the other hand, some MDL
696 proceedings include class actions, and therefore presumably involve judicial review of at least some
697 part of the settlement under Rule 23(e).

698 A beginning might be to focus on judicial involvement in efforts to negotiate settlement
699 terms to be offered to all claimants in an MDL proceeding. At least in some such proceedings, a
700 common set of settlement terms has been so offered, sometimes with a proviso that settlement
701 depends on participation by virtually all claimants. Such a situation might be analogized to
702 development of a proposed settlement of a Rule 23(b)(3) class action, with settlement premised on
703 certification of a class and individual class members permitted to opt out, and the defendants having
704 the option to back out of the settlement if the opt-outs reach a certain level. Even though an
705 analogous situation in an MDL proceeding would not involve a rule-based binding effect, as in a
706 class action, there might be a basis for a rule in light of the court’s role in development of the
707 settlement. Defining when that rule would apply could, however, present a considerable challenge;
708 it likely could not apply with regard to individual settlements or settlements by individual plaintiff
709 lawyers with “inventories” of claims.

710 Presently, Manual (4th) §§ 22.92-22.927 provide considerable advice for judicial review of
711 proposed settlements in mass tort class actions that might also guide MDL transferee judges.
712 Though settlement looms large in MDL proceedings, the Subcommittee has not heard many
713 proposals for rulemaking attention specifically keyed to settlement. One focus (mentioned in Part C
714 above) has been on common funds and awards to leadership counsel, usually following settlement.
715 Another suggestion is that the proposed terms for settlement in MDL proceedings should be made
716 public in the same way that Rule 23(e) requires that the terms of proposed class-action settlements
717 be made public.

718 Despite the absence of specific proposals for rules in MDL proceedings focused on
719 settlement, the general topic remains on the list of possible topics due to its importance.

720 **F. Third Party Litigation Funding (TPLF)**

721 The Subcommittee has heard a great deal about this topic, including during the George
722 Washington University event the day after the full Committee's Nov. 1 meeting. In terms of the
723 overall portfolio of the Subcommittee, it is important to note that TPLF is not distinctly, much less
724 uniquely, a feature of MDL litigation.

725 There seems little doubt that there has been very considerable growth in litigation funding.
726 A recent article referred to "a flood of money moving into litigation financing." Cadman, For the
727 World's Super Rich, Litigation Funding is the New Black, Bloomberg Law Class Action Reporter,
728 Aug. 28, 2018.

729 These developments have prompted interest in many quarters. A number of courts of appeals
730 have local rules requiring disclosure of the interests of such investors in the outcome of pending
731 cases, as have several district courts. These rules seem designed to identify situations that might call
732 for recusal. In addition, one state (Wisconsin) has by statute adopted a requirement of disclosure,
733 and one district (N.D. Cal.) has a local rule requiring disclosure in class actions. *See also* the
734 Litigation Funding Transparency Act of 2018, S. 2815, introduced on May 10, 2018.

735 There seem to be two prominent categories of litigation funding arrangements that have been
736 involved in MDL proceedings. One involves financing provided to lawyers and law firms. The
737 range of forms of financing of law firms is rather wide. At one end may be conventional bank lines
738 of credit to law firms, perhaps secured by the firm's receivables. At another end are loans to lawyers
739 or law firms keyed to one specific case, and non-recourse – keyed to success in that specific case.
740 In between are arrangements that may give a lender an interest in a portfolio of cases being handled
741 by a law firm. This description focuses on funding for the prosecution of cases, although it seems
742 that somewhat similar arrangements have been made with regard to the defense of litigation.

743 But third party litigation funding is a field that is evolving rapidly. Leading funders
744 emphasize that major corporations and major law firms use their services as methods of dealing with
745 litigation risk, on both the plaintiff and defendant sides. The variety of forms of such funding could
746 pose definitional challenges for a rulemaking effort. There is a viable argument for refraining from
747 developing a national rule on TPLF at this time, in favor of permitting the common law to develop
748 in this rapidly evolving area.

749 Regarding funding provided to lawyers, concerns have been raised about professional
750 responsibility rules concerning sharing of attorney fees with non-lawyers. The New York City Bar,
751 for example, has recently adopted the position that lawyers there may not enter into agreements with
752 funders that provide that payment to the funder is contingent on the lawyer's receipt of legal fees.
753 *See Formal Opinion 2018-5 (Litigation Funders' Contingent Interests in Legal Fees).*

754 A distinct form of litigation-related financing might be called "consumer" oriented. These
755 arrangements ordinarily arise between plaintiffs and lenders and do not directly involve lawyers or
756 involve issues of sharing legal fees. These loans may resemble payday loans, and have high rates
757 of interest. Plaintiffs' counsel who have discussed this form of financing with the Subcommittee
758 unanimously say that they urge their clients not to enter into such arrangements because the terms

759 are often onerous. Some states have adopted legislation to regulate such lending, focusing on such
760 things as interest rates and required disclosures.

761 Neither the professional responsibility nor the consumer protection aspects of TPLF seem
762 suited to attention within the civil rules. Two decades ago, the Standing Committee spent
763 considerable time studying the possibility of Federal Rules of Attorney Conduct, but eventually
764 decided not to pursue this possibility. Though TPLF is a much narrower topic than was under study
765 then, possible professional responsibility questions do not seem to be central to the rulemaking
766 effort. Neither do the “consumer protection” features of some state legislation seem attuned to an
767 Enabling Act effort.

768 Even if such efforts were in general suitable objectives for Enabling Act attention, it must
769 be remembered that TPLF is not uniquely focused on MDL proceedings, and efforts focused on
770 MDL proceedings would not naturally lead to TPLF measures. In terms of the financing agreements
771 some lenders reach with lawyers, it seems that most of the plaintiff-side lawyers the Subcommittee
772 has heard from do not enter into such agreements. But “consumer” agreements may occur in MDL
773 proceedings, just as they occur in other litigation. Indeed, on occasion, when an MDL proceeding
774 has reached the settlement phase the financial commitments made by individual plaintiffs can leave
775 them “upside down,” unable to cover the indebtedness with the payout afforded by the proposed
776 settlement.

777 Initial disclosure possibility: In 2014, the Committee was presented with a proposal to add
778 certain TPLF arrangements to Rule 26(a)(1)(A)(iv). The proposal was advanced as consistent with
779 the existing requirement that defendants disclose insurance agreements that might cover a judgment
780 in the action. Essentially the same disclosure proposal was renewed in 2017.

781 The existing disclosure provision in Rule 26(a)(1)(A)(iv) is limited to an agreement by “an
782 insurance business” to indemnify the defendant. Drafting issues would likely be presented to adapt
783 to the TPLF situation. It does not seem that the disclosure possibility is designed to reach so far as,
784 for example, applying to a relative’s loan to a plaintiff for living expenses or even filing fees, with
785 the explicit or implicit expectation that the loan would be repaid only if the litigation were
786 successful.

787 Need for disclosure: The proposal to require disclosure of TPLF is justified in part as
788 enabling defendants to know what and whom they are up against in the litigation. Some proponents
789 of disclosure have told the Subcommittee that they are not interested in the amount or terms of the
790 funding, but only the fact of funding and the identity of the funder.

791 Recusal concerns: As noted above, there are local rules in many courts of appeals and
792 district courts that seem designed to enable judges to determine whether a funder’s interest might
793 provide a ground for recusal. Although some are skeptical about the frequency with which federal
794 judges have invested in funders (supposedly often hedge funds), disclosure for this purpose would
795 seem satisfied with disclosure of the fact of funding and the identity of the funder.

796 Disclosure of the terms of the funding agreement: A current amendment proposal would
797 require that the entire funding agreement be disclosed to the opposing party. This disclosure has
798 been justified in part on the ground that the agreement may either give the funder some say in the
799 decision whether to settle, or provide that the funder can withhold further funds in a way that might
800 make settlement likely or unavoidable. At least for funding provided to lawyers, such arrangements

801 might run afoul of professional responsibility prohibitions on lawyers consigning control of
802 litigation to non-lawyers. Whether a procedural rule is a suitable way of addressing that concern
803 is debatable.

804 Discovery about funding arrangements: A major concern of those resisting disclosure is that
805 disclosure will lead to time-consuming and expensive discovery efforts. These efforts, in turn, might
806 intrude into work product because litigation counsel might sometimes provide candid reports about
807 litigation prospects to the funder, and the funder may offer litigation evaluations and advice.

808 Aspects of TPLF that may be of particular importance in MDL proceedings: As already
809 noted, TPLF is not distinctively a feature of MDL litigation, but is found in many sorts of litigation.
810 But some aspects of TPLF may be particularly important in MDL proceedings.

811 One such feature is the possibility that some individual plaintiffs in MDL proceedings who
812 obtain “consumer” financing might find themselves “upside down” when settlement crystallizes,
813 particularly if the originally favorable prospects of the litigation have been scaled back. Though that
814 can happen in any litigation, it can be a particular challenge to achieving settlement in some MDL
815 proceedings.

816 Another is that some “new entrants” to leadership positions (*see* Part C) may need funding
817 in order to participate even though it seems that well-established leadership presently may not. This
818 issue would focus on TPLF financing of lawyers or law firms, rather than individual plaintiffs.

819 A different concern that might be important in MDL litigation but not significant in ordinary
820 litigation is the burden and difficulty of providing disclosure for “consumer” type funding obtained
821 by individual plaintiffs. As noted above, the plaintiff-side counsel the Subcommittee has talked to
822 uniformly say they urge their clients not to enter into such transactions, but they recognize that
823 clients sometimes do so nevertheless. For larger MDL proceedings, the burden of monitoring and
824 disclosing as to hundreds or thousands of individual plaintiffs could be considerable. And the
825 question whether that burden falls on the PSC or only on the IRPAs might be difficult to answer.

826 Concerns about control of litigation and settlement: As suggested above, one prime concern
827 is whether funders might inappropriately control litigation decision-making. That concern is a
828 reason for rules against fee-sharing by lawyers. Litigation funders who have addressed the
829 Subcommittee emphasize that they do not have or want any control over the litigation. Indeed, some
830 say they could not come close to having the personnel to review and monitor the day-to-day progress
831 of litigation even if they wanted to and had authority under their agreements to do so.

832 Proponents of disclosure counter that neither they nor the courts should have to take such
833 assurances at face value. They also point to examples they contend raise concerns that some funders
834 may be exercising or able to exercise substantial control – or at least influence – over settlement
835 decisions.

836 Disclosure to the court in camera: One way to address some of the concerns that have
837 emerged but avoid some of the problems that have been identified would be a rule calling for
838 disclosure of litigation funding (properly described) to the court in camera. That need not lead to
839 a discovery battle, but would enable the court to be fully apprised of the various forces bearing on
840 potential settlement and continued litigation as well as recusal information. In the ongoing MDL
841 litigation about opioids the court has ordered such disclosure.

848

II. Subcommittee on Social Security Disability Review Actions

849 The Social Security Disability Review Subcommittee’s task has been described in earlier
850 reports. The Subcommittee was formed to study a proposal made by the Administrative Conference
851 of the United States and strongly supported by the Social Security Administration. The proposal asks
852 that “the Judicial Conference develop for the Supreme Court’s consideration a uniform set of
853 procedural rules for cases under the Social Security Act in which an individual seeks district court
854 review of a final administrative decision of the Commissioner of Social Security pursuant to
855 42 U.S.C. § 405(g).” Section 405(g) provides for review “by a civil action.” The provisions of the
856 proposal include rules providing that the complaint be substantially equivalent to a notice of appeal;
857 that the administrative record be “the main component” of the Commissioner’s answer; and that the
858 review be first focused by the claimant’s opening merits brief.

859 The arguments made to support the proposal draw from the sheer numbers of disability
860 review actions and the disparity of district-court practices. Some 17,000 to 18,000 review actions
861 are filed each year. They count for approximately 7% of the federal docket. But the methods used
862 to process them vary widely from one court to another. At least 62 local district rules for these
863 actions have been identified, and they are not at all alike. The Commissioner is represented by the
864 local United States Attorney, but in many districts the bulk of the work is done by Social Security
865 Administration (SSA) attorneys who frequently practice in more than one district and who need to
866 become familiar with distinctive local practices. The SSA estimates that adopting a uniform set of
867 good national rules could free tens of thousands of hours of staff attorney time for more productive
868 uses. Beyond that, the SSA believes that many local practices are counter-productive. One practice
869 encountered in some courts requires the parties to prepare a joint statement of facts, a time-
870 consuming exercise that may obscure the issues more than advance them. Summary judgment is
871 used in several districts to frame the review, a practice that proves useful in requiring citation to
872 specific facts in the administrative record but can be distracting because other aspects of Rule 56
873 procedure – including the inapposite standard for decision – are not suited to review on an
874 administrative record. Nor is it only the SSA that would benefit from good, uniform procedures.
875 Claimants would benefit as well, including those who attempt to proceed pro se. And claimants’
876 representatives who practice in different courts also would benefit.

877 The Subcommittee has had only preliminary discussions about the ultimate question whether
878 it will be desirable to recommend any new rules. While SSA supports comprehensive new rules,
879 DOJ is neutral and bar groups of claimants’ representatives do not believe they are needed. An
880 immediate caution is one that confronts any proposal to adopt rules of procedure for a specific
881 substantive area. Deep knowledge of the substantive law is needed to craft rules specifically adapted
882 to its needs, knowledge that can be gained only from those who work regularly with that law.
883 Important considerations may be lost in translating from substantive experts to procedure
884 generalists. The more specific the rules, the greater the loss of the flexibility to adapt to individual
885 cases that characterizes the transsubstantive character of the Civil Rules. More than one of those
886 who have advised the Subcommittee have advised that a uniform set of national rules could be a
887 good thing, but only if they are good rules.

888 There is a longer-range concern as well. Powerful justifications can be found for the three
889 separate sets of rules that now are integrated with the Civil Rules. The Supplemental Rules for
890 Admiralty or Maritime Claims and Asset Forfeiture Actions began as a necessary component of
891 merging the formerly separate Admiralty Rules into the Civil Rules. They carry forward distinctive
892 parts of once separate rules that respond to the historically distinctive characteristics of admiralty

893 practice. The Rules Governing Section 2254 Cases and the Rules Governing Section 2255
894 Proceedings respond to the blended civil and criminal characteristics of those proceedings: Rule 12
895 of the § 2254 Rules invokes the Civil Rules when not inconsistent with the § 2254 Rules or statutory
896 provisions, while Rule 12 of the § 2255 Rules similarly invokes both the Civil Rules and the
897 Criminal Rules. Similarly powerful reasons should be demanded to begin a process of expansion that
898 could easily invite ever more requests for separate and specialized rules of procedure.

899 Even if not cast as a separate set of supplemental rules, adding to the Civil Rules provisions
900 for specific subject matters runs the same risks. And, in the words of one participant, adopting Civil
901 Rules may be worse than adopting supplemental rules because it begins a process of turning the
902 Civil Rules into a code for special interests.

903 The Subcommittee has not yet decided whether any rules that might be proposed should be
904 framed as supplemental rules or as rules integrated into the body of the Civil Rules. If they are to
905 be placed in the Civil Rules, the location may be influenced by the number of rules. The most recent
906 draft is framed as three rules, a format that could neatly fill the space opened by the abrogation of
907 former Rules 74, 75, and 76 in 1997. Another possibility is to draft the same provisions as a single
908 rule – in the current version it would not be especially long – and cast it either as Rule 74 or as
909 Rule 71.2 to follow the provisions of Rule 71.1 for condemnation actions.

910 The scope of any rules that might be proposed is gradually nearing a consensus in the
911 Subcommittee. The current draft applies the rules only to “an action in which the only claim is made
912 by an individual or personal representative for review on the administrative record * * *.” The vast
913 majority of review actions fit this model. A small number venture further. There even have been a
914 few class actions that assert jurisdiction under § 405(g). Some early drafts applied the social security
915 rules to the part of a more complex action that involves review of a single claimant’s arguments
916 about substantial record evidence, leaving other parts to the regular Civil Rules. The claims that
917 venture beyond the record may at times justify active pretrial management, discovery, and summary
918 judgment. But if the parties and court use those and other procedures that go beyond appeal-like
919 review on the administrative record, it may make sense to use those procedures for the case as a
920 whole. The choice to apply the social security rules only in pure administrative review actions
921 reflects that view. But it may be possible to carry forward with a suggestion in the draft Committee
922 Note that the draft pleading rules can be applied to the claim for review on the administrative record.
923 And the Subcommittee will explore the question whether the reference to “an individual or personal
924 representative” accurately captures all the actions that might be fit into the rules. If there are
925 circumstances in which two or more people can seek review of a single administrative decision on
926 a single administrative record, the scope provision might be changed to include such actions.

927 Successive Subcommittee drafts have reduced the subjects addressed by the review rules.
928 They now focus on pleading, briefing, and timing.

929 The pleading rules have not fully resolved the tensions between two models. One model,
930 favored by the original proposal, clings close to appeal procedure. The complaint would be limited
931 to a simple statement identifying the decision to be reviewed, much as a notice of appeal. The
932 answer would consist of the administrative record. The actual issues would be identified and argued
933 in the briefs. The competing model would allow the plaintiff to embellish the fact and law arguments
934 in the complaint. The answer would include the administrative record, as required by statute, and
935 any affirmative defenses. Further discussion will focus on the next step: whether the SSA must
936 respond to all the allegations in the complaint that go beyond simple assertions of error in law or

937 fact. The SSA is concerned about the burdens entailed in combing the record at the pleading stage,
938 and also fears that occasional failures to deny will result in unintended admissions under Rule
939 8(b)(6). The draft presented to the Committee in November split the difference, allowing the
940 Commissioner to respond to allegations in the complaint but also providing that “Rule 8(b) does not
941 apply.” That compromise seems an odd departure from ordinary practice, and may not survive
942 further scrutiny.

943 Other issues remain with the pleading rules. Attention continues to focus on a provision that
944 would require the plaintiff to state an address and the last four digits of the social security number.
945 These elements raise substantial concerns about privacy and identity theft. The SSA insists that it
946 needs this information to make sure that it identifies the underlying administrative decision and
947 record – hundreds of thousands of claims annually reach the administrative law judge hearing stage,
948 multiple claimants may have the same names, and possible alternatives will not do the job. The SSA
949 will be pressed to elaborate this argument.

950 The draft rules include a provision that eliminates traditional Rule 4 service of summons and
951 complaint. Instead, the court notifies the Commissioner by transmitting a Notice of Electronic
952 Filing. Some districts have adopted this procedure with the consent of the Social Security
953 Administration and the local United States Attorney. It works well. It has been approved, often
954 enthusiastically, in initial reviews of the draft rules. Small details remain to be resolved, but the
955 concept seems secure.

956 The briefing rule provides for the plaintiff’s brief, followed by the Commissioner’s brief,
957 with an opportunity for a plaintiff’s reply brief. All briefs are required to support fact arguments by
958 citations to the record. Two questions remain open.

959 The first question is whether the plaintiff should be required to accompany the brief with a
960 motion for the relief requested in the complaint. The request could easily be included in the brief.
961 But the draft provides for the motion. Under Rule 7(b), a motion is the traditional means to make
962 a request for a court order. The motion will provide a useful flag that focuses the court on the case.
963 And experience suggests that the motion will be no more than a page or two. Whether to require a
964 motion remains a subject for further discussion.

965 The second question is timing. The draft allows the plaintiff 30 days after the answer is filed,
966 and the Commissioner 30 days after service of the plaintiff’s motion and brief. These periods were
967 selected as a means to promote prompt disposition. But they may prove unrealistic. Periods of 60
968 days may be substituted, although that would be a slower track than is routinely provided for
969 briefing dispositive motions.

970 A third aspect of briefing has not really proved to be a question in Subcommittee or
971 Committee discussions. The Social Security Administration would like provisions that set page
972 limits. Although the Appellate Rules set page or word limits, the Civil Rules have not addressed
973 briefs, much less page limits. This is an issue that seems better left to local district practice and
974 preferences absent any showing of pressing problems.

975 The Subcommittee has worked actively with interested groups. In between the April and
976 November meetings of the Civil Rules Committee it held a conference call with representatives of
977 the SSA and a separate conference call with a group of claimants’ representatives gathered by the
978 American Association for Justice. It has received comments from another organization of claimants’

979 representatives, and has received comments from some of these organizations and from the SSA on
980 the current draft and the discussion at the November meeting. It will continue to gather information
981 to address whether it is desirable to go beyond the information-gathering stage to begin developing
982 specific rule proposals.

983 The draft considered at the November Committee meeting is attached to illustrate the basic
984 current approach. Further revisions are being made. If this work succeeds in producing a thoroughly
985 reviewed draft, the Subcommittee may be in a position by the April 2019 Advisory Committee
986 meeting to recommend whether the draft offers sufficient promise to justify further work to prepare
987 draft rules that might be recommended for publication.

988 Rules 74, 75, 76

989 **Rule 74. Scope**

990 (a) Section 405 (g). [This rule applies] [Rules 74,75, and 76 apply] to an action in which the
991 only claim is made by an individual or personal representative for review [on the
992 administrative record] of a final decision of the Commissioner of Social Security under 42
993 U.S.C. § 405(g).

994 (b) Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure also apply to a
995 proceeding under [this rule] [Rules 74, 75, and 76], except to the extent that they are
996 inconsistent with [this rule] [these Rules].

997 Committee Note

998 This rule establishes a simplified procedure that recognizes the essentially appellate character
999 of claims to review a final decision of the Commissioner of Social Security under 42 U.S.C.
1000 § 405(g). An action is brought under § 405(g) for this purpose if it is brought under another statute
1001 that explicitly provides for review under § 405(g). See[, for example,] 42 U.S.C. §§ 1009(b),
1002 1383(c)(3), and 1395w-114(a)(3)(B)(iv)(III).

1003 Most actions under § 405(g) are brought by a single plaintiff against the Commissioner as
1004 the sole defendant and seek only review on the administrative record as provided by § 405(g). This
1005 rule governs only these actions, and is supplemented by the general provisions of the Civil Rules
1006 that are not inconsistent with this rule.

1007 Some [— apparently very few —] actions, however, may plead a claim for review under
1008 § 405(g) but also join more than one plaintiff, or add a claim or defendant for relief beyond review
1009 on the administrative record. Such actions fall outside this rule and are governed by the other Civil
1010 Rules alone. [But pleading the § 405(g) review parts of such actions may properly rely on the model
1011 provided by Rule [75].]

1012 **Rule 75. Initiating the Action; Complaint; Service; Answer**

1013 (a) The Complaint. The complaint in an action for review under § 405(g) must:

1014 [(1) Identify the final decision to be reviewed;]

1015 (1) Identify the plaintiff by name, address, and the last four digits of the social security
1016 numbers of the plaintiff and the person on whose behalf—or on whose wage record
1017 —the plaintiff brings the action;

1018 (2) Identify the titles of the Social Security Act under which the claims are brought;

1019 (3) Name the Commissioner of Social Security as the defendant;

- 1020 (4) State [generally {and without reference to the record}] that the final administrative
1021 decision is not supported by substantial evidence [or must be reversed for errors of
1022 law]; and
- 1023 (5) State the relief requested.
- 1024 (b) Serving the Complaint. The court must[, through its Case Management and Electronic Case
1025 Files system,] notify the Commissioner [of Social Security] of the commencement of the
1026 action by transmitting a Notice of Electronic Filing [with a link to the complaint] [to the
1027 Commissioner,] to the [appropriate] regional office of the Social Security Administration,
1028 and to the United States Attorney for the district. The plaintiff need not serve a summons and
1029 complaint under Rule 4.
1030
- 1031 (c) The Answer; Motion; Voluntary Remand; Time.
- 1032 (1) (A) {*Alternative 1*} The answer must include a certified copy of the
1033 administrative record and any affirmative defenses under Rule 8(c). Rule 8(b)
1034 does not apply.
1035 {*Alternative 2*} A certified copy of the administrative record and a statement
1036 of affirmative defenses [under Rule 8(c)] suffices as an answer.
1037 (B) The answer must be served on the plaintiff within 60 days after notice of the
1038 action is given under Rule 75(b) unless a later time is provided by
1039 Rule 75(c)(2)(C).
- 1040 (2) (A) A motion under Rule 12 must be made within 60 days after notice of the
1041 action is given under Rule 75(b).
1042 (B) A motion to voluntarily remand the case to the Commissioner may be made
1043 at any time.
1044 (C) Unless the court sets a different time or a later time is provided by
1045 Rule 75(c)(1)(B), serving a motion under Rule 75(c)(2)(A) or (B) alters the
1046 time to answer as provided by Rule 12(a)(4).

1047 Committee Note

1048 Section 405(g) provides for review of a final decision “by a civil action.” Rule 3 directs that
1049 a civil action is commenced by filing a complaint. In an action that seeks only review on the
1050 administrative record, however, the complaint is similar to a notice of appeal. The elements specified
1051 in Supplemental Rule 75(a) satisfy Rule 8(a). Jurisdiction is pleaded by identifying the action as one
1052 brought under § 405(g). A bare assertion that the Commissioner’s decision is not supported by
1053 substantial evidence suffices to state a claim—the facts are developed in the administrative record
1054 and, along with the law, are known to the Commissioner. Stating the relief requested provides the
1055 proper focus.

1056 Rule 75(b) provides a means for giving notice of the action that supersedes Rule 4(i)(2). The
1057 Notice of Electronic Filing sent by the court suffices. The plaintiff need not serve a summons and
1058 complaint under Rule 4.

1059 Rule 75(c)(1)(A) builds from this part of § 405(g): “As part of the Commissioner’s answer
1060 the Commissioner of Social Security shall file a certified copy of the transcript of the record
1061 including the evidence upon which the findings and decision complained of are made.” The record

1062 suffices as an answer unless the Commissioner wishes to plead any affirmative defenses. Rule 8(b)
1063 does not apply, but the Commissioner is free to answer any allegations that the Commissioner may
1064 wish to address in the pleadings.

1065 The time to answer is set at 60 days after notice of the action is given under Rule 75(b)
1066 unless a later time is provided under Rule 75(c)(2)(C). The time to file a motion under Rule 12 is
1067 set at 60 days after notice of the action is given under Rule 75(b). If a timely motion is made under
1068 Rule 12, the time to answer is governed by Rule 12(a)(4) unless the court sets a different time.

1069 The Commissioner at times seeks a voluntary remand for further administrative proceedings
1070 before the action is framed for resolution by the court on the administrative record. Rule 75(c)(2)(B)
1071 recognizes that the Commissioner may move to remand before or after filing and serving the record.

1072 **Rule 76 Plaintiff’s Motion for Relief; Briefs**

1073 (a) Plaintiff’s Motion for Relief and Brief. The plaintiff must serve on the Commissioner
1074 a motion for the relief requested in the complaint and a [supporting] brief within 30
1075 days after the answer is filed or 30 days after the court disposes of all motions filed
1076 under Rule 75(c)(2)(A) or (B), whichever is later. The brief must support arguments
1077 of fact by citations to the [parts of the] record [on which the plaintiff relies].

1078 (b) Defendant’s [Response] Brief. The defendant must serve a response brief on the
1079 plaintiff within 30 days after service of the plaintiff’s motion and brief. The brief
1080 must support arguments of fact by citations to the [parts of the] record [on which the
1081 defendant relies].

1082 (c) Reply Brief[s]. The plaintiff may, within 14 days of service of the defendant’s brief,
1083 serve a reply brief on the defendant.

1084 **Committee Note**

1085 Rule 76 addresses the procedure for bringing on for decision a § 405(g) review action that
1086 has not been remanded to the Commissioner before review on the record. The plaintiff serves a
1087 motion for the relief requested in the complaint or any amended complaint. The motion need not be
1088 lengthy; it is supported by a brief that is similar to a brief supporting a motion for summary
1089 judgment, citing to the parts of the administrative record that support the argument that the final
1090 decision is not supported by substantial evidence. The Commissioner responds in like form. A reply
1091 brief is allowed. The times set for these briefs may be revised by the court when appropriate.

1092

III. Consent to Magistrate Judge: Rule 73(b)(1)

1093 Three questions have been raised about the procedure for consenting to referral of an action
1094 for trial before a magistrate judge. The first is the problem that launched this subject, arising from
1095 an uncorrectable feature of the CM/ECF system. The system defeats the provision of Rule 73(b)(1)
1096 that allows a district judge or magistrate judge to be informed of a party's consent only if all parties
1097 consent. The second asks whether the rule should be amended to address the means of securing
1098 consent in courts that make initial referrals to magistrate judges as part of the random assignment
1099 of cases as they are filed. This question remains alive in Committee deliberations. The third asks
1100 whether the rule should address the issues that arise when a new party is joined after the original
1101 parties have consented to a referral. That question has been put aside.

1102 Anonymity was adopted in Rule 73(b)(1) to implement the command of 28 U.S.C. § 636(c)
1103 that "Rules of court for the reference of civil matters to magistrate judges shall include procedures
1104 to protect the voluntariness of the parties' consent." The problem caused by the design of the
1105 CM/ECF system was discussed at the June 2018 Standing Committee meeting. When a party files
1106 an individual consent the system automatically sends a notice to the judge assigned to the case. So
1107 much for anonymity, or at least the assurance of anonymity. Apparently it is not feasible to program
1108 this feature out of the CM/ECF system. Nor are clerks' offices enthusiastic about the prospect of a
1109 rule calling for parties to lodge individual consents with the clerk, to be filed by the clerk only if all
1110 parties consent. The administrative burden, with the prospect of inevitable lapses, seems too much.

1111 The CM/ECF problem could be addressed by a relatively simple change in Rule 73(b)(1):

1112 To signify their consent, the parties must jointly ~~or separately~~ file a statement
1113 consenting to the referral.

1114 The method of securing joint consent could be left to resolution by local rules or practice.
1115 The Southern District of Indiana has established a practice that provides a consent form to the
1116 plaintiff when an action is filed. If the plaintiff wishes a referral, the plaintiff seeks consents from
1117 the other parties and files the joint consent form if all consent.

1118 It may be desirable to offer slight redrafting of the present rule text. One addition that has
1119 met some favor would be to add an explicit reminder: "No party may file a consent filed by fewer
1120 than all parties." That would provide guidance for pro se parties, and perhaps a caution to any party
1121 that might be tempted to file a separate consent.

1122 The Committee plans to develop this proposal for presentation at the June Standing
1123 Committee meeting.

1124 The means of securing consent after a random initial referral to a magistrate judge present
1125 more complex questions. Some courts now place magistrate judges in the rotation for random initial
1126 assignment of cases. This practice may be growing, and does not of itself seem a subject for review
1127 by the Civil Rules Committee. But it may pose questions about the means to implement the statutory
1128 command that rules for referral "shall include procedures to protect the voluntariness of the parties'
1129 consent."

1130 As with referral after initial assignment to a district judge, it is necessary to ensure that any
1131 party may undo an initial referral to a magistrate judge by withholding consent. It remains uncertain,

1132 however, whether the text of Rule 73(b) need address this question separately. The initial language
1133 of Rule 73(b) seems to cover all circumstances of referral or assignment to magistrate judges. Rule
1134 text that requires joint consent could suffice — if a joint consent is not filed, it is up to the court to
1135 withdraw the reference, **no matter how it was first initiated**. The Committee Note might say as much,
1136 without offering any advice on the means to effect withdrawal.

1137 Consideration of the initial random referral practice would be shaped by surveying consent
1138 practices in the courts that follow this practice. It may be that satisfactory practices are followed
1139 now, leaving only the common question whether to leave things as they are or whether instead to
1140 capture the best practice in national rule text. The clerk’s notice to the parties of their opportunity
1141 to consent, for example, could be framed in a way that addresses consent when there has been an
1142 automatic referral to a magistrate judge for all purposes and also when there has not. Before
1143 automatic withdrawal of an automatic reference for lack of a joint consent, the Rule 73(b)(2)
1144 reminder could be framed to reflect the initial reference.

1145 The Committee will consider this issue further, recognizing that any exploration of the
1146 various means of utilizing magistrate judges among the district courts could involve sensitive issues.

1147 The decision not to take up questions of consent by late-added parties reflects two concerns.
1148 First, although a number of decisions address these issues, there is no apparent sense that the
1149 problems are sufficiently serious to require explicit rule provisions. Second, the question arises in
1150 several different contexts. New parties may be joined under the rules for permissive joinder of
1151 plaintiffs or defendants, or under Rule 19 for mandatory joinder, or as added parties to crossclaims
1152 or counterclaims, or as third party defendants, or as intervenors. There even has been some dispute
1153 about the role of class members once a class is certified (consent does not seem to be required).
1154 Joinder might come soon after the referral, or only after substantial development of the case before
1155 the magistrate judge. There may be a risk that joinder decisions could be affected by a desire to
1156 defeat the referral. Crafting a good rule to address these issues would present a real challenge.

1157

IV. Disclosure Statements

1158 Expanding the scope of the disclosure statements required by Civil Rule 7.1 and analogous
1159 Appellate, Bankruptcy, and Criminal Rules is the subject of several suggestions. The suggestion to
1160 revise Rule 7.1 to include a nongovernmental corporation that seeks to intervene, so as to parallel
1161 Appellate Rule 26.1 and proposed Bankruptcy Rule 8012(a), will likely be proposed for publication.
1162 The first disclosure statement rules were crafted by a process that sought to achieve rules as similar
1163 as possible in light of differences in the contexts presented by each set of rules. Maintaining
1164 uniformity remains a desirable goal. The other suggestions, and the recent revisions of the Appellate
1165 and Bankruptcy Rules on different schedules, raise the question whether the time may have come
1166 to take a broader, all-committees review. No recommendation is offered on the broader review
1167 question. It is identified only to open an initial discussion.

1168

A. Rule 7.1

1169 The task of making Rule 7.1 parallel to the new Appellate Rule and proposed Bankruptcy
1170 Rule is easily accomplished:

1171 (a) A nongovernmental corporate party and a nongovernmental corporation that
1172 seeks to intervene must file 2 copies of a disclosure statement that: * * *

1173 Although it is possible to imagine arguments that would distinguish civil actions from appeals and
1174 bankruptcy proceedings, none seem persuasive. Recusal on a motion to intervene may be as
1175 important as recusal after intervention is granted.

1176 The Bankruptcy Rules Reporter has advised that there is no need to add to Rule 7.1 a
1177 provision similar to the Appellate Rule 26.1 provision for disclosure of debtors in bankruptcy cases.
1178 The Bankruptcy Rule will carry over to proceedings in the district court.

1179 It might be possible to proceed with this proposal as a technical or conforming amendment
1180 that simply picks up identical proposals that have been examined in two separate periods of
1181 publication and comment. Nonetheless, it seems better to follow the ordinary path of publication and
1182 comment. Something unexpected might yet appear. Beyond that possibility, there may not be any
1183 urgency about this proposal. If a broader examination of disclosure statements is to be undertaken,
1184 Rule 7.1 might be held back for inclusion in a broader package rather than publish proposed
1185 amendments only a year or two apart.

1186

B. Parties' Full Names and Addresses

1187 The National Association of Professional Background Screeners has proposed a rule that
1188 would require natural persons who are parties to any civil action or criminal prosecution to disclose
1189 their full names and addresses. This information is described as not sensitive, but the proposal is to
1190 make it available only as a search criterion in the PACER system so that it can be found only in
1191 response to a search that identifies the full name and address. The purpose is to support more
1192 complete reports to prospective employers, landlords, and other customers. The Committee was not
1193 able to identify any procedural purpose that would be served by the proposal. The Criminal Rules
1194 Committee rejected a similar proposal made in 2005, and has rejected it again. It has been removed
1195 from the Civil Rules agenda.

1196 **C. Diversity Jurisdiction: Members and Owners of LLCs, Trusts, and Entities**

1197 Judge Thomas Zilly has proposed a rule that would require “disclosure of the names and
1198 citizenship of any member or owner of an LLC, trust, or similar entity.” The proposal grows out of
1199 his experience in a case that went to judgment after a 10-day trial, only to be remanded on appeal
1200 for a determination of the citizenship of four LLC parties, including the plaintiff and three
1201 defendants.

1202 Looking first to LLCs, Rule 8(a)(1) may not provide satisfactory assurances that diversity
1203 jurisdiction is accurately pleaded. An LLC takes the citizenship of each of its owners. If an owner
1204 is itself an LLC, all of its owners must also be counted. Still deeper layers of owners and citizenships
1205 are possible. A plaintiff LLC ordinarily should have a good idea of the citizenships attributed to it.
1206 But even if that is true, the plaintiff may not have access to comprehensive information about the
1207 citizenship of a defendant LLC. Ignorance may be bliss if a diversity-destroying citizenship is never
1208 uncovered, but it can lead to waste, and perhaps great waste, if it is uncovered – or revealed after
1209 a deliberate cover-up – after substantial proceedings have been had. Rather than impose the burden
1210 of defining jurisdiction on the uncertain foundation of Rule 8(a)(1), a disclosure requirement that
1211 requires each party to reveal its own citizenships may be more efficient.

1212 Since diversity jurisdiction is a problem in civil actions, it may be that a disclosure
1213 requirement would be lodged in the Civil Rules and perhaps in the Appellate Rules as well.

1214 The proposal extends beyond LLCs to a “trust or similar entity.” A wide variety of
1215 organizations take on the citizenship of their members for diversity purposes. It may prove difficult
1216 to develop a workable catalogue, even if the purpose is confined to ensuring the basis for diversity
1217 jurisdiction.

1218 Developing a catalogue of noncorporate entities might take on a different color if the purpose
1219 is to support better-informed recusal decisions. The cross-committees subcommittee that developed
1220 the initial disclosure statement rules considered local rules and found a wide array of details. Some
1221 rules extended to partnerships, limited partnerships, joint ventures, business trusts, and on through
1222 occasionally exotic entities. Some simply sought identification of anyone with a financial interest
1223 in the outcome of the action. A similar variety of local rules persists.

1224 The challenge of identifying suitable subjects for disclosure statements may not be easily
1225 met. Lengthy itemization might generate substantial volumes of essentially irrelevant information.
1226 Reliance on something as open-ended as “financial interest in the outcome” could again lead to more
1227 disclosure than anyone wants or needs, and pose awkward questions for those who are not familiar
1228 with recusal standards. A party’s dependent children, parents, siblings, spouse, or others, for
1229 example, could easily qualify as financially interested in the outcome.

1230 Whether disclosure for purposes of informing recusal decisions should be reexamined may
1231 depend on experience in the courts. Is there any sense that, without expanded disclosure statements,
1232 judges will often fail to recognize grounds for recusal? It might be argued that there is little need for
1233 disclosure so long as the judge is unaware of the interests that may support recusal, but the problem
1234 of appearances remains.

1235

D. Third Party Litigation Funding

1236 The work of the MDL Subcommittee, described earlier in this Report, illustrates another
1237 dimension of disclosure. Third party litigation financing arrangements are proliferating. Some local
1238 rules may be read to require disclosure now. Courts have ordered or invited disclosure in a variety
1239 of forms in several different settings. Funding arrangements take a wide variety of forms, include
1240 many different kinds of terms, and reach across many types of litigation both great and ordinary.
1241 Several proposals have been made to require disclosure, ranging from modest proposals to disclose
1242 simply the fact of funding and the funder's identity to providing copies of the funding agreement
1243 to all parties. A disclosure statement may provoke demands for discovery, with inevitable disputes
1244 about privilege and work-product protection. This topic was originally assigned to the MDL
1245 Subcommittee because MDL proceedings are one of the contexts in which it is openly encountered.
1246 The Subcommittee has gained substantial information, drawn from several sources and conferences,
1247 but if anything this information serves mostly to highlight the need for still more information.

1248 Third party financing can occur for the first time on appeal. It has emerged in bankruptcy
1249 practice. Disclosure statement questions will arise at least in these areas. Some civil defendants have
1250 found third party financing attractive. Whether that presages inventive means of funding criminal
1251 defense expenses remains to be seen; the inventiveness of funders suggests that this possibility
1252 cannot be discarded out of hand.

1253 Disclosure of third party funding arrangements may be sought for reasons independent of
1254 recusal. The reasons often will prove controversial, and are likely to verge into arguments for
1255 substantive regulation. Problems also will arise in relation to the role to be played by rules of
1256 professional conduct and responsibility.

1257 Related issues will involve the difficulty of defining the kinds of third party funding
1258 arrangements that might be included in a disclosure rule. There seems to be general agreement that
1259 a loan from a family member need not be disclosed, even if repayment is expressly or tacitly
1260 dependent on the outcome. So too, a general loan or line of credit extended to a law firm seems an
1261 unlikely candidate for disclosure. But it seems likely that any inquiry should extend beyond partial
1262 sale of a claim or a nonrecourse advance to fund a single specific litigation.

1263 The value of disclosure for recusal purposes does not encounter similar concerns, but may
1264 not be as simple as it seems. Most judges agree that it is quite unlikely that a judge will invest in any
1265 of the prominent third party funding organizations. But at least for the moment, third party funding
1266 is expanding at a rapid pace. It may come to include more traditional lenders.

1267 This bare sketch illustrates the reasons for anticipating that any consideration of disclosure
1268 statements for third party litigation financing will require much effort and will involve continuing
1269 attempts to remain informed of evolving practices. There is a viable argument for refraining from
1270 developing a uniform national rule at this time in favor of permitting the common law to continue
1271 to develop in this rapidly evolving area.

1272 The difficulty of confronting disclosure statements for third party financing could lead in
1273 different directions. It could support deferring any study of third party financing disclosure while
1274 taking up more familiar disclosure statement questions now. The familiar questions could include
1275 proposals aimed at the need for informed recusal decisions, those aimed at determining diversity
1276 jurisdiction, or both. Or the challenges posed by third party funding could support deferring all

1277 further work on disclosure statements, apart from bringing Rule 7.1 into line with the new Appellate
1278 and Bankruptcy Rules.

1279 These questions are posed for initial discussion without any recommendation as to what steps
1280 might be undertaken beyond a conforming amendment to Rule 7.1. It is likely that a Rule 7.1
1281 amendment will be proposed for publication next summer unless further consideration provides
1282 reasons to blend it into a larger project.

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V. Final-Judgment Appeals in Consolidated Actions

The Committee has taken up consideration of the effect on final-judgment appeal jurisdiction of consolidation in the district court of two or more cases that were commenced as independent actions. Authority to address this question is confirmed by 28 U.S.C. § 2072(c), which extends the Enabling Act to include rules that “define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.” In addition to this express authority, the most likely place for new rules provisions will be Rules 42(a) and 54(b). Rule 54(b) has provided for entry of a final judgment disposing of less than all claims in an action since 1938, and was amended several times before the amendment that added § 2072(c).

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As noted below, the Appellate Rules Committee is interested in this topic but has suggested that “this matter is appropriately handled by the Civil Rules Committee.” The Civil Rules Committee will coordinate its work with the Appellate Rules Committee through a process that enables both committees to proceed in tandem.

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The impetus for this project is *Hall v. Hall*, 138 S.Ct. 1118 (2018). The Court ruled that cases consolidated under Rule 42(a) retain their separate identities for purposes of appeal finality, no matter how complete the consolidation. A judgment that disposes of all claims among all parties in what began as a separate action is a final decision that establishes the right to appeal under 28 U.S.C. § 1291. At the same time, Chief Justice Roberts concluded the Court’s opinion by observing that “changes with respect to the meaning of final decision ‘are to come from rulemaking, . . . not judicial decisions in particular controversies.’” If the Court’s interpretation of Rule 42 “were to give rise to practical problems for district courts and litigants, the appropriate Federal Rules Advisory Committees would certainly remain free to take the matter up and recommend provisions accordingly.” Although it might appear to be too early to conclude that practical problems have arisen from the Supreme Court’s decision, there is already substantial relevant historical information and the multi-year rulemaking process should yield more.

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As explored below, this suggestion about possible rulemaking may be bolstered by the grounds of decision. The Court relied almost entirely on what it viewed as an unbroken line of decisions that began with the first explicit authorization of consolidation by an 1813 statute. Practical considerations barely figured in the opinion.

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The Appellate Rules Committee considered *Hall v. Hall* and made this report to the Standing Committee in June:

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* * * [T]he Committee considered the recent Supreme Court decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), which held that cases consolidated under Fed.R.Civ.P. 42(a) retain their separate identities at least to the extent that final decision in one is immediately appealable. While this decision might raise efficiency concerns in the courts of appeals, by permitting separate appeals that deal with the same underlying controversy, and might raise trap-for-the-unwary concerns for parties in consolidated cases who do not appeal when there is a final judgment in one of consolidated cases but instead wait until all of the consolidated cases are resolved, the Committee decided that this matter is appropriately handled by the Civil Rules Committee. The Committee expects to keep an eye on the trap-for-the-unwary concern and may consider whether provisions of the Appellate Rules regarding consolidation of appeals present any similar issues.

1327 Agenda Book, Committee on Rules of Practice and Procedure, June 12, 2018, p. 86.

1328 Hall v. Hall in Detail: The litigation in *Hall v. Hall* began as a single action, but spun into two
1329 actions. The underlying dispute involved family relationships and money. The first action was
1330 brought by a mother, in her own capacity and as trustee of her inter vivos trust, against her son and
1331 his law firm. Her “claims – for breach of fiduciary duty, legal malpractice, conversion, fraud, and
1332 unjust enrichment – concerned the handling of her affairs by [her son] and his law firm * * *.” When
1333 the mother died she was replaced by her daughter as trustee and personal representative. The
1334 defendant brother initially counterclaimed against her in both capacities for intentional infliction of
1335 emotional distress, as well as for other wrongs that eventually were dropped from the case. But
1336 confronting an “obstacle” that his sister was not a party in her individual capacity, the defendant
1337 brother filed a separate action against her on the same claims. The district court consolidated the two
1338 actions under Rule 42(a), “ordering that ‘[a]ll submissions in the consolidated case shall be filed in’
1339 the docket assigned to the trust case.” Just before trial began the brother dismissed his counterclaims
1340 filed in the original action.

1341 The jury returned a verdict for the brother in his action, but the court granted a new trial and
1342 that “case remains pending before the District Court.” The jury returned a verdict against the sister
1343 in her representative capacity. Judgment was entered on the verdict and the sister appealed.

1344 The Third Circuit dismissed the appeal, 679 Fed.Appx. 142 (2017). It characterized the
1345 consolidation as made “for all purposes.” The sister moved to sever the cases for trial, but the district
1346 court did not respond to the motion and tried them together. Separate judgments were entered in the
1347 two actions; the court of appeals described them as “final judgments” or “styled as a final
1348 judgment.” The Third Circuit opinion began with a general view that when two cases are
1349 consolidated for all purposes, “a final decision on one set of claims is generally not appealable while
1350 the second set remains pending.” But “we do not employ a bright line rule and instead consider on
1351 a case-by-case basis whether a less-than-complete judgment is appealable.” Factors to be considered
1352 include “the overlap among the claims, the relationship of the various parties, and the likelihood
1353 of the claims being tried together.” Consideration also is given to serving justice and judicial
1354 economy. For this case, all claims had initially been tried together before a single jury. “That
1355 counsels in favor of keeping the claims together on appeal.” The record “illustrates some overlap
1356 of evidence among the claims.” The same witnesses would inevitably testify, and both sets of claims
1357 turned on the mother’s reactions to her son’s conduct. There were likely to be overlapping issues
1358 on appeal once the still-pending action was resolved. The “appeal is not properly before us at this
1359 time.”

1360 The Supreme Court reversed in a unanimous opinion, ruling that each originally separate
1361 action retained its separate character, so that entry of final judgment in one of them was an
1362 appealable final judgment.

1363 The Court began its explanation by looking to an 1813 statute that “authorized the newly
1364 formed federal courts” to “consolidate” “causes of like nature, or relative to the same question,”
1365 when consolidation appears reasonable. Examining its own decisions ranging from 1852 to 1933,
1366 the Court found an unwavering rule that actions filed separately remain separate actions for
1367 application of the final judgment rule:

1368 Several aspects of this body of law support the inference that, prior to Rule 42(a), a
1369 judgment completely resolving one of several consolidated cases was an immediately
1370 appealable final decision. (138 S. Ct. at 1128)

1371 Turning to Rule 42(a), the Court pointed to the 1938 Committee Note. The Note stated that
1372 Rule 42(a) “is based upon” the successor to the 1813 statute, “but in so far as the statute differs from
1373 this rule, it is modified.” Despite the tantalizing suggestion that Rule 42(a) somehow modified the
1374 statute, the Court concluded:

1375 No sensible draftsman, let alone a Federal Rules Advisory Committee, would take
1376 a term that had meant, for more than a century, that separate actions do not merge
1377 into one, and silently and abruptly reimagine the same term to mean that they do.
1378 (138 S. Ct. at 1130)

1379 The Committee Note “did not identify any specific instance in which Rule 42(a) changed the statute,
1380 let alone the dramatic transformation” that would defeat finality upon complete disposition of all
1381 claims among all parties to what began as a separate action.

1382 Nor did arguments from the full text of Rule 42(a) prevail. Rule 42(a) says:

- 1383 (a) If actions before the court involve a common question of law or fact, the
1384 court may:
- 1385 (1) join for hearing or trial any or all matters at issue in the actions;
 - 1386 (2) consolidate the actions; or
 - 1387 (3) issue any other orders to avoid unnecessary cost or delay.

1388 Seeking to support dismissal of the appeal, the defendant brother argued that paragraphs (1) and (3)
1389 show that “consolidate” has taken on a new meaning, distinct from the orders that fall short of
1390 consolidation. “Consolidation” means to transform originally separate actions into a single action.
1391 Lesser measures of coordination, such as a joint hearing or trial on some or all matters at issue, or
1392 “any other orders,” leave the actions separate. Consolidation does not. The Court disagreed. It found
1393 in Rule 42(a)(2) authority to consolidate cases for limited purposes, such as motions practice or
1394 discovery, not qualifying as a joint hearing or trial under (1).

1395 The Court supplemented this textual history and analysis with one pragmatic concern:

1396 Forcing an aggrieved party to wait for other cases to conclude would substantially
1397 impair his ability to appeal from a final decision fully resolving his own case—a
1398 “matter of right.” (138 S. Ct. at 1128)

1399 The character of the Court’s opinion leaves the way open to consider possible rules
1400 amendments without implying any disrespect for its decision. As quoted above, the Court expressly
1401 recognized the Committees’ freedom to take up these questions of finality. Beyond that, the opinion
1402 is framed as a matter of historic textual analysis, with no more than a hint of pragmatic concerns.
1403 If pragmatic concerns suggest a different approach to finality in consolidated actions, the
1404 Committees should not hesitate to explore possible amendments.

1405 Proceedings consolidated by the Judicial Panel on Multidistrict Litigation for pretrial
1406 purposes can be put aside at the outset. Under *Gelboim v. Bank of America Corp.*, 135 S. Ct. 897
1407 (2015), they remain separate actions for application of the final judgment rule. The Multidistrict
1408 Litigation Subcommittee is considering various proposals that seek to increase the opportunities for
1409 interlocutory appeals in MDL proceedings, and has encountered no contrary arguments to cut back
1410 the rule of appealable finality upon complete disposition of any single action in the MDL
1411 proceeding.

1412 At least two pragmatic reasons may weigh against going further now. One is the concern
1413 expressed by the Court: At least any party that resisted consolidation of a once-separate action
1414 should not be forced to defer – in the worst case, for years – any opportunity to appeal until final
1415 disposition of every other action in the consolidation. The other is the value of clear rules on finality.
1416 Ambiguity invites premature appeals and also creates a risk of forfeiture by failing to appeal within
1417 the time measured from some event that was not recognized as an appeal-time trigger.

1418 The values of case-specific discretion, on the other hand, are illustrated both by the Third
1419 Circuit’s decision to dismiss the appeal in *Hall v. Hall* and by the experience of other courts. Some
1420 courts anticipated the Supreme Court’s decision, while others took different approaches. A summary
1421 is provided by the text in 15A Federal Practice & Procedure: Jurisdiction § 3914.7, pp. 603-608,
1422 omitting the footnotes and the additional cases described in the 2018 supplement, pp. 529-536:

1423 Turning first to consolidation, the First Circuit has adopted a rule that actions
1424 commenced independently remain independent for purposes of the final judgment
1425 rule, no matter how completely they may have been consolidated. Under this
1426 approach, complete disposition of all matters involved in any one action establishes
1427 finality without regard to Rule 54(b). The Ninth and Tenth Circuits, on the other
1428 hand, have adopted a rule that following consolidation an order disposing of less than
1429 the entire consolidated proceeding can never be final unless judgment is properly
1430 entered under Rule 54(b). Either rule has the virtue of clarity. The rule that
1431 consolidated actions remain independent for purposes of finality has the added virtue
1432 that it recognizes that the desirability of consolidated trial court proceedings does not
1433 automatically extend to appeals. The contrary rule that consolidation always creates
1434 a single action within Rule 54(b) has the contrary virtue of recognizing that the
1435 relationships that justify consolidation for trial often make consolidation on appeal
1436 desirable as well. Most courts have rejected both of these rules, however, in favor of
1437 an intermediate position that turns on the purpose and extent of consolidation. If
1438 consolidation was intended to be for all purposes, Rule 54(b) applies as if the
1439 consolidated proceedings were a single action. If consolidation was for more limited
1440 purposes—commonly for trial—the original actions retain an independent identity,
1441 and Rule 54(b) does not apply when there is a complete disposition of any of the
1442 original actions. This position may be the most workable, particularly if it is coupled
1443 with a presumption that Rule 54(b) applies. The presumption that Rule 54(b) applies
1444 provides a substantial element of clarity, but protects against the risk that
1445 consolidation undertaken for [limited] purposes may have unforeseen consequences
1446 for appealability. Perhaps astute administration of Rule 54(b) could protect against
1447 any untoward consequences and provide the even greater clarity of a requirement
1448 that the rule always applies, but reliance on astute administration may not yet be
1449 fully justified. Whatever the best answer may prove to be, it will be important to
1450 ensure that it does not lead to confusion over the running of appeal time.

1451 This summary survey suggests that many courts of appeals have, in one way or another,
1452 resisted the position ultimately adopted by the Supreme Court. They have sought more effective
1453 ways to advance efficient litigation in both trial courts and appellate courts. There may be ways to
1454 advance this cause without sacrificing the virtues of clear lines for determining finality.

1455 Since 1938 the Civil Rules have sought through Rule 54(b) to bring the district court into the
1456 determination of finality in actions that present multiple claims, and more recently in actions that
1457 involve multiple parties. Rule 54(b) provides clear guidance in actions that began as a single action.
1458 An order that disposes of fewer than all claims among all parties can be made final, but only by
1459 directing entry of judgment after expressly determining that there is no just reason for delay. The
1460 trial judge is enlisted as “dispatcher,” charged with considering the importance of immediate
1461 enforcement, the ways in which an immediate appeal likely would advance or impede further
1462 development of the action in the trial court, and the ways in which an immediate appeal might cause
1463 the court of appeals to invest time in studying the record and deciding the case only to repeat the
1464 process on a later appeal.

1465 The Advisory Committee did not overlook Rule 54(b) when it propounded both Rule 42(a)
1466 and Rule 54(b). The final paragraph of the 1938 Committee Note for Rule 42(a) observed: “For the
1467 entry of separate judgments, *see* Rule 54(b) (Judgment at Various Stages).”

1468 Rather modest amendments of Rule 42(a) and Rule 54(b) might well establish a procedure
1469 that provides bright lines, supports consideration of a losing party’s interest in a prompt appeal, and
1470 establishes the most effective integration of continuing trial-court proceedings with the interests of
1471 the court of appeals.

1472 Clear delineation of authority and responsibility does not mean that the task always will be
1473 easy. Far from it. A trial judge is likely to focus an initial consolidation order on the advantages of
1474 joint proceedings on related matters, without being able to foresee the subsequent developments that
1475 will lead to complete disposition of all claims among all parties to a case that was commenced as
1476 an independent action. The calculus of appeal timing can be made with greater assurance when what
1477 began as an independent action is completely resolved. But at that point, the trial judge has much
1478 to contribute. And the result will provide a clear line: Finality is established by a Rule 54(b) order
1479 and appeal time starts to run. Absent a Rule 54(b) order there is no final judgment, appeal cannot
1480 be taken, and appeal time does not start to run.

1481 Rule 54(b) itself has generated a rich lore of decisions on what count as separate claims
1482 (separate parties are easier to define) and on the breadth of trial-judge discretion. It requires careful
1483 deliberation by the trial judge, and stimulates more than a few reexaminations of appeal jurisdiction
1484 by appellate courts. But on the whole, it works well. There are strong reasons to believe that it can
1485 work as well when two or more independent actions are consolidated in the trial court as when
1486 multiple claims and parties are joined from the beginning in a single action. A simple illustration
1487 would be two plaintiffs injured in the same automobile accident and intent on suing the same
1488 defendant. They might join in a single action. Or they might file separate actions in the same court,
1489 only to be met by consolidation. If the two actions are consolidated for all purposes, including trial
1490 (if there is to be a trial), the appeal calculus is essentially the same. A more complex illustration is
1491 provided by *Hall v. Hall* itself. The defendant initially attempted to bring all his claims as a
1492 counterclaim in the original action, but concluded that because the plaintiff had come into the action
1493 only in representative capacities he could not bring a counterclaim against her in her individual

1494 capacity. A more daring defendant might have tested the question whether he could counterclaim
1495 against her in her representative capacity and then join her in her individual capacity as an added
1496 party to the counterclaim. So long as there is a viable counterclaim addressing the representative
1497 capacity, a court might well allow this procedure, keeping everything within a single action that
1498 would be indistinguishable for all appeal purposes from the consolidated proceedings that actually
1499 occurred.

1500 It is too early to offer initial sketches of the integrated amendments that might be made to
1501 Rule 42(a) and Rule 54(b). Rule 42(a) should preserve flexibility to order common – “consolidated”
1502 – proceedings in all combinations short of complete consolidation for all purposes. But it also should
1503 continue to allow complete consolidation for all purposes, including creation of a single action that
1504 would come within Rule 54(b). Rule 54(b) could be amended in a way that is little more than a
1505 cross-reference to Rule 42(a): “When an action – including one that consolidates actions under
1506 Rule 42(a) – presents more than one claim for relief * * * or when multiple parties are involved *
1507 * *” a partial final judgment can be entered. The integration might be perfected by recognizing that
1508 the Rule 42(a) complete consolidation might be ordered at the time of entering judgment under
1509 Rule 54(b), but that question will require further thought.

TAB 4B

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 1, 2018

1 The Civil Rules Advisory Committee met at the Administrative
2 Office of the United States Courts in Washington, D.C., on November
3 1, 2018. Participants included Judge John D. Bates, Committee
4 Chair, and Committee members Judge Jennifer C. Boal; Judge Robert
5 Michael Dow, Jr.; Judge Joan N. Ericksen; Hon. Joseph H. Hunt;
6 Judge Kent A. Jordan; Justice Thomas R. Lee; Judge Sara Lioi; Judge
7 Brian Morris; Judge Robin L. Rosenberg; Virginia A. Seitz, Esq.;
8 Joseph M. Sellers, Esq.; Professor A. Benjamin Spencer; Ariana J.
9 Tadler, Esq.; and Helen E. Witt, Esq.. Professor Edward H. Cooper
10 participated as Reporter, and Professor Richard L. Marcus
11 participated as Associate Reporter. Judge David G. Campbell, Chair;
12 Professor Daniel R. Coquillette, Reporter (by telephone); Professor
13 Catherine T. Struve, Associate Reporter (by telephone); and Peter
14 D. Keisler, Esq., represented the Standing Committee. Judge A.
15 Benjamin Goldgar participated as liaison from the Bankruptcy Rules
16 Committee. Laura A. Briggs, Esq., the court-clerk representative,
17 also participated. The Department of Justice was further
18 represented by Joshua Gardner, Esq.. Rebecca A. Womeldorf, Esq.,
19 Julie Wilson, Esq., and Ahmad Al Dajani, Esq., represented the
20 Administrative Office. Dr. Emery G. Lee attended for the Federal
21 Judicial Center. Observers included Jason Batson, Esq. (Bentham
22 IMF); Amy Brogioli, Esq. (AAJ); Fred Buck, Esq. (American College
23 of Trial Lawyers); Jason Cantone, Esq. (FJC); Bob Chlopak (CLS
24 Strategies); Stacy Cloyd, Esq. (National Organization of Social
25 Security Claimants' Representatives); Andrew Cohen, Esq. (Burford
26 Capital); Alexander Dahl, Esq. (Lawyers for Civil Justice); David
27 Foster, Esq. (Social Security Administration); Joseph Garrison,
28 Esq. (NELA); William T. Hangle, Esq. (ABA Litigation Section
29 liaison); Ted Hirt, Esq. (DOJ Ret.); Brittany Kauffman, Esq.
30 (IAALS); Zachary Martin, Esq. (Chamber Institute for Legal Reform);
31 Benjamin Robinson, Esq. (Lawyers for Civil Justice); Jerome
32 Scanlan, Esq. (EEOC); Professor Jordan Singer; Susan H. Steinman,
33 Esq. (AAJ); and Andrew Strickler (Law360 Reporter).

34 Judge Bates welcomed the Committee and observers to the
35 meeting. He noted the Committee is sad that former members Barkett,
36 Folse, Matheson, and Nahmias have completed their terms and have
37 rotated off the Committee. Judge Shaffer, who has resigned the
38 bench, is in the thoughts and prayers of all members. All Committee
39 members are pleased to welcome new members, and soon-to-be friends
40 Boal, Hunt, Jordan, Lee, Rosenberg, Sellers, and Witt.

41 Judge Bates further reported that in June the Standing
42 Committee had a lively discussion of Rule 30(b)(6), made some minor
43 adjustments in the rule text, and approved publication for comment.
44 Rule 30(b)(6) was published in August; hearings are scheduled in
45 January and February. The work of the MDL Subcommittee also was

46 described and was discussed briefly.

47 Judge Bates also noted that the only Civil Rules business at
48 the September meeting of the Judicial Conference was a brief
49 information report from the Standing Committee on the work of the
50 MDL and Social Security Subcommittees.

51 *April Minutes*

52 The draft Minutes for the April 10, 2018 Committee meeting
53 were approved without dissent, subject to correction of
54 typographical and similar errors.

55 *Legislative Report*

56 Julie Wilson presented the legislative report. She noted that
57 most of the bills listed in the agenda materials are familiar.
58 There has been no legislative movement on the bills that were
59 described last April. Some new bills have been introduced. The
60 Litigation Funding Transparency Act provides for disclosure of
61 third-party funding in class actions and MDL proceedings. The
62 Federal Courts Access Act would make several changes in federal
63 diversity jurisdiction, particularly in Class Action Fairness Act
64 cases. The Injunctive Authority Clarification Act would address
65 nationwide injunctions by prohibiting orders that purport to
66 restrain enforcement against a non-party of any statute or like
67 authority, with exceptions for representative actions. And the
68 Anti-Corruption and Public Integrity Act includes provisions that
69 would Amend Civil Rule 12 to prohibit dismissal under Rule
70 12(b)(6), (c), or (e) in terms that essentially undo the Supreme
71 Court decisions in the *Twombly* and *Iqbal* cases.

72 Two other bills were noted. A Judiciary Reform and
73 Modernization of Justice Act is being considered by the Committee
74 on Court Administration and Case Management; its provisions include
75 internet streaming of court proceedings. Another bill would modify
76 the structure of the Ninth Circuit, dividing it into divisions.

77 *Rules Amendments in Congress*

78 Judge Bates noted that amendments to Rules 5, 23, 62, and 65.1
79 are pending in Congress, to take effect this December 1 unless
80 Congress intervenes before then. He also observed that the early
81 stages of Committee work on Rule 23 included provisions addressing
82 cy pres remedies; those provisions were deleted, and a case
83 involving cy pres questions was argued in the Supreme Court the day
84 before this meeting.

85 Judge Bates also noted that as published in August, the
86 proposal to amend Rule 30(b)(6) directs the parties, or a nonparty
87 subjected to a deposition subpoena, to confer about the number and
88 description of the matters for examination, and also to discuss the
89 identity of the persons who will testify for the entity named as
90 deponent. Few comments have come in so far, but there are likely to

91 be a fair number. The direction to discuss the identity of the
92 witnesses has encountered substantial resistance. "We look forward
93 to comments from all parts of the public."

94 *Report of the MDL Subcommittee*

95 Judge Bates introduced the Report of the MDL Subcommittee by
96 noting that this is one of the two current major subcommittees.
97 Chaired by Judge Dow, with Professor Marcus as principal Reporter,
98 the subcommittee has been hard at work for a year. It has drawn
99 from many sources, and has met with several outside groups.

100 Judge Dow began the report by noting that several Subcommittee
101 members and Judge Bates attended the annual transferee judges
102 conference of the Judicial Panel on Multidistrict Litigation on
103 October 31. About 150 transferee judges attended the morning
104 session. The Subcommittee members had a meeting in the afternoon
105 with between 20 and 25 of the most experienced transferee judges.
106 "Every time we sit down with a group it's very fruitful." The
107 November 2 Roundtable on third-party litigation funding at George
108 Washington University Law School will add still further insights,
109 both as to the role of financing in MDL proceedings and as to more
110 general issues.

111 The judges at the JPML meeting were perhaps more interested
112 than the Subcommittee has been in some of the familiar topics that
113 have been on the Subcommittee's short list for particular study.
114 They were particularly interested in sorting out supportable
115 individual claims, appellate review, and in third-party funding not
116 only in MDL proceedings but more generally. There also is interest
117 in the analogies between MDL proceedings and class actions. Many
118 MDL proceedings include class-action cases, and Rule 23 procedures
119 come into play whenever disposition includes class certification,
120 ordinarily for purposes of settlement. The possibility of creating
121 formal rules to apply like procedures to non-class MDLs may deserve
122 closer study, in part because many judges now apply them by
123 analogy. The Subcommittee had not much focused on the proposals
124 that every plaintiff in an MDL should pay an individual filing fee,
125 an issue that arises with actions "directly filed" in the MDL court
126 after consolidation. The MDL judges were interested.

127 Judge Bates added that the MDL judges agreed on many issues.
128 On others there was a variety of views. There was some discussion
129 of the question whether formal rules are needed. "They thought not,
130 except perhaps for a few issues." "Information gathering will not
131 stop." It may be that empirical research by the Federal Judicial
132 Center will be requested. The Judicial Panel has provided much
133 useful information. So have several conferences. "But there may be

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134 more conferences and events."

135 Professor Marcus added that "We want reactions, not our own
136 views," on agenda topics. Six major categories are identified at p.
137 142 of the agenda materials.

138 Real concern is shown in many quarters about the number of
139 plaintiffs that appear in some MDLs without any supportable claim.
140 Is there an effective remedy – perhaps by imposing heightened
141 pleading requirements, or enhanced Rule 11 requirements for
142 plaintiff's counsel, or plaintiff fact sheets? How should any such
143 requirements apply to cases filed before the MDL consolidation, or
144 outside the MDL court after consolidation?

145 The need for increased opportunities for interlocutory
146 appellate review has been stressed by many, mostly representing
147 defendants' interests. Common examples include Daubert rulings on
148 the admissibility of expert testimony and rulings on preemption. If
149 new appeal opportunities are to be created, should the appeals be
150 as a matter of right? If an exercise of discretion is required,
151 should it include both the district court and the court of appeals?

152 The process of forming and funding plaintiffs' steering
153 committees is another area of continuing interest. Creative
154 approaches have been adopted, including appointments for one-year
155 terms that enable the MDL judge to evaluate performance and
156 encourage vigorous development of the proceedings. Common-benefit
157 funds to compensate lead counsel generate much interest, including
158 caps on fees. Related questions ask whether the court can limit
159 fees charged by individual plaintiffs' lawyers who do not
160 participate in the leadership and who contribute to, rather than
161 gain from, common benefit funds. Do Rule 23(g) and (h) on class
162 counsel appointment and fees provide useful models?

163 Trial questions have focused on "bellwether" trials, and
164 particularly on the question whether party consent is required if
165 the MDL court is to hold a bellwether trial. Bellwether trials
166 usually proceed with party consent.

167 Settlement promotion and review are a central feature of MDL
168 proceedings. But writing a rule for reviewing settlements by
169 analogy to Rule 23(e) is a challenge because it will be difficult
170 to define the distinction between truly individual settlement of
171 individual actions in the MDL proceeding and settlement efforts
172 that seek to generate common terms for groups of cases or all
173 cases.

174 Third-party litigation funding occurs in MDL proceedings as
175 well as others. It can provide essential resources to develop the

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176 case, and may support efforts to diversify the ranks of those who
177 appear in leadership roles. Proposals for court rules have focused
178 on disclosure, often raising issues similar to those that are
179 addressed in considering third-party funding as a more general
180 phenomenon. Should disclosure be limited to the fact there is
181 funding, and the identity of the funder? Should it include more
182 detailed information about the funding arrangements – and if so,
183 should the disclosure be made in camera, or should it be made to
184 all parties? To the world?

185 I Unsupported Claims: Judge Dow noted that there is "some
186 consensus" that substantial numbers of unsupported claims are a
187 problem, at least in large mass-tort MDL proceedings. Judges Fallon
188 and Barbier are experts, who agree that any rule that might be
189 adopted to address the problem should allow flexible responses by
190 MDL judges. In turn, that raises the question – much discussed in
191 the Subcommittee – whether a rule framed at a high level of
192 generality "will be much of a rule"? Perhaps the most that should
193 be attempted is to identify this as a subject for discussion in
194 Rules 16 and 26.

195 Judge Bates added a reminder that at any time there are rather
196 more than 200 pending MDL proceedings. The focus of concern is on
197 about ten percent of them, mostly mass torts, and among the mass-
198 tort proceedings mostly medical devices and pharmaceutical
199 products. It seems probably true that there is an issue with
200 unsubstantiated claims in these proceedings. But there is not as
201 much agreement on what causes the problem. The perspective of
202 judges is different from plaintiffs' perspectives or defendants'
203 perspectives. Defendants add business concerns such as the impact
204 of sheer claim numbers on SEC filings and regulatory filings.
205 Should such business concerns, of themselves, be a reason for
206 generating new rules?

207 A judge observed that plaintiff fact sheets are an option for
208 identifying unsubstantiated claims: may that be a sufficient
209 remedy? Judge Dow responded that various approaches were discussed
210 at the October 31 MDL conference, including fact sheets, enhanced
211 Rule 11 enforcement, and other means. The variety of approaches
212 underscores the value of flexibility. "Most experienced MDL judges
213 think the tools are there." It is an open question whether one
214 tool, such as plaintiff fact sheets, should be elevated over
215 others. "The judges often suggested we should not tie their hands.
216 Many judges focus more on getting the parties on a settlement
217 track."

218 Another judge reported that one MDL judge said he did not want
219 to go through hundreds of fact sheets. And there was a sense that
220 the time frame for fact sheets could be a problem – a plaintiff's

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221 attorney may not be able to gather the information requested by a
222 fact sheet within, for example, 60 days after filing. Still, there
223 was agreement that fact sheets work well.

224 A Committee member asked whether it would be useful to have a
225 rule that presumes plaintiffs must file fact sheets unless there is
226 a special showing they are not needed? Judge Dow replied that the
227 judges at the conference likely think such a rule would be too
228 specific. Judge Bates added that a rule that adds fact sheets as a
229 subject for discussion at Rule 16 and 26 conferences would be
230 acceptable, although this approach "has few teeth." And "remember
231 we are talking about a subset of MDL proceedings."

232 Another Committee member asked whether a fact sheet is a
233 pleading subject to a Rule 12 motion? A judge answered that one
234 role for fact sheets can be to take the place of an individualized
235 pleading in a direct-filed case. Prompt filing may be needed for
236 limitations purposes. "The problem is that some causes of action
237 are easier than others to identify in 30 days." Most fact-sheet
238 responses are general, addressing such questions as when the injury
239 occurred.

240 A different judge reported that in a medical-product MDL the
241 parties proposed there should be a master complaint and plaintiff
242 fact sheets. They recognized that it would be "too much" to insist
243 on individual complaints, individual answers, and individual Rule
244 12 motions. The MDL was formed after 50 cases had been filed. The
245 plaintiffs advertised. The MDL now counts 5,000 cases - 300 were
246 filed last week alone. The master complaint "pleads every plausible
247 claim." Plaintiffs file a short-form complaint identifying the
248 product and injury, and checking the boxes on which of the claims
249 in the master complaint they are asserting. Then they have 60 days
250 to file a specific fact sheet that is like discovery; the order
251 says that the fact sheet is treated as answers to interrogatories,
252 so Rule 37 applies. Defendants have 20 days to tell the plaintiff
253 of perceived defects in the fact sheet. The plaintiff has 20 days
254 to respond. Then the defendant can request dismissal. No motions to
255 dismiss have been made, nor have any challenges been made to the
256 adequacy of individual fact sheets. The defendants go forward with
257 discovery guided by the fact-sheet information about who the
258 plaintiff is, and what the product is. Daubert motions are made.
259 Taken together, the fact sheets inform the defendants of the value
260 of the aggregate claims for settlement.

261 Still another judge noted that a variety of approaches are
262 taken to winnowing out unsupported claims. Some judges use "Lone
263 Pine" orders. The master-complaint approach just described is
264 typical of many mass torts. Judges say it works, that there is no
265 need for a rule.

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266 A Committee member asked whether it would help to add a
267 special disclosure rule for mass tort cases to Rule 26(a)(1)? This
268 approach is discussed at pages 146-147 of the agenda materials. One
269 question is whether the consequences of inadequate Rule 26(a)(1)
270 disclosures under Rule 37(c)(1) provide sufficient incentives to
271 deter unsupported claims. Defendants want a rule that can be the
272 basis for early dismissal of unsupported claims. That could extend
273 to requiring the judge to consider individual plaintiffs, perhaps
274 in unmanageable numbers. Another Committee member added a reminder
275 that "mass torts are only a slice of it." Many class actions are
276 gathered in MDL proceedings. "A rule for all MDL cases would be a
277 problem."

278 This question was developed by asking how a fact sheet
279 translates into winnowing out unsupported claims. A judge replied
280 that 95% of the cases in MDLs "never get transferred back. The
281 winnowing occurs in settlement." Both sides have an understanding
282 of the value of different categories of claims, including, for
283 example, a category of claims that are worthless because the
284 plaintiffs have no injury. It is a good question whether fact
285 sheets are useful for winnowing out unsupported claims early in the
286 case. Defendants want to litigate some plaintiffs out of the MDL
287 early-on. Perhaps a survey could ask MDL judges for their views. It
288 was suggested that if a survey is to be done, practitioners should
289 be surveyed as well to ask about all the procedures that have been
290 used to identify unsupported claims and about how well they work.

291 A judge said that fact sheets can be used for early winnowing.
292 A procedure has been set up in her MDL after talking with other
293 judges. The defendant has an opportunity to tell the court what is
294 a deficient fact sheet. Once a case has been on the monthly docket
295 two times, the defendant can move to dismiss because the fact sheet
296 is inadequate. "Cases do fall by the wayside." The procedure takes
297 the place of Rule 8, especially with advertising to gather more
298 plaintiffs and no direct-filing fee for direct-filed cases. A
299 master complaint makes a difference. And individual cases can be
300 dismissed with prejudice when there is no response at all to the
301 order for a fact sheet. Other judges agreed that fact sheets can be
302 used to identify unsupported claims, but it may help to study this
303 further. "We get the sense that a lot of it washes out at the end."
304 It seems likely that most MDL judges follow pretty much the same
305 procedures. An example of dismissals for inadequate showings by
306 individual plaintiffs is provided by the decision in *Barrera v. BP*,
307 P.L.C. (5th Cir. No. 17-30122 October 18, 2018).

308 Some proposals made to the Committee, or reflected in pending
309 legislation, would require the judge to deal with each plaintiff on
310 the basis of the fact sheet. In proceedings with large numbers of
311 plaintiffs, that is a real problem for the judge. In the same vein,

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312 a Committee member asked whether it is clear that plaintiffs have
313 an adequate opportunity to find the facts they are required to
314 provide in fact sheets? If we do a survey, we should ask whether
315 MDL judges are satisfied that plaintiffs have a fair chance,
316 including through discovery.

317 Discussion moved to the role of individual filing fees, a
318 topic discussed at the October 31 conference. A judge who did not
319 require individual filing fees for direct-filed cases expressed
320 regrets about the decision. There was some sense at the October 31
321 conference that more judges will move toward requiring filing fees
322 for each plaintiff, but some have not. If there is to be a survey,
323 perhaps this practice should be included.

324 II Interlocutory Appeals: Judge Dow noted the range of questions
325 that have been raised by proposals that there should be more
326 opportunities for interlocutory appeals from orders in MDL
327 proceedings that may add cost and delay that would be spared by
328 appeal and reversal. Any actual rule proposals will be coordinated
329 with the Appellate Rules Committee, to our advantage. The first
330 question may be to learn whether there is a gap that somehow makes
331 inadequate the opportunity to appeal on certification under §
332 1292(b), adding in the prospect of partial final judgments under
333 Rule 54(b) and extraordinary writs under § 1651 when special
334 circumstances warrant. Is it possible to identify particular kinds
335 of cases that deserve new appeal rules? Should any new appeal
336 opportunity be a matter of right? If permission is required, should
337 permission be required from both courts, only the district court,
338 or only the court of appeals? District judges express concern about
339 the prospect that appeals will delay trial-court proceedings, even
340 if there is no formal stay. It may be useful, but difficult, to
341 determine whether new appeal opportunities should be provided only
342 for particular categories of cases. And it will be interesting to
343 speculate about the amount of work that would be generated for the
344 courts of appeals by either permissive or mandatory appeal rights
345 – some proponents have suggested that no more than one or two
346 appeals per circuit per year are likely, but that is only
347 speculation.

348 A Committee member asked about the views of MDL judges about
349 § 1292(b) – should we find out more by including this as a question
350 in any survey that may be made? A judge said that most MDL judges
351 think that § 1292(b) is adequate to the appeal needs of MDL
352 proceedings. Another judge suggested that if MDL judges are
353 surveyed, it would be good to learn how many requests are made for
354 § 1292(b) appeal certification, and how many are granted by the
355 district court and then the court of appeals. An example of a
356 recent district-court certification was noted. Another question
357 could ask about the effects of an accepted appeal on delay. In a

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358 class action, not an MDL, a § 1292(b) appeal was certified from an
359 order that, choosing among conflicting circuit precedents, denied
360 summary judgment. The appeal was accepted. The decision was made 27
361 months later. Delay of that magnitude "gives pause." In an MDL, the
362 same judge denied a motion to dismiss that asserted state-law
363 claims were preempted, and denied certification for appeal because
364 the answer seemed clear and the first bellwether trial was almost
365 ready to begin.

366 Another judge repeated that proponents of expanded appeal
367 opportunities predict that there will be few appeals, perhaps one
368 or two per circuit per year. Predictions are likely to be shaped by
369 the types of MDL proceedings included in any proposed rule. But
370 delay remains an issue.

371 Further discussion suggested that the criteria for certifying
372 a § 1292(b) appeal are treated differently in different circuits.
373 Some take more formal, less flexible, approaches. Although most MDL
374 judges believe § 1292(b) suffices, their views may depend on the
375 approach of the local circuit.

376 The defense bar argues that they will win a good number of
377 appeals, yielding gains that will offset any delay in district-
378 court proceedings.

379 Another judge asked who are the proponents of expanded appeal
380 opportunities? If MDL judges do not think new opportunities are
381 needed, we should know who feels the need and what motives drive
382 their views. A judge responded that "we have the equivalent of a
383 survey" in meetings with the defense bar. Another judge added that
384 "part of it is a view of fairness." Defendants argue that when a
385 defendant wins a ruling that defeats a plaintiff, the plaintiff can
386 appeal. But if the defendant loses the ruling on the same issue,
387 there is no appeal and huge expenses follow. Preemption issues are
388 frequently advanced as an example. "Defendants are confident these
389 are good motions. And many defendants are repeat players." Some
390 defendants also think that some MDL judges are too reluctant to
391 certify appeals that should be allowed, whether from fear of
392 reversal, a sense that the cases will settle anyway, or a
393 preference for settlement over dismissal without any remedy.

394 Defendants also urge that delay can be reduced if appeals are
395 expedited. But the committees have been reluctant to adopt rules
396 that require expedition on appeal. There are too many competing
397 demands on the time of appellate courts. When, for example, would
398 an interlocutory appeal in an MDL proceeding deserve priority over
399 criminal appeals? A Committee member noted that rule 23(f) appeals
400 are attempted in almost every class action, and that the impact is
401 delay. We might try to find out more about the frequency of §

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402 1292(b) appeals in MDL proceedings. It is important to remember
403 that the cost of delay is not simply money. In medical product
404 cases delay may mean that some plaintiffs die before the case
405 resolves. "If we're looking at a very thin slice of cases, why not
406 be transsubstantive"?

407 A further suggestion was that if cases are to be counted, we
408 might look at how often courts of appeals grant permission for §
409 1292(b) appeals, and in which types of cases.

410 One judge thought that at the October 31 conference some MDL
411 judges showed they did not understand the discretion they have
412 under § 1292(b). Could it be useful to adopt a rule that clarifies
413 this?

414 Another judge noted that MDL judges have discussed the effect
415 of remanding a case to the court where it was filed, often in a
416 circuit other than the circuit for the MDL court. Although there is
417 a prospect that differences in circuit law could defeat rulings
418 made by the MDL court, it is agreed that this is not a problem
419 because the MDL rulings are treated as the law of the case.

420 III PSC Formation and Funding: Judge Dow opened this topic by
421 saying that nothing new was discussed at the October 31 conference.
422 No rule-based proposal has yet been made.

423 Professor Marcus noted that in drafting the amendments to Rule
424 23(g) on appointing class counsel, the Committee drew from
425 experience in appointing lead counsel in MDL proceedings. "This is
426 a two-way street." So it is common for MDL judges to draw on
427 analogies to Rule 23(g) in appointing lead counsel. Judge Dow
428 agreed, adding that MDL judges think the analogy to Rule 23(g)
429 provides guidance enough without any need for a new rule. Judge
430 Bates also agreed, noting that in both settings courts are
431 concerned with the adequacy of the resources available to counsel
432 to properly develop the case.

433 A Committee member asked whether there is an interaction
434 between unsupported claims and the composition of the Plaintiffs'
435 Steering Committee. Judge Dow responded that the Subcommittee has
436 often heard that having a large number of clients is a ticket to a
437 role on the steering committee. "Some lawyers may seek to pump it
438 up by advertising." But judges do not think we need a rule.

439 This view was expanded by another judge. Very experienced
440 judges think they are handling the appointment of steering
441 committees quite well. They look to the credentials of the lawyers
442 who vie for appointment. Some make one-year appointments, a
443 practice that can easily lead to flushing out lawyers who have

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444 garbage lists of clients. And a lot of attention is being paid to
445 the repeat-player problem, both by MDL judges and the JPML. Still
446 another judge pointed out that MDL judges are making active efforts
447 to expand the ranks of steering committee participants, looking to
448 expand the MDL bar to more lawyers and more diverse lawyers. A
449 website is available and the JPML provides resources.

450 Professor Marcus pointed to estimates that the cost of
451 preparing a single bellwether trial is at least a million dollars,
452 not counting lawyer time. Third-party financing may be a means for
453 "those who are not over-rich" to play a role.

454 IV Trial Issues: Judge Dow reported that the October 31 conference
455 supports the view that a number of MDL judges are not doing
456 bellwether trials. There is no groundswell of support for rules
457 addressing this practice. Here, as elsewhere, MDL judges want
458 flexibility. Lexecon "workarounds" are used, but there may be a
459 trend toward more frequent remands to other courts for trial, both
460 in actions filed elsewhere and then transferred to the MDL and in
461 actions direct-filed in the MDL but naming the court where the case
462 should be remanded for trial. Some MDL judges ask to be transferred
463 with the case so they can try it in the remand court. Again, there
464 is no sense of a need for new rules.

465 Judge Bates formed the same sense of the views expressed at
466 the conference. He added that there is a feeling that cases are
467 dropped on the eve of a scheduled bellwether trial, that the
468 plaintiff dismisses or the defendant settles. There is a risk of
469 strategic maneuvering to gerrymander the selection of bellwether
470 cases. Judges devise procedures to respond. One procedure, for
471 example, is to list a number of bellwether trials on a set
472 schedule; if one drops, the next case on the list is advanced for
473 trial on the date set for the drop-out. "We did not even hear much
474 in terms of proposed rules."

475 Another judge observed that in his MDL, the lawyers asked for
476 bellwether trials. In other MDL proceedings, lawyers may feel that
477 bellwether trials are forced on them. Further conversation among
478 the judges suggested that MDL judges are not likely to force
479 bellwether trials, but that they want to move cases, and to have a
480 pool of defendants willing to waive the Lexecon limits on transfer
481 for trial. Judges have not expressed concerns on this score, but
482 proposals have been made to require all parties' consent. If we
483 undertake a survey of lawyers, perhaps questions could be asked
484 about these concerns.

485 A judge noted one response to the risk that cases set for
486 bellwether trials will be dismissed or settled to skew what was
487 intended to be a representative sample: he told the parties that

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488 once a list of bellwether cases had been set, he would end the
489 bellwether process if the cases started to dismiss or settle, and
490 would remand them all for trial. Another approach would be to allow
491 defendants to substitute a case for one dismissed by the plaintiff,
492 and to allow plaintiffs to substitute a case for one settled by the
493 defendants.

494 V Settlement: Judge Dow began the discussion of settlement by
495 noting that many MDLs include class actions, so that settlement
496 brings compliance with Rule 23(e). Many non-class settlements
497 reflect involvement of the judge, but without the Rule 23 process:
498 is this a problem? The Subcommittee members at the October 31
499 conference made the possibility of a rule regulating settlement a
500 major focus. There was a lot of discussion. But the Subcommittee
501 has not yet given much thought to these questions, nor developed
502 them as well as might be.

503 Judge Bates added that conversations with MDL judges suggest
504 that they have pushed for settlement in proceedings that never
505 would have been certified as a class. Or they have suggested to the
506 parties what criteria might lead them to promote a settlement.
507 "There is something like Rule 23(g) only if the judge puts it in
508 place." It is easy to imagine that the Supreme Court might be
509 concerned about settlements accomplished without the guidance and
510 protection of something like Rule 23(g).

511 A Committee member suggested a need to ask whether the MDL
512 court must look after the interests of individual plaintiffs. What
513 harms need to be guarded against? What role does the court have
514 when every plaintiff has a lawyer?

515 Professor Marcus responded that Individually Retained
516 Plaintiffs Attorneys sometimes feel they do not have much influence
517 in the proceedings, and may feel pressure to accede to a proposal
518 for common settlement. A rule could tie settlement review to
519 selecting the plaintiffs' steering committee, making court
520 involvement a major feature. It seems likely that judges consider
521 factors similar to Rule 23(g) in appointing steering committees.

522 The caution was repeated: The Subcommittee has not much got
523 into these questions. But perhaps there is not much there. Still,
524 the questions remain.

525 VI Third-Party Litigation Funding: Judge Dow opened the topic of
526 third-party funding by noting that the Subcommittee has benefited
527 from several meetings that included representatives of litigation
528 funding firms. There is a broad diversity among funding
529 arrangements. Often a sharp distinction is drawn between two
530 settings. One involves small loans made directly to individuals in

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531 ordinary litigation. The other involves large loans made to
532 litigants or law firms in complex or high-stakes actions. Many
533 models of disclosure have been advanced. Judge Pollster's order in
534 the Opioids MDL directing disclosure of funding agreements for in
535 camera inspection, supplemented by affidavits about actual practice
536 under the agreements, is one model. Another is disclosure to all
537 parties – perhaps of the agreements themselves, or perhaps only of
538 the fact of funding and the identity of the funder. Yet another is
539 to supplement disclosure with some discovery. The purposes of
540 disclosure also may vary. One purpose is to support recusal
541 decisions by the judge. Another is to decide whether a funder
542 should be involved in settlement conferences. Yet another is to
543 determine whether a funder has influence or even a veto power over
544 settlement.

545 Judge Bates noted that judges at the October 31 MDL conference
546 were not opposed to a disclosure rule, and thought there might be
547 some benefit. But the discussion left open the same questions
548 whether disclosure should be confined to the fact of funding and
549 the identity of the funder; whether disclosure should be made in
550 chambers, or to all parties; whether the full agreement should be
551 disclosed, and to whom; and whether discovery should be allowed.

552 A Committee member asked how third-party funding would be
553 defined for purposes of any disclosure rule. "Different funders
554 define terms differently." Should a rule aim only at case-specific
555 funding? At funding of a firm's inventory of cases? At funding of
556 an individual client? One or all law firms in a case that involves
557 many firms? "We aren't always talking about the same thing." This
558 caution was repeated in later parts of the discussion.

559 The Committee was reminded that disclosure is complicated by
560 overlapping regulatory regimes. Professional responsibility
561 organizations are considering this.

562 A Committee member asked whether MDL judges generally require
563 disclosure. Judge Dow responded that there is a trend toward
564 disclosure, especially given the order in the Opioid litigation,
565 but it is not yet a practice. Another judge agreed – more and more
566 judges are directing disclosure. The member followed up by asking
567 whether a rule should start at the modest end of limited
568 disclosure, or should aim higher?

569 Professor Marcus suggested that it is useful to consider
570 actual current practice in framing a rule. The Rule 5 limits on
571 filing discovery materials with the court, for example, were
572 adopted after about half of the districts had adopted rules that
573 limited or prohibited filing. "You've got to put the sidewalks
574 where people are walking." But it would be a mistake to approach

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575 disclosure of third-party funding only for MDL proceedings. A
576 broader approach should be considered. Judge Bates followed up this
577 advice by reminding the Committee that third-party funding has been
578 lodged with the MDL Subcommittee because disclosure had been
579 proposed as part of package proposals for MDL proceedings, and
580 because this tie avoided the need to form a third major
581 subcommittee. The Subcommittee recognizes that the inquiry is not
582 limited to MDL proceedings, and that funding occurs in many forms.

583 This discussion framed the question whether disclosure should
584 be approached incrementally. One possibility would be a rule that
585 requires only disclosure of the fact of funding and identity of the
586 funder, supplemented by a Committee Note stating that the rule sets
587 a floor that can be supplemented by the court on a case-by-case
588 basis.

589 The question of professional responsibility regulation
590 returned. Most districts incorporate either the ABA Model Rules or
591 the local state rules of professional responsibility. So
592 Massachusetts could adopt a rule that would thus be incorporated in
593 the local rules for the District of Massachusetts. The prospect of
594 varying state rules, incorporated into district-court rules, should
595 be taken into account.

596 A judge noted that third-party funding happens without the
597 knowledge of judges. "A number of my colleagues are not even aware
598 that it happens." Learning about the phenomenon generates an
599 interest in disclosure. "You cannot do anything about what you do
600 not know about."

601 Another judge suggested that if there is a survey of judges,
602 MDL or more generally, it could ask what is done about third-party
603 funding. And whether, when there is disclosure, it leads to
604 recusals. Judge Dow noted that a survey of MDL judges by the Panel
605 this year asked about experience with third-party funding. "There
606 is an interest in the recusal problem."

607 A familiar question was asked: do we know about what kinds of
608 investments judges make that might lead to recusal because of
609 third-party funding? There are some big funding firms that everyone
610 recognizes. It may be that judges are quite unlikely to invest in
611 them. But there are perhaps a few dozen more, not all well known.
612 More importantly, third-party funding has expanded rapidly in just
613 a few years. It is possible that many other forms of lenders will
614 emerge, but uncertain whether many lenders will be interested in
615 the case-specific or nearly case-specific types of lending, and
616 particularly non-recourse lending, that give rise to the most
617 pressing recusal issues.

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618 A judge asked how third-party funding plays into settlement.
619 And if the judge knows there is funding, does that affect the
620 judge's approach? One reply was that one concern is that the lawyer
621 advises the client on settlement, and the advice may be affected by
622 the fact and terms of funding even if the funding agreement
623 explicitly denies any role for the funder. As one example, a lawyer
624 who repeatedly deals with a funder may be influenced simply by
625 knowing that the funder wants an early settlement in a particular
626 case.

627 A Committee member returned to the professional responsibility
628 rules that deal with outside influence: Are they adequate to deal
629 with funding that does not of itself pay the lawyer's fees?

630 The discussion came back to MDL-specific issues by noting that
631 Rule 23(a)(1)(A)(iv) provides that in appointing class counsel, the
632 court must consider the resources that counsel will commit to
633 representing the class. An MDL judge has a similar concern to
634 appoint lawyers who can fund the MDL. In one MDL the plaintiffs'
635 lawyers have invested tens of millions of dollars in expenses. If
636 courts want to bring new lawyers into the ranks of lead and
637 coordinating counsel, they likely will need third-party funding.

638 When asked, a Committee member said she had not seen the
639 question of third-party funding come up in designating lead
640 counsel. Lawyers seeking appointment simply state that they have
641 adequate resources. The questions do not go further to ask whether
642 the lawyers are self-funding, have a line of credit, or whatever.
643 And remember that third-party funding occurs on the defense side as
644 well. It can be used to pay a defense firm every month. Is this any
645 different from funding for plaintiffs? She went on to ask what
646 actions by the court might we contemplate after disclosure? And she
647 urged that third-party funding opens opportunities to lawyers,
648 including minorities and young lawyers. "MDLs are extremely costly.
649 Most lawyers are working for contingent fees. Fee requests are
650 often cut, especially in class actions."

651 Judge Dow noted that some MDL judges say that they ask about
652 third-party funding when "people not in the usual mix" seek
653 leadership positions.

654 Judge Dow concluded the Subcommittee report by suggesting that
655 if the Subcommittee is to go about gathering more information along
656 the lines suggested in the Committee discussion, it may be another
657 year before the Subcommittee will be in a position to narrow the
658 range of subjects that might be developed into actual rules
659 proposals.

660 *Social Security Disability Review*

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661 Judge Bates introduced the Report of the Social Security
662 Review Subcommittee by noting that the Subcommittee has worked for
663 a year gathering information and considering what it is learning.
664 Questions remain about the wisdom of developing rules for a
665 specific substantive area, about the scope of any rules that might
666 be adopted, and whether rules can effectively reduce the problems
667 that inspired the request that the Committee take up these
668 questions.

669 Judge Lioi began the report by summarizing the overall
670 questions it addresses.

671 The task has been taken up in response to a recommendation by
672 the Administrative Conference of the United States based on an in-
673 depth study of practices around the country. Since the Committee
674 meeting last April, the Subcommittee has held a conference call
675 with the Social Security Administration; another with a group of
676 plaintiff attorneys gathered by the American Association for
677 Justice; and three additional calls among Subcommittee members to
678 consider and continually revise draft rules.

679 The current draft rules are limited to actions with one
680 plaintiff, one defendant – the Commissioner of Social Security, and
681 no claim beyond review on the administrative record for substantial
682 evidence.

683 Among the questions that remain are how detailed the complaint
684 should be, and whether the answer should be anything more than the
685 administrative record.

686 The draft also dispenses with Rule 4 service of the summons
687 and complaint, substituting a notice of electronic filing sent to
688 social security officials and the United States Attorney. A few
689 details remain to be worked out, but this proposal has met with
690 approval on all sides.

691 The draft rules set the times and order of briefing and
692 require specific references to the record. After considerable
693 discussion, they require that the plaintiff begin with a motion for
694 the requested relief, supported and explained by the plaintiff's
695 brief. The plaintiff is given an option to file a reply brief.

696 The draft does not include several provisions requested by the
697 Social Security Administration. It does not set page limits for
698 briefs. It does not prohibit the practice in some courts that
699 require the parties to file a joint statement of facts, although
700 that practice should be found inconsistent with the pleading and
701 briefing rules. Nor does it take up the proposal to address
702 requests for attorney fees based in services on judicial review

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703 under § 406(b).

704 Several drafts framed these rules as a new set of supplemental
705 rules. The current draft brings them into the body of the Civil
706 Rules, providing three rules to replace abrogated Rules 74, 75, and
707 76. It is possible that the three will be collapsed into a single
708 rule. The result would not be remarkably long, simply leaving more
709 white space as rules become subdivisions and on down to items. And
710 the benefit would be to retain two vacant rules slots for future
711 use. Some thought has been given to framing a single new rule as a
712 Rule 71.2, coming immediately after Rule 71.1 for condemnation
713 actions. Whether as Rule 74 or Rule 71.2, the new rule would fit
714 into Title IX for "Special Proceedings.

715 The Subcommittee will seek another round of comments on the
716 current draft by the Social Security Administration and plaintiffs'
717 representatives. This draft was prepared too late to seek their
718 review before today's meeting. Representatives of these groups are
719 observing this meeting, and will provide comments on the draft and
720 the discussion here today within three weeks. All of this
721 information will be considered in preparing the next draft and
722 seeking comments on it.

723 Discussion began with Rule 74, which defines the scope of the
724 rules. It limits Rules 74, 75, and 76 to actions in which a single
725 claimant names only the Commissioner of Social Security as
726 defendant and seeks no relief beyond review on the record under 42
727 U.S.C. § 405(g). If there is more than one plaintiff, or a
728 defendant in addition to the Commissioner, or a request for relief
729 that goes beyond review for substantial evidence in light of
730 correct law, the new rules do not apply. The draft Committee Note
731 includes in brackets a possible suggestion that even in actions
732 that are not directly governed by the new rules, it may be
733 appropriate to rely on the pleading standards of Rule 75 for the
734 parts of the action that seek review on the administrative record.
735 The decision to narrow the scope of the new rules reflects in part
736 the value of avoiding the complications that arise from efforts to
737 integrate the simple review rules with the full sweep of procedure
738 that is commonly invoked in more complicated actions. The vast
739 majority – likely nearly all – of § 405(g) review actions fit the
740 simple model. It seems better to separate out such things as class
741 actions. Very few class actions seek to base jurisdiction on §
742 405(g), and it seems better to leave them out of the new rules.

743 Draft Rule 74(b) is a relic of the drafts framed as
744 supplemental rules. It says that the Federal Rules of Civil
745 Procedure also apply except to the extent they are inconsistent
746 with the new rules. There is no need for this subdivision if the
747 new rules are swept into the regular body of Civil Rules.

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748 The first question was whether two claimants can join in a
749 single Social Security Administration proceeding? The consensus was
750 that this cannot be done, but this is a point that must be made
751 certain. If two claimants can proceed together before the
752 Administration, it likely will make sense to permit them to join in
753 a single action for review.

754 The next observation went to where any rules should be
755 located. The tentative decision to put them in the main body of the
756 Civil Rules should be reconsidered. Placing them in the body of the
757 rules risks setting a precedent that will lead to expanding the
758 rules into a set that resembles the Internal Revenue Code, a
759 collection of special-interest rules. Making them supplemental
760 rules poses less of a threat. Supplemental rules emphasize that
761 this is a separate universe and make it easier to resist other
762 efforts for special rules.

763 The Committee was asked to remember that this project comes
764 from a request by the Administrative Conference, joined by the
765 Social Security Administration. Their goal is to achieve a
766 nationally uniform set of procedures for the 17,000 to 18,000
767 review cases that are filed every year. The concern is that
768 different districts follow markedly different procedures, including
769 62 districts that have local rules for social security review
770 cases. The hope is that a nationally uniform practice would provide
771 great benefits to the Social Security Administration, and would
772 also provide real benefits to plaintiffs' counsel. Although the
773 Administration is represented by local United States Attorneys,
774 Administration lawyers commonly bear the brunt of the work and at
775 times are appointed special Assistant United States Attorneys.
776 Administration lawyers frequently appear in different districts and
777 need to learn the local procedures. A uniform set of national rules
778 might save as much as two or three hours per case; if so, something
779 like 35,000 hours of attorney time could be freed up for more
780 productive uses. In addition, the Administration believes that some
781 local practices are undesirable. Some courts, for example, require
782 plaintiff and Commissioner to prepare a joint statement of facts,
783 a process that wastes time and can cause difficulties. Several
784 courts rely on summary judgment to frame the review, a practice
785 that has the benefit of specific provisions for citing to the
786 record but that may cause difficulties because several provisions
787 in Rule 56 are inapposite to administrative review and the standard
788 for summary judgment – no genuine dispute as to any material fact
789 – is inapposite to review on an administrative record.

790 It is important to remember that much of the delay in
791 processing social security disability claims occurs in the
792 administrative process. New rules for district-court review will
793 not affect that, and are not likely to affect the high rate of

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794 remands. It is important to provide as efficient and prompt review
795 as possible, but the Committee should take care to remember that
796 new rules will not do much to cure problems that primarily arise
797 from an understaffed administrative structure.

798 The argument for the values of uniform national procedures was
799 met with the observation that there are many areas of the law that
800 encounter wide variations in local practice. But the rejoinder is
801 that social security review brings 17,000 to 18,000 cases to the
802 district courts every year, accounting for seven percent of the
803 docket. And it is common to find district courts spending more time
804 on a case than was devoted to it in the administrative process.

805 A different response was that if local practices are indeed
806 undesirable in this setting, it may be important to ensure that the
807 new rules foreclose local rules that undermine the goals of
808 uniformity and efficiency. This approach might even extend to
809 setting page limits for briefs, although the Civil Rules have never
810 done that and there are good reasons to allow local variations that
811 conform to local practice in other types of cases.

812 Rule 75 came up next. In many ways it is the heart of the new
813 rules, addressing the complaint, service, answer, the time to
814 answer, and the effect of motions on the time to answer. In some
815 ways it is a hybrid that blends an effort to analogize the
816 proceedings to appeal procedure with the greater detail customarily
817 provided in civil pleading. Many questions remain about the success
818 of this blend. The effects of the blend are not limited to the
819 complaint. As drafted, the rules allow the Commissioner to answer
820 by filing the administrative record and stating any affirmative
821 defenses, making it optional whether to respond to the allegations
822 in the complaint.

823 As drafted, Rule 75(a) does not specifically state that the
824 complaint must identify the decision to be reviewed. Perhaps that
825 should be added to the rule text.

826 The first information that the complaint must include is the
827 plaintiff's name and address, along with the last four digits of
828 the plaintiff's social security number. It also must identify "the
829 person on whose behalf – or on whose wage record – the plaintiff
830 brings the action." Serious questions have been raised about
831 requiring the address and the last four digits of the social
832 security number. Plaintiffs in other actions are not required to
833 provide these details about themselves, and there is an inevitable
834 risk in providing them. The Social Security Administration insists
835 that it needs these details to make sure that it has identified the
836 proper administrative proceeding and can file the correct record.
837 With more than a million administrative proceedings each year,

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838 there often are many claimants with the same name. This insistence
839 apparently reflects the absence of any other means to identify the
840 administrative docket, but it might be asked whether the
841 Administration should protect itself by developing a separate
842 system to identify individual proceedings.

843 The next item specified for the complaint is "the titles of
844 the Social Security Act under which the claims are brought." One
845 question is whether this is necessary. Although it is borrowed from
846 a draft prepared by the Social Security Administration, it is not
847 clear why the Administration needs to know anything more than the
848 identity of its own proceeding: is new law, not invoked in the
849 administrative proceeding, often invoked on review? Is it simply
850 that § 405(g) review provisions are adopted by some other statutes?
851 And for that matter, is "titles" a term sufficiently understood by
852 practitioners to convey the intended meaning? The Subcommittee will
853 press the Administration for more information on these questions.

854 After that, the complaint must name the Commissioner of Social
855 Security as a defendant. That is required by statute, but it may be
856 useful to remind plaintiffs, particularly pro se plaintiffs, of the
857 proper form. Complaints in fact sometimes name a wrong defendant.

858 These three elements roughly correspond to Rule 8(a)(1),
859 establishing the grounds of the court's jurisdiction.

860 The fourth element provides the analogue to Rule 8(a)(2),
861 stating the core requirement that a claim be stated by asserting
862 that the decision is not supported by substantial evidence or must
863 be reversed for errors of law. The reference to errors of law might
864 be surplusage, since a substantial-evidence argument can be framed
865 by arguing that there is not substantial evidence when the record
866 is reviewed under the proper law. But it may be helpful. The draft
867 includes in brackets possible language that would limit the
868 complaint to a general statement that the decision is not supported
869 by substantial evidence, "without reference to the record." These
870 words would emphasize the analogy to a notice of appeal. But it may
871 be better to allow a plaintiff who wishes to plead greater detail
872 about the lack of substantial evidence to do so. Among other
873 things, more detailed pleading might educate the Administration to
874 the reasons that lead to the frequent motions for a voluntary
875 remand to correct deficiencies in the administrative decision.

876 The fifth and final element is a request for the relief
877 requested. This corresponds to Rule 8(a)(3).

878 The first question raised about Rule 75(a) was why it requires
879 so much detail? And what happens if the plaintiff does not include
880 more? In two different districts, located in different regions of

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881 the Social Security Administration, "I have never seen any issue of
882 finding the right record." Nor was the Administration ever
883 defaulted for failure to respond.

884 The next question asked about the plaintiff's name and
885 address. The Committee on Court Administration and Case Management
886 has proposed that district courts should describe plaintiffs in
887 social security disability opinions only by first name and last
888 initial because the opinions themselves often include detailed
889 personal information. Should these rules adopt a similar limit?
890 Is it protection enough that Rule 5.2(c)(2) limits nonparty remote
891 electronic access to the file in an action for benefits under the
892 Social Security Act to the docket maintained by the court and the
893 court's opinion, "but not any other part of the case file or the
894 administrative record"? Nonparties can have access to the complaint
895 at the courthouse, but not by remote electronic means. The same
896 holds true for Rule 12 motions. The opinion, on the other hand, is
897 available on PACER. But, again, why does the Administration need
898 the last four digits to identify the proper record? If the
899 complaint identifies the date of the final administrative decision,
900 as required to establish jurisdiction, why is that not enough? the
901 decision becomes final when the Appeals tribunal affirms or denies
902 review. There is never a doubt as to what is the final substantive
903 decision. The administrative law judge's decision is not the
904 trigger for appeal, but the decision "is the front of the record."

905 Another Committee member expressed concern about having "all
906 this personal information all at one time in one place." It is
907 easily accessible for identity theft and other misuse. Yet another
908 member suggested we should learn more about why the Social Security
909 Administration cannot identify the proper record by other means.
910 The Subcommittee "will press them on that."

911 Separately, it was urged that draft Rule 75(a)(4) should
912 retain the phrase "or must be reversed for errors of law."

913 A separate question was raised as to the phrase in draft Rule
914 75(a)(1) asking for the identity of the person "on whose wage
915 record" the action is brought. This phrase was offered by the
916 Social Security Administration, and they have offered assurances
917 that it is the proper phrase to reflect substantive rights.

918 A Committee member observed that a bare bones complaint seems
919 to work: why require more? The proceeding is really an appeal. It
920 should work to frame the complaint as a notice of appeal. The draft
921 rule creates unnecessary complexity. We can call it a complaint, to
922 conform to the statutory direction that review is initiated by
923 commencing a civil action and to Rule 3. So what is the need to
924 plead more? Do local rules now require more? This ties to the

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925 answer. The Social Security Administration believes that the
926 administrative record is a sufficient answer. In practice,
927 complaints typically are one page, or at most two. They say "I am
928 me. I am appealing."

929 The question of local rules returned to an earlier theme. The
930 Social Security Administration urges that tens of thousands of
931 attorney hours can be saved by adopting uniform national rules. But
932 this depends on the expectation that the national rules will
933 supersede local rules. It will be necessary to identify what 62
934 sets of local rules – and perhaps more than 62 – now provide, and
935 whether they may persist in the face of new national rules. This is
936 a perennial problem: if a national rule does not say expressly that
937 it preempts local rules, it may not effectively do that. But if we
938 start adding express preemption provisions here and there, we may
939 create a risk that the absence of an express preemption provision
940 will be read to justify undesirable local rules.

941 A judge noted that the local rule in his court has five
942 paragraphs detailing what must be in the opening brief. If the
943 brief asks for a remand to take additional evidence, it must
944 describe what the evidence is. Local rules like this are likely to
945 persist so long as they are not inconsistent with a set of simple
946 national rules. A short national rule may not save any time for the
947 Social Security Administration.

948 Draft Rule 75(b) provides that the court must notify the
949 Commissioner of a review action by transmitting a Notice of
950 Electronic Filing. The draft provides for notice to the regional
951 Social Security office and to the local United States Attorney; it
952 leaves open the question whether notice should also be sent
953 directly to the Commissioner. The Commissioner's position on that
954 question will be important in moving toward any rule that might be
955 proposed for publication. This description of the draft elicited no
956 further discussion.

957 Draft Rule 75(c) addresses the Commissioner's answer. It
958 complements the provisions for the complaint in a rather unusual
959 way. The Commissioner would prefer a rule that states that filing
960 the administrative record is the answer. The draft provides that
961 the answer must include the administrative record and any
962 affirmative defenses under Rule 8(c). One version says simply that
963 these responses suffice as an answer. Another version says
964 explicitly that Rule 8(b) does not apply. Ousting Rule 8(b)
965 responds to the Commissioner's concern that it is a waste of scarce
966 attorney time to require a point-by-point response to any
967 allegations in the complaint that go beyond asserting a lack of
968 substantial evidence. If Rule 8(b)(6) applies, however, there is a
969 risk that failure to deny will become an admission. The draft

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970 Committee Note supplements the rule text by stating that the
971 Commissioner is free to address any allegations in the complaint
972 that the Commissioner wishes to address.

973 Discussion began with the observation that it seems odd to
974 leave it to the Commissioner to decide whether to respond to
975 allegations in the complaint. It can be predicted that different
976 regional offices and different United States Attorneys will respond
977 to such rules in different ways, undercutting uniform practice. In
978 turn, this prospect leads to the question whether there is any
979 problem with ordinary rules for complaint and response – do the
980 perceived problems that lead to a desire for uniform national rules
981 arise instead during later stages of review litigation?

982 Judge Lioi responded that the Social Security Administration
983 complains of the differences in practices among different
984 districts. In the Northern District of Ohio there is no apparent
985 problem with pleading. But the Administration wants to streamline
986 the process, relying on the administrative record as the only
987 answer. She also noted that delay does not seem to be a problem at
988 the district-court level.

989 The next suggestion was that these questions might be put
990 aside by adopting a practice analogous to a notice of appeal,
991 addressed by filing the administrative record. "Why bother to plead
992 more"? But is there a problem of affirmative defenses? – if they
993 are not pleaded, the plaintiff will file the opening brief without
994 addressing them. It does not seem likely that many cases will
995 involve affirmative defenses. Res judicata is one possible example.
996 Still further, is there a risk that the Administration will not yet
997 have identified possible affirmative defenses when it files the
998 answer? Is it likely that a bare bones complaint will give the
999 Administration notice of what affirmative defenses might be
1000 available? Res judicata, for example, may not be apparent on the
1001 face of a complaint that does not note that review of the same
1002 administrative decision was sought in a separate action. Other
1003 issues may arise from filing in the wrong district, something that
1004 likely would be apparent if the complaint must include the
1005 plaintiff's address, but not otherwise, especially as plaintiffs
1006 may move after the date of the address provided in the
1007 administrative proceeding. Exhaustion of administrative remedies
1008 also might be an issue, although in this context it might be
1009 treated as a matter of jurisdiction by analogy to the requirement
1010 that there be a final administrative decision. This part of the
1011 discussion concluded by noting that the risk is that affirmative
1012 defenses will be waived if not timely pleaded, and by asking
1013 whether anyone present had seen a review action that included an
1014 affirmative defense. No one had. But it was suggested that in some
1015 districts it may be routine to advance half a dozen affirmative

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1016 defenses.

1017 However that may be, it makes sense to address the complaint
1018 and answer, but why go beyond that? Support was provided for this
1019 suggestion. The goal is to develop a streamlined and uniform
1020 practice. "We should have a rule that says 'do not do anything
1021 more.'" The purpose of uniform national rules can be undercut by
1022 persisting in different local practices. National rules should
1023 expressly preempt them.

1024 Another observation was that these pleading rules seek to
1025 streamline the process. It is an appeal on a record. Why not go
1026 straight to briefing? But even uniformity at that opening level
1027 will not prevent the continuation of different methods of
1028 processing cases in different districts. And of course uniformity
1029 of outcomes could be achieved only by harmonizing the views of
1030 different circuits on social security law, a matter outside the
1031 Rules Enabling Act.

1032 Discussion of pleading led to a statement that the Department
1033 of Justice is concerned about treating subsets of cases
1034 differently. The Executive Office of United States Attorneys has
1035 prepared a model local rule that includes e-service, a mode of
1036 service that might creep into other kinds of cases. "Efficiency is
1037 a concern." Combining a national rule with local rules could lead
1038 to inefficiencies. That prospect will not please the Social
1039 Security Administration.

1040 The final comment on pleading was that the discussion had not
1041 shown that the draft rules would save time for the Social Security
1042 Administration, unless we delete any provision for answers that go
1043 beyond filing the administrative record. "All the problems seem to
1044 be post-pleading."

1045 Draft Rule 76 provides for briefing. The first step is a
1046 motion by the plaintiff for the relief requested in the complaint,
1047 accompanied by a brief that must support arguments of fact by
1048 citations to the record. The brief must be filed within 30 days
1049 after the answer is filed or 30 days after the court disposes of
1050 all motions filed under Rule 75(c). The Subcommittee has debated at
1051 length the question whether a motion should be required in addition
1052 to the brief. This draft retains the motion, in part because it is
1053 the traditional means of asking the court for an order that will
1054 protect against losing sight of a brief filed without a motion. The
1055 motion is not likely to exceed a page or two, and will not impose
1056 a serious burden on the court or parties.

1057 The plaintiff's brief is followed by the Commissioner's brief,
1058 due 30 days after service of the plaintiff's motion and brief. This

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1059 brief too must support arguments of fact by citations to the
1060 record.

1061 The final step is draft Rule 76(c), which gives the plaintiff
1062 an option to file a reply brief.

1063 The motion requirement was addressed by suggesting that the
1064 question is related to the analogy to a notice of appeal. It is a
1065 fair question whether a motion will often serve an important
1066 purpose. But the burden will be slight.

1067 A response suggested that the motion is an unnecessary piece
1068 of paper. Why not just file the brief? That will avoid arguments
1069 that the motion does not cover the arguments made in the brief.

1070 The time periods suggested by the draft were questioned. One
1071 court has a local rule that provides 60 days from answer to opening
1072 brief, and the court frequently gets requests for an additional 30
1073 days. The same holds for the Administration's answer. The
1074 Subcommittee actually began with 60-day periods, but thought it
1075 unwise to allow so much time. It is important to expedite district-
1076 court proceedings for the benefit of plaintiffs. The importance of
1077 helping plaintiffs toward speedy resolution is reflected in the
1078 six-month reporting period for motions that remain undecided.

1079 Discussion of the draft social security review rules concluded
1080 by observing that many of the provisions seem designed for the
1081 benefit of the Social Security Administration. Do they also provide
1082 benefits for claimants? "We should be careful to consult with
1083 plaintiffs." Judge Lioi noted that representatives of the Social
1084 Security Administration, the American Association for Justice, and
1085 the National Organization of Social Security Claimants
1086 Representatives are present for the discussion. She has asked them
1087 to respond to the draft and to the discussion here today within
1088 three weeks. The draft will be revised further, and the
1089 Subcommittee will plan to meet with them to discuss the next
1090 version. It would be helpful to arrange an in-person meeting, but
1091 it may be that only telephone conferences will be possible.

1092 Judge Bates thanked the Subcommittee for its work.

1093 *Rule 73: Consent to Magistrate Judge Trial*

1094 Judge Bates introduced the question that has been raised about
1095 Rule 73(b)(1). The Rule applies when a magistrate judge has been
1096 designated to conduct civil actions or proceedings. It implements
1097 the requirement of 28 U.S.C. § 636(c)(2) that when an action is
1098 filed the clerk shall notify the parties of the availability of a
1099 magistrate judge to exercise trial jurisdiction. "The decision of

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1100 the parties shall be communicated to the clerk of court. * * *
1101 Rules of Court for the reference of civil matters to magistrate
1102 judges shall include procedures to protect the voluntariness of the
1103 parties' consent." Rule 73(b)(1) seeks to protect voluntariness by
1104 providing that "the parties must jointly or separately file a
1105 statement consenting to the referral. A district judge or
1106 magistrate judge may be informed of a party's response to the
1107 clerk's notice only if all parties have consented to the referral."

1108 The problem arises from the automatic operation of the CM/ECF
1109 system. The system automatically sends notice of an individual
1110 consent to the judge assigned to the case, destroying anonymity.
1111 The Committee has been informed that it is not possible to program
1112 this feature out of the CM/ECF system. Nor does it seem practicable
1113 to pick up on the lead of the statute by providing that the parties
1114 lodge individual consents with the clerk of court, to be filed only
1115 if all parties consent. There is too much burden on the clerk's
1116 office, with an accompanying risk that something will go astray in
1117 the process.

1118 The agenda materials illustrate alternative possible
1119 approaches to the anonymity question, and also address two other
1120 questions that have emerged in early discussions. One asks whether
1121 Rule 73(b) should be revised to address the problem of consent in
1122 courts that automatically assign cases to magistrate judges for
1123 trial. The other asks whether the rule should be revised to address
1124 the problems that arise when a new party is joined after all
1125 original parties have consented to a referral.

1126 The simplest amendment of Rule 73(b)(1) would simply delete
1127 the reference to separate consents: "the parties must jointly ~~or~~
1128 ~~separately~~ file a statement consenting." This approach could be
1129 implemented by local procedures like the procedure adopted in the
1130 Southern District of Indiana. A notice and consent form is
1131 delivered to the plaintiff. If the plaintiff wishes to consent, the
1132 plaintiff is responsible to gather consents from all other parties.
1133 The form is filed only if all consent.

1134 A somewhat more complex revision might substitute these words:
1135 "The parties may consent by filing a joint statement signed by all
1136 parties. [No party may file a consent signed by fewer than all
1137 parties.]" Reference to a joint statement seems a bit more direct
1138 than reference to joint filing.

1139 Discussion began with a suggestion that the part in brackets
1140 should be retained in the rule. There is a risk that some party may
1141 seek an advantage by filing a separate consent. Another judge
1142 observed that there are a lot of pro se complaints, and pro se
1143 plaintiffs do not understand the difference between a reference for

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1144 trial and a reference for discovery. The prohibition on consents
1145 filed by fewer than all parties should remain in the rule. Yet
1146 another judge observed that in the District of Massachusetts pro se
1147 plaintiffs get separate notices. They are instructed to send
1148 consents to the magistrate judge's clerk, who gathers consents from
1149 all sides.

1150 A related observation was that in many districts there is an
1151 effort to get consents for more referrals. Judges require the
1152 parties to discuss referral at the Rule 26(f) conference. The
1153 result may be a Rule 26(f) report that expressly identifies parties
1154 who consent to referral and those who do not.

1155 It was agreed that the question of joint consents should be
1156 developed further.

1157 The next questions address party consent when a court
1158 routinely assigns some cases to magistrate judges for trial as part
1159 of the random initial draw. This practice seems to be increasing;
1160 although it does not seem to be followed in a majority of
1161 districts, it likely is followed in more than a handful. The
1162 Committee may need more information about the prevalence of this
1163 practice, and about the possible effects on it that would flow from
1164 different rule approaches.

1165 A judge noted that districts vary in their uses of magistrate
1166 judges. In the Northern District of Illinois cases are assigned at
1167 the outset, "off the wheel," to both a magistrate judge and a
1168 district judge. Some district judges automatically refer all
1169 discovery to the magistrate judge. Other district judges keep
1170 discovery for themselves. Local terminology uses "reference" to
1171 designate assignment to a magistrate judge for specified purposes,
1172 while "consent" is used to designate assignment for all purposes,
1173 including trial.

1174 Practice in the Southern District of Florida is similar. Cases
1175 are automatically assigned to a district judge and a magistrate
1176 judge. Some judges automatically refer all discovery to the
1177 magistrate judge. "My order has a very clear description." At times
1178 when a particular motion is assigned to a magistrate judge for a
1179 report and recommendation the magistrate judge may get the parties
1180 to consent to a referral for decision of that particular motion. It
1181 was noted that this practice fits within § 636(c)(1), which
1182 provides that a magistrate judge "may conduct any or all
1183 proceedings in a jury or nonjury civil matter and order the entry
1184 of judgment in the case * * *." An order granting dismissal or
1185 summary judgment can be made the judgment of the court, for
1186 example.

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1187 In the District of Massachusetts, magistrate judges are on the
1188 initial case draw, but all parties must consent to make the
1189 referral effective.

1190 The draft of Rule 73(b)(1) in the agenda materials undertakes
1191 to illustrate the consent issue, but in an awkward form. The
1192 illustration would work better if it is divided into separate
1193 paragraphs. Paragraph 73(b)(1)(A) would adopt whatever provision is
1194 proposed for party consent when the case is initially assigned to
1195 a district judge, Paragraph 73(b)(1)(B) might look like this:

1196 (B) If a case is initially assigned to a magistrate
1197 judge without the parties' consent, any party may
1198 refuse consent by [filing a refusal][lodging a
1199 refusal with the clerk]. [Refusal by any party
1200 withdraws the action or proceeding {from the
1201 magistrate judge}.] [A district judge or magistrate
1202 judge may not be informed of any party's refusal to
1203 consent.]

1204 Further discussion noted that referrals for pretrial
1205 proceedings under § 636(b) do not need party consent. The Northern
1206 District of California has had magistrate judges "on the wheel" for
1207 many years. The right approach is to make it clear that the court
1208 is obliged to determine that all parties consent to the reference.
1209 We should learn more about how this is accomplished in all the
1210 districts that make referrals before all parties consent. At the
1211 same time, it may be necessary to address the question of implied
1212 consent, lest parties play along with the referral until one is
1213 displeased by something the magistrate judge does.

1214 The suggestion that local rules should be examined prompted
1215 the observation that the search may not be entirely
1216 straightforward. In Minnesota the question is addressed in Social
1217 Security Local Rule 7.2 because those cases are the only cases that
1218 are routinely referred to magistrate judges.

1219 Discussion concluded with the observation that automatic
1220 initial assignments to magistrate judges raise a number of issues.
1221 Further thought should be given to the question whether they should
1222 be taken up now, when the only proposal directly put to the
1223 Committee addresses the effects of the CM/ECF system on anonymity.

1224 Finally, the question of consent by late-added parties might
1225 be addressed. The agenda materials sketch two possible approaches.
1226 One would require the new party to give consent within 30 days of
1227 joining the action. That approach might disrupt referrals more
1228 frequently than the alternative of requiring that a refusal be
1229 filed within 30 days. Neither approach would protect anonymity.

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1230 Anonymity could be protected by requiring all parties, old and new,
1231 to file a joint consent after a new party is joined. That would
1232 open the way for second thoughts by a party dissatisfied with the
1233 direction of proceedings before the magistrate judge.

1234 Professor Marcus noted that it may be better to leave the
1235 question of consent by new parties where it lies. Courts have found
1236 different ways of coping with the question of consent by new
1237 parties. The questions arise in different settings, and have
1238 elicited different responses. An extreme example is provided by an
1239 argument that after class counsel and the defendant have agreed to
1240 a referral and a class is certified, any class member can defeat
1241 the referral by objecting. That argument did not succeed. But what
1242 of an intervenor? Courts have said that an intervenor must accept
1243 the case as it is. But what of a Rule 19 party joined by court
1244 order? Or other later-added parties?

1245 Brief discussion led to the conclusion that there is no need
1246 to pursue a rule-based solution to the variety of questions that
1247 may be raised by consent of late-added parties.

1248 *Rule 7.1 Disclosure Statements*

1249 Three distinct sets of questions have been raised about Rule
1250 7.1 disclosure statements. Each can be approached separately.

1251 Intervenors: The first questions arise from proposals before other
1252 advisory committees. A proposal has been made to amend Appellate
1253 Rule 26.1 to require a disclosure statement from a nongovernmental
1254 corporation that seeks to intervene. This proposal has been
1255 published, approved for adoption, and prescribed by the Supreme
1256 Court. It is on track to take effect this December 1. A proposal to
1257 adopt a parallel amendment to Bankruptcy Rule 8012(b) was published
1258 this summer.

1259 The Appellate and Bankruptcy Rules were initially adopted as
1260 part of a package developed by a subcommittee of the Standing
1261 Committee. The goal was to have disclosure rules in the Appellate,
1262 Bankruptcy, Civil, and Criminal Rules that are as nearly uniform as
1263 the different contexts permit. The desire to have uniform
1264 provisions provides strong reason to make a parallel change in Rule
1265 7.1(a):

1266 (a) A nongovernmental corporate party and a
1267 nongovernmental corporation that seeks to intervene
1268 must file two copies of a disclosure statement
1269 that: * * *

1270 A potential complication was pointed out. New Appellate Rule

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1271 26.1 calls for a nongovernmental corporation disclosure statement
1272 by a debtor that is a corporation. Is a parallel provision needed
1273 in Rule 7.1 to cover cases on appeal from the bankruptcy court?
1274 Bankruptcy Rule 8001(a) provides that the Part VIII Rules, which
1275 include Rule 8012, govern the procedure in a district court and BAP
1276 on appeal from a judgment, order, or decree of a bankruptcy court.
1277 That seems to be enough to do the job without further amending Rule
1278 7.1. But there may be a complication. Bankruptcy Rule 7007.1(a)
1279 calls for a corporate disclosure statement by any corporation that
1280 is a party to an adversary proceeding, other than the debtor or a
1281 governmental unit. The advice of the Bankruptcy Rules Committee
1282 will be sought on the need to add to Rule 7.1 something about
1283 bankruptcy appeals to the district court. (Inquiry showed that
1284 there is no need to further complicate Rule 7.1.)

1285 The Committee agreed that this conforming amendment should be
1286 recommended for publication, subject to answering the bankruptcy
1287 appeal question. The simple form of the amendment might be
1288 recommended for adoption without publication as a noncontroversial
1289 adoption of a proposal that has been examined in two separate
1290 publications by other committees. But it likely is better to go
1291 through the full publication and comment process. The no-
1292 publication practice should be indulged sparingly, mostly for
1293 purely technical amendments. And the possibility of bankruptcy
1294 appeal complications may counsel publication even if the committees
1295 are satisfied there is no need to address bankruptcy appeals in
1296 Rule 7.1.

1297 Natural Persons' Names and Birth Dates: The second disclosure
1298 proposal, 18-CV-W, was advanced by the National Association of
1299 Professional Background Screeners. They propose a new rule that
1300 would require all natural persons who are parties to civil and
1301 criminal cases to file a disclosure statement of the person's full
1302 name and full date of birth. The proposal, drawing from Bankruptcy
1303 Rule 1007(f), would make the information available as a search
1304 criterion in the PACER system – a nonparty who already has the
1305 information could put it into the PACER system and learn whether
1306 the person identified by this information is a party to any civil
1307 or criminal case. The information is described as not sensitive.
1308 The purpose of supporting the search would be to support more
1309 complete reports to prospective employers, landlords, and others.
1310 The same proposal was made to the Criminal Rules Committee in 2005
1311 and was rejected. The Criminal Rules Committee has again rejected
1312 it at its October meeting.

1313 The first question for the Committee is whether a procedural
1314 purpose can be identified for the proposed disclosure. Rules should
1315 be adopted and amended to pursue procedural goals, not to serve
1316 outside interests.

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1317 Discussion failed to identify any procedural purpose for this
1318 proposal. It was removed from the agenda.

1319 Citizenship of LLCs, Trusts, and Similar Entities: The third
1320 disclosure proposal, 18-CV-S, is advanced by Judge Thomas Zilly. It
1321 calls for "disclosure of the names and citizenship of any member or
1322 owner of an LLC, trust, or similar entity."

1323 The proposal is inspired by experience with the difficulty of
1324 determining the citizenship of some forms of entities for the
1325 purpose of establishing diversity jurisdiction. Judge Zilly
1326 describes a case that went to judgment after a 10-day trial, only
1327 to be remanded by the court of appeals to determine the citizenship
1328 of the LLC parties – the plaintiff and three defendants. An LLC is
1329 a citizen of every owner's state. If an owner of an LLC is itself
1330 an LLC, the citizenship of each of the LLC owner's owners must be
1331 determined. Often this information is not readily available. Indeed
1332 it may be that an LLC itself does not know all of the citizenships
1333 ascribed to it for establishing or defeating diversity
1334 jurisdiction.

1335 This proposal draws from practical experience that diversity
1336 jurisdiction may not be adequately ensured by the Rule 8(a)(1)
1337 requirement that a pleading that states a claim for relief must
1338 contain a short and plain statement of the grounds for the court's
1339 jurisdiction. The pleader may not have ready access to the required
1340 information. And serious inefficiencies arise if a diversity-
1341 destroying citizenship is uncovered only after substantial progress
1342 has been made in an action. One judge noted an experience with a
1343 late-arising question. Another noted a slip-and-fall case that
1344 involved half a dozen LLCs as parties, and urged that requiring
1345 disclosure of the owners' citizenships often will not be an onerous
1346 requirement. Another judge has a standard order, reflecting the
1347 common involvement of LLCs as parties and the frequent lack of
1348 understanding of the rules that govern diversity jurisdiction. Yet
1349 another court has an order to disclose, but has found that some
1350 parties would rather discuss the question than disclose their
1351 owners and their citizenship.

1352 Diversity jurisdiction does not seem likely to be a concern of
1353 the Bankruptcy and Criminal Rules. But LLC ownership may bear on
1354 recusal as well as diversity jurisdiction. The subject deserves
1355 discussion among the rules committees. The Civil Rules Committee
1356 can take the lead in raising the issue.

1357 The proposal extends beyond LLCs to a trust or a similar
1358 entity. Here too the questions extend beyond diversity jurisdiction
1359 to information useful in knowing possible grounds for recusal. A
1360 wide variety of entities may be involved. Some local court rules

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1361 list many of them. Others speak generally of disclosing anyone with
1362 a financial interest in the outcome. Discussion of financial
1363 interests ties back to the MDL Subcommittee's exploration of
1364 proposals to require disclosure of third-party litigation funding
1365 arrangements. It may be time to ask whether these broader issues
1366 should be considered by an all-committees group.

1367 *Final Judgment in Consolidated Cases: Rule 42(a)(2)*

1368 Judge Bates introduced this topic. In *Hall v. Hall*, 138 S.Ct.
1369 1118 (2018), the Court ruled that when originally independent cases
1370 are consolidated under Rule 42(a)(2) they remain separate actions
1371 for purposes of final-judgment appeal under 28 U.S.C. § 1291.
1372 Complete disposition of all claims among all parties to what began
1373 as a separate independent action establishes a final judgment. The
1374 opinion concludes by observing that changes in the meaning of a
1375 "final judgment" "are to come from rulemaking, * * * not judicial
1376 decisions in particular controversies.'" If the always-separate
1377 approach "were to give rise to practical problems for district
1378 courts and litigants, the appropriate Federal Rules Advisory
1379 Committees would certainly remain free to take the matter up and
1380 recommend provisions accordingly."

1381 The Appellate Rules Committee has considered this question,
1382 noting that the always-separate approach may create inefficiencies
1383 for courts of appeals by generating separate appeals involving the
1384 same controversy and essentially the same record. The Committee
1385 also noted that the rule may generate traps for the unwary, who do
1386 not realize that the time to appeal has begun to run. It decided
1387 that "this matter is appropriately handled by the Civil Rules
1388 Committee."

1389 The immediate question is whether the Committee should wait to
1390 see whether practical problems in fact emerge, or whether there is
1391 enough experience already to justify taking up this topic for
1392 consideration now.

1393 The question of practical effects was not much explored in the
1394 Court's opinion. Primary reliance was placed on a century's worth
1395 of interpretations of the 1813 statute that first explicitly
1396 authorized consolidation of federal-court cases. The always-
1397 separate rule was firmly established, most recently in 1933. The
1398 Court concluded that the Federal Rules Advisory Committee must
1399 surely have been aware of the established final-judgment rule, and
1400 must have intended the rule to carry forward in the original Rule
1401 42(a) language that authorized the court to "order all actions
1402 consolidated." But the Court also noted one pragmatic concern –
1403 forcing a party to wait for "other cases" to conclude would
1404 substantially impair the right to appeal.

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1405 The Court's decision can be set against the background of
1406 appellate decisions construing Rule 54(b). Two clear rules were
1407 adopted, along with a more flexible middle ground. One rule was the
1408 rule adopted by the Court: actions that begin life as separate
1409 actions are always separate for purposes of final-judgment appeal,
1410 no matter how completely they have been consolidated with other
1411 cases in a single trial-court proceeding. The opposing rule was
1412 that consolidation for all purposes makes formerly separate actions
1413 a single action; complete disposition of all claims among all
1414 parties to what was a separate action is appealable as a final
1415 judgment only on entry of a partial final judgment under Civil Rule
1416 54(b). In between these rules, several circuits – including the
1417 Third Circuit in *Hall v. Hall* – looked to several factors to
1418 measure finality, including the overlap among the claims, the
1419 relationship of the various parties, the likelihood of the claims
1420 being tried together, and "serving justice and judicial economy."

1421 Several courts of appeals, in short, subordinated the
1422 important value of bright-line rules of appeal jurisdiction to the
1423 belief that better results can be achieved by flexible
1424 consideration of the many interests that bear on identifying the
1425 occasions for appeal. The trial court may have a strong interest in
1426 maintaining control of closely related proceedings, serving the
1427 purposes that prompted consolidation. The trial court also may have
1428 an interest in deciding whether it is better to have an immediate
1429 appeal that will settle issues common to the matters that remain,
1430 or instead to move ahead with the matters that remain so that
1431 related issues will be resolved on one appeal that considers the
1432 full context of the entire proceedings. The appeals court has an
1433 interest in avoiding the prospect of reexamining the same basic
1434 disputes in two or even more appeals. And the parties have parallel
1435 interests. If one party has interests that would be advanced by an
1436 immediate appeal, or quite different interests in moving promptly
1437 to execute a favorable judgment, other parties may have competing
1438 interests that align with the interests of the trial and appeal
1439 courts.

1440 This array of interests may be quite the same whether the
1441 proceeding began life as a single multi-party, multi-claim action,
1442 or instead began as separate actions that were consolidated. When
1443 the proceeding begins as a single action, Civil Rule 54(b) plainly
1444 controls. It vests the initial decision whether to enter a partial
1445 final judgment in the district judge, often characterized as the
1446 "dispatcher." The wisdom of this approach may apply almost
1447 indistinguishably when separate actions are consolidated, although
1448 the fact that the parties may have deliberately chosen not to join
1449 in a single action must be considered if Rule 54(b) is to be
1450 invoked after consolidation.

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1451 Several sketches of possible rule amendments were provided to
1452 illustrate the approaches that might be taken if *Hall v. Hall* is to
1453 take a place on the agenda. In short, it may be best to amend both
1454 Rule 42(a) and Rule 54(b). One approach would be to revise Rule
1455 42(a)(2) to provide that the court may "consolidate the actions for
1456 all purposes." Anything less than melding the actions into a single
1457 action would be covered by (a)(1) and (3): "(1) join for hearing or
1458 trial any or all matters at issue in the actions; * * * (3) issue
1459 any other orders to avoid unnecessary cost or delay." Rule 54(b)
1460 would be amended in parallel: "When an action – including one that
1461 consolidates [formerly separate] actions under Rule 42(a)(2) –
1462 presents more than one claim for relief * * * or when multiple
1463 parties are involved, the court may direct entry of a final
1464 judgment as to one or more, but fewer than all, claims or parties
1465 only if the court expressly determines * * *."

1466 Discussion began with the question whether it is wise to "dive
1467 in now," or might be better to wait to see what practical problems
1468 may emerge.

1469 A judge suggested that there are practical problems now. That
1470 is why different circuits took different approaches. The Third
1471 Circuit had settled law that guided its decision to dismiss the
1472 appeal in *Hall v. Hall* by an unpublished decision that looked to
1473 all the factors that bear on appeal timing. "The history sheds
1474 enough light to take a look at it." There is a problem in the risk
1475 that failure to recognize the need to take a timely appeal will
1476 prove a trap for the unwary. And efficiencies in the system, in
1477 both trial and appeals courts, are important.

1478 Another judge asked whether the Court might take it amiss if
1479 the Committee were to begin immediate consideration of its
1480 decision. Would it be more seemly to wait for a while?

1481 A judge responded that the Court seems to have opened the
1482 door, to have invited the Committee to decide whether to take these
1483 questions up now. Others noted that it is not rare for the advisory
1484 committees to take up questions promptly after a Supreme Court
1485 decision. Rule 15(c) on the relation back of pleading amendments
1486 changing the party against whom a claim is asserted was taken up
1487 promptly after a "plain meaning" interpretation of the former rule.
1488 The proposed amendment was accepted without apparent difficulty.
1489 Rule 4(k)(2) was added in prompt response to a suggestion by the
1490 Court that it might be good to adopt a rule for serving process on
1491 internationally foreign defendants that fall within the reach of
1492 federal personal jurisdiction power but that could not be reached
1493 without an implementing rule for service. The Evidence Rules
1494 Committee has reacted promptly to a ruling on the admissibility of
1495 past convictions.

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1496 It also was noted that these problems can be considered
1497 without reopening the rather recent ruling that individual actions
1498 consolidated for multidistrict pretrial proceedings under § 1407
1499 remain separate for final-judgment appeals. That question is
1500 distinct from Rule 42(a) consolidation of cases that are before the
1501 court for all purposes. Nor do these problems have any direct
1502 bearing on the proposals to expand the opportunities to appeal in
1503 MDL proceedings in other directions.

1504 Reporter Coquillette observed that the Court understands there
1505 are things the Committees can do that the Court cannot do, studying
1506 a problem over time, gathering information, and proposing solutions
1507 informed by a variety of perspectives outside the pressures of
1508 adversary positions in a single action.

1509 Judge Bates concluded that no one had expressed a need to
1510 hesitate. A structure will be devised for taking the next steps.

1511 *Naming Parties in Social Security Review Opinions*

1512 Judge Bates reported a recommendation by the Committee on
1513 Court Administration and Case Management that opinions in social
1514 security review cases should identify the claimant only by first
1515 name and last initial. The recommendation is initially addressed to
1516 courts, but includes, 18-CV-L, a suggestion that Rule 5.2(c) might
1517 be amended. Rule 5.2(c) limits remote electronic access by
1518 nonparties to the court file, but subdivision (c)(2)(B) expressly
1519 allows remote electronic access to the court's opinion. Opinions
1520 often include substantial amounts of personal and medical
1521 information. The recommendation is being made to all courts without
1522 awaiting development of a national court rule. There are good
1523 reasons to hesitate about writing into Rule 5.2 provisions that
1524 dictate opinion-writing practices. It may be wise to wait to see
1525 how courts respond. The agenda materials include as an example a
1526 proposal by the Second Circuit Local Rules Committee that would
1527 respond to the CACM suggestion.

1528 A judge reported on experience in the Appellate Rules
1529 Committee considering sealing practices. One view is that a party
1530 who seeks court action should be prepared for public access to
1531 information about the case. "We may learn by waiting."

1532 A contrary view was expressed: "We should take it up."

1533 The outcome was to keep this item on the agenda, but to wait
1534 for a year before considering it again.

1535 *Time to Decide Motions*

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1536 Judge Bates reported on 18-CV-V, a proposal to adopt court
1537 rules that mandate decisions on motions in a specific number of
1538 days, perhaps 60 days or 90 days. He noted that there are many
1539 competing demands on court time. "It is difficult to manage dockets
1540 by court rule." The Judicial Conference has long opposed docket
1541 priorities in rules or proposed legislation.

1542 This item will be removed from the docket.

1543 *Pilot Projects*

1544 Judge Campbell reported on the initial discovery pilot
1545 projects in the District of Arizona and the Northern District of
1546 Illinois. In short compass, they require initial discovery by
1547 providing other parties with facts and documents, favorable and
1548 unfavorable. The project has been under way in Arizona for 18
1549 months, and for 17 months in Illinois. The Federal Judicial Center,
1550 led by Emery Lee, is doing good work in gathering data to evaluate
1551 the success of the pilots.

1552 No real problems have emerged in Arizona, most likely because
1553 the initial discovery rules closely parallel initial disclosure
1554 rules that Arizona has implemented for many years. The bar is
1555 comfortable with the procedure. Some mid-stream changes have been
1556 made in the rules. A real test of success will come if motions
1557 emerge to exclude evidence at summary judgment or trial because it
1558 was not revealed in the initial discovery process. Judge Bates
1559 added that although not many cases have proceeded to this point, so
1560 far this seems OK.

1561 Judge Dow reported that attorneys have not reported problems
1562 with the initial discovery process in individual conversations, but
1563 that an anonymous survey showed a need to modify the process to
1564 allow delaying disclosure when a motion to dismiss is filed.
1565 "Overall our judges feel pretty good about it." It has been
1566 reasonably smooth from the judges' perspective. The court has
1567 stressed that rolling discovery production is allowed in heavy
1568 discovery cases. "We're getting statements of compliance."

1569 A Committee member reported that there is still some
1570 unhappiness in the Northern District of Illinois, "especially on
1571 the defense side." When lawyers consider choice-of-court clauses,
1572 defense lawyers counsel against picking the Northern District of
1573 Illinois because of the initial discovery project. But there is a
1574 lot of behind-the-scenes cooperation to work on deadlines.

1575 Responding to a question, Judge Campbell noted that Arizona
1576 lawyers "had angst" for the first three years of the Arizona state-
1577 court rules, but came to accept it. One of its virtues is that it

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1578 gets the parties talking to each other.

1579 Emery Lee reported that the FJC has completed three rounds of
1580 attorney surveys in closed cases in Arizona and Illinois. Data will
1581 soon be available. "We're starting to see Rule 56 cases." The
1582 survey response rate has been 30%. They hope for a better rate in
1583 future surveys. Judges will be surveyed soon.

1584 Judge Bates noted that efforts continue to recruit district
1585 courts to engage in the pilot project for expedited disposition
1586 practices.

1587 Emery Lee also reported that the employment disclosure
1588 protocols that have been adopted by some 50 district judges began
1589 life in 2011. A 2018 report can be found at FJC.gov. Comparing
1590 cases governed by the protocols with other cases shows that the
1591 protocol cases are not moving faster, and are resolving in the same
1592 ways. The median cases resolve in 10 to 11 months. They mainly
1593 involve Title VII claims. There are fewer discovery motions in the
1594 protocol cases, but it has not been possible to tell whether that
1595 is because judges who use the protocols also do other things to
1596 manage discovery.

1597 *Next Meeting*

1598 The next Committee meeting is scheduled to begin at 12:00 noon
1599 on April 2, 2019, in San Antonio, Texas. It is scheduled to
1600 conclude at 12:00 noon on April 3.

1601 *Closing*

1602 Judge Bates thanked all present for their input and hard work.

Respectfully submitted,

Edward H. Cooper
Reporter

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TAB 5

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TAB 5A

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

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CHAIR

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BANKRUPTCY RULES

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CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

DEBRA ANN LIVINGSTON
EVIDENCE RULES

MEMORANDUM

TO: Hon. David G. Campbell, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Hon. Donald W. Molloy, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: December 4, 2018

I. Introduction

The Advisory Committee on Criminal Rules met on October 10, 2018, in Nashville, Tennessee. This report discusses several information items, including the Committee's decision to undertake a review of Rule 43(a), and the first phase of its consideration of the provisions governing discovery concerning expert witnesses.

II. Information Items

A. Rule 43(a) (18-CR-C)

A Subcommittee has been appointed to consider the suggestion in the opinion in *United States v. Bethea*, 888 F.3d 864 (7th Cir. 2018), that "it would be sensible" to amend Rule 43(a)'s requirement that the defendant must be physically present for the plea and sentence. On two recent occasions, the Committee has rejected suggestions that it expand the use of video conferencing for pleas or sentencing, but members concluded that it would be appropriate to revisit the issue with

this case in mind. In *Bethea*, the defendant's many health problems made it extremely difficult and for him to come to the courtroom, and given his susceptibility to broken bones, doing so might have been dangerous for him. But even in such an exceptional case, and even at the defendant's request, the panel in *Bethea* concluded, "the plain language of Rule 43 requires all parties to be present for a defendant's plea" and "a defendant cannot consent to a plea via videoconference." Committee members emphasized that physical presence is extraordinarily important at plea and sentencing proceedings, but they also recognized that *Bethea* was a really compelling case. On the other hand, members wondered if the case might be a one-off. Members noted that practical accommodations at the request of the defendant and with the agreement of the government and the court have been made in such rare situations, obviating the need for an amendment. Judge Molloy concluded that the issue warranted further study.

The Subcommittee, chaired by Judge Denise Page Hood, will assess the need for a narrow exception to the requirement of physical presence for plea or sentence, how such an exception could be defined, and what safeguards would be necessary, including the procedures needed to ensure a knowing and intelligent waiver, and to accommodate the right to counsel when the defendant and counsel are in different locations.

B. Time for Ruling on Habeas Motions (18-CR-D)

The Committee considered, and decided not to pursue, Mr. Gary Peel's suggestion that both the Criminal and Civil Rules be amended to require "district court judges to issue decisions/opinions on pending motions within a specified number of days," and suggesting 60 or 90 days absent exigent circumstances. Mr. Peel states that the failure of judges to rule on motions in Section 2254 and 2255 cases, in particular, is a "systemic problem," and that it is not uncommon for Section 2254 and 2255 motions to remain "pending" or "under consideration" for a year or more.

The problem of delay in resolving these matters has been raised in commentary. The reporters provided data from two studies in the past documenting this delay and showing that time to disposition for 2254 noncapital cases varies considerably, with many districts taking multiple years on average to close these cases. Marc Falkoff, the author of the more recent study, argued that the reason for delay in these cases is that these cases are not among those that must be reported as motions that have been pending for more than six months. They have been exempted from that reporting requirement. Mr. Falkoff suggested that that exemption be removed.

Although the Committee did not favor setting strict timelines for the consideration of 2254 and 2255 cases, members expressed concern about the long delays, and the effect of exempting habeas cases from the CJA reporting requirements. This exemption gives district judges an incentive to prioritize the other matters that are reported. Members agreed that eliminating the exemption would have an effect on judge's behavior. On the other hand, they also recognized that the situation varies from district to district, with some jurisdictions—some with only a small number of district judges—having exceptionally heavy habeas caseloads.

Because the reporting requirements fall within the jurisdiction of the Judicial Conference Committee on Court Administration and Case Management (CACM), the Committee requested that Judge Molloy refer its concerns about the incentives created by the current exemption, and the role it may play in delaying the disposition of habeas cases, to CACM. The referral would draw attention to the issue, without presuming to prejudge the conclusion. Judge Molloy subsequently did so, by letter, and was informed that the issue has been placed on the agenda for CACM's June 19, 2019 meeting.

C. Disclosure of Defendant's Full Name and Date of Birth (18-CR-E)

After discussion, the Committee decided not to pursue a proposal from the National Association of Professional Background Screeners (NAPBS), which recommended that the Civil and Criminal Rules, and the architecture of the PACER system, be revised to provide each criminal defendant's full name and date of birth. NAPBS proposed that this information not be visible to the general public when it accessed PACER, but be available as a search term so that background screeners would be able to perform their search functions more accurately and efficiently. This is similar to a request that NAPBS made in 2006 when Criminal Rule 49.1 and the other E-Government Act amendments were promulgated. The Association's request was a little broader at that time. At that time, NAPBS wanted Social Security numbers. This proposal is more limited, and is premised on its argument that making this data available would benefit not only screeners, but also society at large because their screening would be more efficient and accurate. The proposal emphasizes that something similar is presently done in the bankruptcy system to assist in identifying assets, and so on.

No member favored taking up the proposal. The information provided in bankruptcy serves a different function, and the suggested change did not serve the functions that the Criminal Rules are designed to serve. Moreover, it could impose a burden on the courts to collect and add this information, and to modify PACER. Accordingly, the Committee decided not to pursue the proposal.

D. Cooperators

The Committee received an update on the work of the Cooperators Task Force from Judge Kaplan, chair of the Task Force, and Judge St. Eve, who served as a member. The Task Force has completed its work and delivered its report to the Director of the Administrative Office, James C. Duff. The Task Force divided its report into two sections.

An interim report containing recommendations for changes in Bureau of Prisons (BOP) procedures was delivered in August, but efforts to implement these changes have been delayed by leadership changes in that organization. Director Duff has designated Judge St. Eve as the liaison to the BOP, and Judge St. Eve reported that she is working to get its support for the recommendations. She also noted that some of the recommendations, if accepted by the BOP, will

take time to implement because they concern matters governed by agreements with the union representing the BOP employees.

The second and final part of the Task Force report made five principal recommendations.

The first recommended a modification of the existing approach to docketing and filing of materials on CM/ECF from which the fact of cooperation and the details of cooperation can be ascertained. The report proposes something called the plea and sentencing folder approach, or PSF approach. Once implemented, each docket sheet would have tabs for two subfolders, one called the plea documents folder and the other called the sentencing documents folder. All documents that relate to sentencing or to pleas would go into the respective folders. The plea documents would include the plea agreement, plea transcript, and the like. The sentencing folder would include 5K letters, character letters, sentencing motions, sentencing memos and transcripts, and other things relating to sentencing.

The documents for both folders would be available for public viewing at the courthouse, but only on a restricted basis. Someone who wanted to view those folders would have to furnish appropriate identification, and their access would be logged by the Clerk's Office. The object is to create a record of who had access so that if there is an incident involving a cooperator, it would be possible to determine who saw what and when. That would give the investigative personnel something to go on.

Remote access to those folders would not be available to the general public, but would be available to attorneys, self-represented parties in the cases in which they are representing themselves, and individuals who demonstrate to the assigned judge a need for the documents. The objective of this is to restore, to some degree, the practical obscurity enjoyed by court filings that had cooperator information before we converted over to CM/ECF.

There will be some significant implementation time, as well as a great deal of flexibility left to local courts. Each judge and district would have discretion to vary. For example, any judge, just as today, could seal any document that he or she thought appropriate. If a document were sealed or otherwise restricted by the judge, the same restrictions on access that apply today would apply, even with respect to people who view the content of the folders at the courthouse after providing identification, and even to attorneys and others who have remote access. So there is a considerable amount of room for local courts that want to be more protective. A deliberate decision was made to leave the question of press remote access to individual districts. The thinking there was two-fold. First, press access tends to be more of an issue in certain of the larger districts and not much of an issue in many others. Second, there was a sense that given that premise, it would be better not to wave a red flag in circumstances where a national controversy could erupt unnecessarily. Courts have been pretty successful in dealing appropriately with press access in appropriate cases and the Task Force thought it best to leave that where it is.

The second major recommendation is to modify criminal docket sheets. No information would be removed by this, but the sheets would be modified to take what is referred to as JS-3 information off the top of the docket sheet. The information would still be in there, but it would be less readily available.

The remaining three recommendations are less extensive. First, references to Rule 35(b) would be deleted from the amended judgment form. That form currently indicates whether a sentence has been amended as a result of a Rule 35(b) motion, which is for substantial assistance to the government. Second, an educational program would be undertaken so that people understand and properly implement the system. It is clear to the Task Force that once this whole system is adopted and implemented, there will be a need for a considerable amount of education for judges, U.S. Attorneys, the BOP, probation and pretrial staff, and others. Finally, the BOP would be asked to track incidents of assault and other misbehavior affecting cooperators on the basis of motivation, that is, whether the assault or misbehavior was cooperation related. The BOP does not do this now and it would be extremely helpful if that data were collected so that we would have some means of measuring how successful these recommendations, once implemented, prove to be, whether the trend line is in the right direction or the wrong direction. The BOP does not want that information in the institutions, so the suggestion has been made that an anonymized database be created by the Department of Justice based on information furnished by the BOP, so that the information would be available in a useful form and would be out of the institutions.

As of October 10, the full report was in Director Duff's hands.

The Committee had tabled its consideration of Rule 49.2, a potential new rule on remote access, pending the completion of the Task Force's work. The submission by the Task Force of its final report and recommendations to Director Duff raises the question whether the effort to draft Rule 49.2 is unnecessary. Ms. Womeldorf advised the Committee that the answer is not clear, as there has been interest in some quarters in proposing and publishing a rule or rules that would implement the Task Force's recommended PSF approach. The E-Government Act provides that exceptions to remote access can be made by rules adopted pursuant to the Rules Enabling Act. CACM, with assistance from the Administrative Office, continues to investigate the best means to implement the PSF approach. Judge Molloy will ask the Cooperators Subcommittee to consider before the full Committee's spring 2019 meeting whether any additional action by the rules committees is warranted at this juncture.

E. Pretrial Disclosure Concerning Expert Witnesses

The last information item concerns Rule 16's provisions on the discovery of expert witness information. At its April meeting, the Committee decided to take a close look at these provisions. It had received two proposals from district judges suggesting that it would be beneficial to expand pretrial discovery of expert witness testimony, bringing the requirements in criminal cases closer to the current requirements in civil cases. Both judges urged that expanded discovery was needed to help the parties prepare for trial, and to provide the necessary basis for rulings on *Daubert*

motions. Members agreed that the scope of pretrial disclosure of expert testimony is an important issue that needs to be addressed, though it will not lend itself to a simple solution. There are many different kinds of experts, and criminal proceedings are not parallel in all respects to civil proceedings. Additionally, the Department of Justice had recently adopted new internal guidelines calling for significantly expanded discovery of expert forensic witnesses, and it may take some time for the effects of the new guidelines to be fully realized.

A Subcommittee to consider the issue, chaired by Judge Ray Kethledge, is planning a mini-conference for February 15, 2019, in Dallas. The Committee used a portion of its October meeting as an educational session on these issues. Multiple representatives from the Department of Justice made presentations to the Committee. The speakers were:

Andrew Goldsmith, National Criminal Discovery Coordinator
Zachary Hafer, Chief of the Criminal Division, District of Massachusetts
Ted Hunt, Senior Advisor on Forensic Science, Office of the Deputy Attorney General
Erich Smith, Physical Scientist/Examiner, Firearms-Toolmarks Unit, FBI Laboratory
Jeanette Vargas, Deputy Chief of the Civil Division, Southern District of New York

The presentations covered the Department's development and implementation of new policies governing disclosure, its efforts to improve the quality of its forensic analysis, and its discovery and disclosure practices in cases involving forensic and non-forensic evidence. They also provided an opportunity to compare discovery in criminal cases with the discovery provided under Civil Rule 26(a).

TAB 5B

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ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
October 10, 2018, Nashville, TN

I. Attendance and Preliminary Matters

The Criminal Rules Advisory Committee (“Committee”) met in Nashville, Tennessee, on October 10, 2018. The following members, liaison members, and reporters were in attendance:

Judge Donald W. Molloy, Chair
Brian Benczkowski, Esq.
Judge James C. Dever
Donna Lee Elm, Esq.
Judge Gary S. Feinerman
Judge Michael J. Garcia (by telephone)
James N. Hatten, Esq.
Judge Denise Page Hood
Judge Lewis A. Kaplan (by telephone)
Professor Orin S. Kerr
Judge Raymond M. Kethledge
Judge Bruce McGivern
Catherine Recker, Esq.
Susan Robinson, Esq.
Jonathan Wroblewski, Esq.
Judge David G. Campbell, Chair, Standing Committee
Judge Amy J. St. Eve, Standing Committee Liaison (by telephone)
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Daniel R. Coquillette, Standing Committee Reporter (by telephone)
Professor Cathie Struve, Standing Committee Associate Reporter (by telephone)

And the following persons were present to support the Committee:

Rebecca A. Womeldorf, Chief Counsel, Rules Committee Staff
Julie Wilson, Counsel, Rules Committee Staff
Ahmad Al Dajani, Esq., Law Clerk, Standing Committee
Laural L. Hooper, Federal Judicial Center
Shelly Cox, Rules Committee Staff

The following persons attended to inform to the Committee about Department of Justice disclosure procedures for expert witnesses:

Kira Antell, Senior Counsel, Office of Legal Policy
Eric Booker, Section Chief of FBI laboratory at Quantico
Andrew Goldsmith, National Criminal Discovery Coordinator
Zachary Hafer, Chief of the Criminal Division, District of Massachusetts

Ted Hunt, Senior Advisor on Forensic Science, Office of the Deputy Attorney General
Elizabeth J. Shapiro, Deputy Director, Civil Division, Department of Justice
Erich Smith, Physical Scientist/Examiner, Firearms-Toolmarks Unit, FBI Laboratory
Jeanette Vargas, Deputy Chief of the Civil Division, Southern District of New York

Finally, two observers attended:

Patrick Egan, American College of Trial Lawyers
Amy Brogioli, American Association for Justice.

Judge Molloy brought the meeting to order, and welcomed the new members: Judge Michael Garcia from the New York Court of Appeals, Katie Recker (who has attended many meetings in the past as a representative of the American College of Trial Lawyers), Susan Robinson, from Charleston, West Virginia, and Brian Benczkowski, Assistant Attorney General for the Criminal Division of the Department of Justice.

The Committee unanimously approved the minutes of the April 2018 meeting, subject to typographical corrections brought to the reporters' attention.

Ms. Womeldorf reported on the progress of Rules amendments. She noted that the Standing Committee and the Judicial Conference had approved Rule 16.1 and the changes to the Rules for 2254 and 2255 cases, which will be forwarded to the Supreme Court. Assuming the Court accepts them, they will be forwarded to Congress. If Congress does not act, those rules will be effective December 1, 2019. She drew the Committee's attention to p. 57 of the Agenda Book, which includes language added to the Committee Note by the Standing Committee to address a concern about the relationship between the new rule and local rules.

Professor Beale explained that this Committee first included a reference to local rules in the Committee Note to accommodate local rules with shorter time periods. We intended to make it clear that the Rule doesn't prevent local rules from setting shorter time periods, but just sets an outer boundary. At the Standing Committee, members emphasized that local rules cannot contravene the Rules of Criminal Procedure, and expressed concern that the statement in the Note might be read to undercut that principle. The new language referring to local rules that "supplement and [are] consistent with" was added to the Note by the Standing Committee to highlight that everything being done under local rules must be consistent with the Rules of Criminal Procedure. The language was inserted into a sentence that this Committee had approved, which had focused on making sure that the Rule didn't override the existing authority of the district judge. Professor Coquillette noted that he agreed with what had been said about local rules, and this was an important change.

Ms. Womeldorf then reported on Judicial Conference developments and noted the public release of the 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act Program. That Committee has been working for a number of years. A key recommendation, and

major change, is that Congress create an independent federal defender commission within the judicial branch but outside the oversight of the Judicial Conference. The idea is to parallel the Sentencing Commission, which is part of the judicial branch but not under the judiciary's control. A member added there have long been concerns that defense attorneys run into conflicts because of the need to keep something confidential, and that led to this recommendation. They are now working on an interim plan that looks like it's been approved by several of the committees, so we are going ahead with the plans. But the recommendation will take Congressional action.

In response to a question about how many of the roughly 34 recommendations made in the report had been adopted, Ms. Womeldorf stated that many have been adopted. But it is a large report and other recommendations are still under study. The full report is available on the uscourts.gov website.

Ms. Wilson provided the legislative update, referencing the chart in the Agenda Book, pp. 113-121, and noted there were no legislative developments that would amend the Criminal or habeas Rules. The Rules staff is monitoring a lot of activity on the Civil Rules, including a bill to restructure the Ninth Circuit and provisions creating new federal judgeships.

Judge Molloy turned to the proposal to amend Rule 43, which emanated from a decision of the Seventh Circuit suggesting that the Rules be amended so that under certain circumstances a defendant need not be present for plea or sentencing. He noted this is not the same as the issue the Committee addressed recently, where a judge wanted to sentence remotely while the defendant was in the courtroom. This proposal concerns a defendant who was sentenced at his own request while not in the courtroom and then raised the issue on appeal.

Professor Beale reported that this proposal came from the Circuit Executive of the Seventh Circuit Court of Appeals, who forwarded an opinion in which the Seventh Circuit panel said it had no authority to uphold a guilty plea and sentence where the defendant wasn't present, regardless of the circumstances. The defendant in the case, Bethea, had several very severe health conditions, and even touching him could break his bones. So it was to the defendant's advantage not to have to travel to the courtroom in another city for his guilty plea and sentencing. But on appeal, he challenged the legitimacy of his sentence, and the court of appeals set it aside. The court held Rule 43 says the defendant must be present, and there is error even if the defendant asked not to be present. The court also suggested it might be a good idea if the rule was more flexible.

She noted that the Committee has previously considered on at least two occasions whether to allow a video plea or sentencing in felony cases, and the answer has been no. But those were different suggestions. One arose when we were doing a complete review of changes to implement improvements in technology. For example, we concluded that it would be advantageous to allow electronic service and filing of the grand jury indictment, and we amended Rule 6 accordingly. But we did not provide for video pleas and sentencing. The second, more recent, proposal the Committee rejected was from an individual judge who spent

many months away from his courthouse and thought it would be convenient to be able to sentence remotely, unless the defendant could show a very good reason he had to be present. This question raised by this proposal is different: whether Rule 43 should be amended to allow a defendant to be absent for sentencing if, on a case by case basis, the defendant could show exceptional circumstances, perhaps after waiving or being advised of his right to be present. If this might be a good idea, we would need a subcommittee to determine whether such an exception could be narrowly drafted. This Committee is on record saying it is far, far, better to take pleas and sentence in person. So the key policy question is whether we should permit any exceptions, which, inevitably, could creep. That is what is teed up for discussion.

Professor King added that in researching this topic in federal and state courts the reporters had identified issues any subcommittee asked to take on this proposal may have to tackle, including any limits on when the defendant could make a request, under what circumstances the judge could refuse a defense request, whether the prosecutor has to agree, and how to avoid pressure from the prosecutor and the judge to waive presence. If there was sentiment on the Committee to convene a subcommittee, there is plenty to consider.

Judge Molloy asked for members to express their views.

One member stated that the Rule is sufficiently clear the way it is.

Another indicated she had been in the courtroom on multiple occasions where a defendant decides at the plea hearing he doesn't want to plead. It is far preferable to have a defendant in front of the judge at that solemn time.

A member agreed it is far preferable to have the defendant there in person, but noted that the Seventh Circuit case presented a much more compelling situation than those we previously addressed, where the judge wanted to be absent. It is worth taking a look at this.

Another member stated that she had a client who did this once for a very compelling reason, and did not appeal. She said it is curious this case was appealed. She favored sending this issue to a subcommittee, because there are rare compelling cases, and the letter of the rule is so strict that it would not allow exceptions.

A member wondered how often this happens and whether, when it does, there is usually no appeal. It seems likely that it happens quietly for the benefit of the defendant. If it is rare, and there are quiet workarounds, it is not obvious that we need to go through the work of trying to draft rules to deal with a very unusual set of circumstances. He was skeptical about having a subcommittee.

Another member responded that there are societal interests in sentencing, not just the defendant's. Accordingly, having the Rule clearly stated is important. Judge Molloy noted the Crime Victim's Rights Statute states victims have a right to be present.

Another member was skeptical of the need for a subcommittee. First, this doesn't seem to happen very much and there are probably workarounds when these problems do arise. He also

expressed doubt about the Seventh Circuit's ruling that presence is not waivable. The opinion says proceeding without the defendant is per se prejudice, but that assumes the issue has been presented to the court for it to consider. But this is outright waiver. The defendant is asking the district court to do something, the court does it, and then the defendant wants to appeal. That's not forfeiture, it's waiver. His condition is so extraordinary, but this is a really important value, and the Rule is really clear. I'd be very reluctant to do anything to the Rule. And this case does not present a compelling instance to do something.

Another member said a lot happens in a plea, and the potential for the defendant and the judge not to be communicating at the same level because they are separated by video screens is very concerning. Just getting through the factual basis from the clients' perspective is very, very difficult, and the member would be reluctant to see any further alienation between the defendant and that experience.

A member agreed that physical presence is extraordinarily important in the sentencing context, and he'd be reluctant to see any deviation. He was not quite as sure about the plea context. This as a really compelling case. The member agreed that the court might have mixed up per se prejudice with waiver, and saw the value of a subcommittee examining a possible amendment for pleas.

Another member said she thought with both pleas and sentencing there is a lot going on in the room. If you have it on video conference it's not clear whether the judge gets the impression of everybody participating in it so that there isn't any error. Technology will get better and better. But this is a slippery slope. If we start to allow it, there's a danger that things may be characterized as extraordinary that it might not really be extraordinary. She did not believe the Committee would want to look at it again.

Professor Coquillette commented that this is an area where the Supreme Court has historically taken a role in rule making, particularly Justice Scalia. They are extremely sensitive about this area.

Assistant Attorney General Benczkowski stated that as a general matter the Department does not seek to take pleas or conduct sentencings in this manner. The Department would be skeptical about going down this road for many of the reasons already stated.

Judge Campbell observed that the Civil Rules Committee has tried to draw a very narrow exception to the requirement that a witness be in court to testify during a trial. Civil Rule 43(a) says "for good cause in compelling circumstances, and with appropriate safeguards, the court may permit" remote testimony. He also asked why Criminal Rule 43 makes an exception allowing defendants to be in a remote location for initial appearances and arraignments under Rules 5 and 10, but not for a plea?

Professor King stated that when the Committee addressed in a comprehensive way where technology such as video conferencing might be appropriate or inappropriate, members thought it was too important to be present at pleas and sentencings to allow for an exception. The reasons

were like those just articulated about the importance of one on one communication between the judge and the defendant, there was no interest in moving videoconferencing to pleas and sentencing.

Professor Beale noted several differences between the current proposal and earlier amendments allowing video presence. The waivers that occurred at the plea hearing are a different order of magnitude from those at earlier points in the process, where the Committee was persuaded that the advantages, convenience, and speed at which things could be done would warrant allowing for some ability to do conduct proceedings remotely. In recent discussions, the Committee has concluded that the line should be drawn at pleas and sentencing. Pleas because of the importance of making sure the defendant really knows what is going on. And sentencing, because presence has such a huge impact on the defendant and his ability to allocute, as well as to understand what is happening. As a member once said, sentencing is the most human thing a judge does. Those are more significant, requiring the face to face.

Judge Molloy remembered discussion on similar issues when Judge Anthony Battaglia brought some of these issues to the Committee. It was important that the defendant had to ask for the video. It couldn't be the court that asked. And many members who do defense work stressed the importance of having the defendant in the courtroom. What happens is much different when people are doing it remotely, than if you are eyeball to eyeball.

Professor King recalled that there may also have been a much more pragmatic reason for allowing videoconferencing in preliminary proceedings. Especially in the large Western districts where apprehension and immediate detention may take place a long distance from the judge, and transporting the defendant was sometimes not feasible within the required time frame, there were already efforts to have videoconferencing for those preliminary proceedings. So it fit with not only the view of the judges about the relative importance of those proceedings, but also the way that they were already starting to use video technology.

Professor Beale agreed and added it might be a drive of 300 miles, and in bad weather in the winter. The question the Committee wrestled with was how important was presence in the courtroom was, and exceptions were sensible if something had to be done quickly.

Judge Campbell noted there were cases where the defendant was so disruptive that you couldn't conduct a trial with the defendant in the courtroom, and courts have authorized proceedings to have the defendant taken out to watch by video. He doubted whether the Seventh Circuit's per se prejudice rule is necessarily correct. Professor Beale responded that Rule 43(c)(1)(C) authorizes the judge to have the defendant removed after a warning about disruptive behavior.

A member noted that a waiver by misconduct can go all the way through sentencing. He also related that he once had a case where the defendant claimed he was a sovereign citizen, opted out, and did not recognize the validity of the proceeding. He had a trial, was convicted, and

sentenced. The member did not know if he appealed. Another member noted he had a capital case where the defendant punched his lawyer in his face and was removed.

Professor Beale observed that in the *Bethea* case the defendant got a lot longer sentence than he anticipated, and this likely led to the appeal.

A member indicated this wouldn't have happened in the case where her office represented someone remotely sentenced, because it was a Rule 11(c)(1)(C) case, where the plea stipulation covered the sentence.

A member suggested that the Seventh Circuit's decision in *Bethea* may be a one off. Professor Beale responded that there was the other district court case cited in the reporters' memo where the defendant was very, very ill and the estimate was it was going to cost at least \$4000 to bring him to court in an ambulance. It is unclear how many of these cases are there. We have an aging population, and people who are not in good health can commit crimes from their keyboards at home. Maybe the Committee should wait and see if there are a number of these cases. If there are, it could return to the issue. In addition to the Civil Rules language, there are some state cases, and state rules on this we could consider. And there is some language in our own rules -- Rule 15(a), discussing when depositions can be taken, says "because of exceptional circumstances and in the interest of justice," and that might cover the interests of victims and others. But perhaps there are not yet enough of these cases that we think there is a good idea to start creating an exception.

Judge Molloy noted this is a published opinion of a circuit court, and it would be a good idea to have a subcommittee look into it, explore the ideas that have been expressed here, and come back with some definitive answer. The Seventh Circuit obviously had a concern about it, although they may have gotten it wrong. He stated that he would establish a subcommittee to consider the issue. Judge Campbell added that there are other parts of the rules that are implicated if a subcommittee is formed. For example, Rule 11(b)(2) says the court must address the defendant personally in open court.

Answering a question from another member inquiring about any cases where the defendant has tried to achieve a quiet work around and the judge said "No, the Rule is clear," one member said she was aware of another case where a defendant was sentenced by video a little while ago, but she didn't know of any case where a person who has legitimate need has been turned down.

Professor Beale said Rule 43(c)(1)(B) says sentencing can proceed if the defendant is voluntarily absent after being there for trial. So there are some exceptions already in the rule. Some of the pressure points are taken care of already.

Another member suggested that the Court's decision in *United States v. Davila* might be relevant. The Supreme Court ruled that the Eleventh Circuit had erred in applying a per se reversal rule for judicial participation in plea negotiations, and there was a specific reference to the harmless error standard in Rule 11(h). He agreed that this Seventh Circuit case is an oddity.

Judge Molloy turned to the next matter on the agenda: the time for ruling on habeas petitions. Professor King noted that the discussion of this proposal begins on p. 147 of the agenda book. It came to the Committee from Mr. Peel, who is litigating his own 2255 case. He wanted the Civil and Criminal Rules Committees to consider a rule that judges must decide pending petitions and motions within a certain period of time.

Based on prior consideration of timelines for judicial decisions by the Civil and Criminal Rules Committees over the years, the reporters thought a strict timing rule for the consideration of 2254 and 2255 cases would be a non-starter for many reasons. However, the issue of delay in resolving these matters has been a problem raised in commentary. It's been a particular problem in capital cases, and very controversial there. But this proposal concerns only non-capital cases. There have been two studies in the past documenting this delay, as noted in the reporters' memo.

Professor King projected two bar graphs on the screen, one from each study, showing the variation in average time to disposition for 2254 noncapital cases in every district, with many districts taking multiple years on average to close these cases. The author of the more recent study argued that the reason for delay in these cases is that these cases are not among those that must be reported as motions that have been pending for more than six months. They've been exempted from that reporting requirement. This author suggested that the exemption be removed. The reporters included that suggestion in the memorandum as one potential response to Mr. Peel's proposal. There are a few other options also suggested at the end of the memo, if the Committee is concerned about delay in these cases. The memo also explains that there is language about the judge "promptly" examining, but there is no specific timeline for the court's decision. So the question for the Committee is whether to create a subcommittee, do something else, or just let it go.

Professor Beale noted that the reporters asked Ms. Womeldorf whether this Committee can make suggestions about things that are not about the rules, such as whether these kinds of motions should be included among those that courts are asked as an administrative matter to report. The general answer was that we can make such a suggestion, to CACM or others, but we obviously don't have the ability to make that change ourselves. There might also be best practices that move these things along expeditiously, such as additional training, specialization, or organization of the pro se clerks. Although this Committee cannot promulgate best practices, if we think this is a problem, we can talk about what we might be able to usefully suggest to other groups who may want to look at this.

Professor King added that even though the proposal went to both the Civil and Criminal Rules Committees, and 2254 cases are governed by the Civil Rules as well as the 2254 Rules, this Committee had jurisdiction over habeas cases and the rules governing them. So if this Committee doesn't do anything, it is not likely to happen.

Judge Kaplan joined the meeting by phone at this point and gave his report on the Cooperators Task Force, with the remainder of the discussion on habeas delay to follow.

Judge Kaplan regretted he couldn't be at the meeting because of a trial. The Cooperators Task Force rendered its Final Report to Director James Duff in August. That was the second installment. There was an interim report earlier that dealt with recommendations principally relating to the Bureau of Prisons (BOP). Director Duff has written to the BOP forwarding that report. The BOP is in the process of deciding what they intend to do about it. Director Duff appointed Judge Amy St. Eve to be the liaison to the BOP, and she is in the best position to report about where that stands. The second and final part of the report made five principal recommendations.

The first recommended a modification of our approach to docketing and filing of materials on CM/ECF from which the fact of cooperation and the details of cooperation could be ascertained. As a result of very hard work by the working group charged with this area, chaired by Judge Phil Martinez, the recommendation proposes something called the plea and sentencing folder approach, or PSF approach. He described the essentials of this approach in very broad strokes. Once implemented, each docket sheet would have tabs for two sub folders, one called the plea documents folder and the other called the sentencing documents folder. All documents that relate to sentencing or to pleas would go into the respective folders. The plea documents would include the plea agreement, plea transcript, and the like. The sentencing folder would include 5K letters, character letters, sentencing motions, sentencing memos and transcripts, and other things. The documents for both folders would be available for public viewing at the courthouse, but only on a restricted basis. Someone who wanted to view those folders would have to furnish appropriate identification, and their access would be logged by the Clerk's Office. The object is to create a record of who had access so that if there is an incident involving a cooperator, it would be possible to determine who saw what and when. That would give the investigative personnel something to go on. Remote access to those folders would not be available to the general public, but would be available to attorneys, self-represented parties in the cases in which they are representing themselves, and individuals who demonstrate to the judge assigned a need for the documents. The objective of this is to restore, to some degree, the practical obscurity enjoyed by court filings that had cooperator information before we converted over to CM/ECF.

There are details to be worked out, and there will be some significant implementation time. There will also be a lot of flexibility left to local courts. Each judge and district would have discretion to vary. For example, any judge, just as today, could seal any document that he or she thought appropriate. If a document were sealed by a judge or otherwise restricted by him, the same restrictions on access that apply today would apply even with respect to people who view the content of the folders at the courthouse after providing identification and even to attorneys and others who have remote access. So there is a considerable amount of room there for local courts, particularly for those who want to be more protective, to do that. Another thing to flag is that a deliberate decision was made to leave the question of press remote access to individual districts. The thinking there was two-fold. First, press access tends to be more of an issue in some of the larger districts and not much of an issue in many others. Second, there was

a sense that given that premise, it would be better not to wave a red flag in circumstances where a national controversy could erupt unnecessarily. Courts have been pretty successful in dealing appropriately with press access in appropriate cases and the Task Force thought it best to leave that where it is.

The second major recommendation is to modify criminal docket sheets. No information would be ultimately removed by this, but the sheets would be modified essentially to take what is referred to as JS-3 information off the top of the docket sheet. The information would still be in there, but it would be less readily available.

The other recommendations are much less extensive.

- Deletion of references to Rule 35(b) on the amended judgment form. That form currently indicates whether a sentence has been amended as a result of a Rule 35(b) motion, which is for substantial assistance to the government.

- An educational program be undertaken so that people understand and properly implement the system. It is clear to the Task Force that once this whole system is adopted and implemented, there will be a need for a considerable amount of education for judges, US Attorneys, BOP, probation and pretrial staff, and others.

- Asking the BOP to track incidents of assault and other misbehavior affecting cooperators on the basis of motivation, that is, whether the assault was cooperation related. The BOP does not do this now and it would be extremely helpful if that data were collected so that we would have some means of measuring how successful these recommendations once implemented prove to be, whether the trend line is in the right direction or the wrong direction. BOP does not really want to have that information in the institutions, so the suggestion has been made that an anonymized database be created by the Department of Justice based on information furnished by the BOP, the information that would be available in a useful form and would be out of the institutions.

In terms of where this all stands, it is on Director Duff's desk. There was a conference call with him last week about just exactly how this becomes policy, assuming that it does, and he is taking appropriate advice from the AO General Counsel and no doubt others as to whether this lies within his authority to simply adopt, or whether he needs to or wishes to present it to the Executive Committee or the Conference. He has promised an early report back.

Judge Kaplan continued that he, and Judges St. Eve and Martinez, have recommended to Director Duff that it would be desirable to refer different parts of these recommendations to different entities: the changes in CM/ECF to adopt the PSF approach and the modification of the docket sheets and judgment form to CACM; the education program to the FJC; and the creation of the anonymized data base to be implemented by CACM and the Criminal Law Committee of the Conference. All of these committees will need cooperation from BOP and DOJ.

That is the proposal. Judge Kaplan said they expect to hear from Director Duff shortly about the mechanics of getting this into full implementation mode. It is clear that some of these recommendations might take longer than others. There is significant software work that will have to be done in order to implement the PSF approach, and we don't yet have a timeline on that. That will fall to CACM to work out.

In conclusion, he added that the Task Force consisted of seven voting judge members—three from CACM, three from Criminal Rules, and Judge St. Eve from the Standing Committee—and eight adjunct members representing every constituency affected by this: BOP, DOJ, Criminal Law Committee, and others. We had also a very helpful hearing in Washington last spring with a representative group of federal defenders. Ultimately the work done by the working groups on BOP and CM/ECF was critical and we ended up with a unanimous consensus on all of this, which he was enormously pleased to report. He offered to take questions.

Judge Molloy noted that the report was a monumental piece of work by Judge Kaplan, Judge St. Eve, and other members of the Committee. He asked if it was correct that the recommendations of the Task Force are not subject to debate when they are referred to CACM, the Criminal Law Committee, or others: would it be a direction to implement what has been proposed and recommended by the Task Force?

Judge Kaplan responded yes, the question is whether Director Duff is going to make that policy decision or whether he's going to go with some or all of it to the Conference.

A member inquired whether the recommendations address who or what would qualify as a press organization that would be able to get remote access. Judge Kaplan said the recommendations do not address the issue, leaving the question of whether and who gets remote access on the basis of press to each district. He personally despaired of being able to define "press" for this purpose. A member said that anybody can be press at this point and expressed concern that certain elements might create a press organization as a front for obtaining information for purposes that we might not want them to have the information. Judge Kaplan agreed that concern is well founded.

Judge Campbell inquired whether, if the Director moves forward with this, the Rule this Committee was considering on limiting remote access would be moot, or at least taken off the table for now. Judge Kaplan said that would be his view, and Judge Molloy said that was consistent with his view, too.

Judge Molloy asked Judge St. Eve if she could report any supplemental information about the Bureau of Prisons (BOP).

Judge St. Eve commended Judge Kaplan for strong leadership on this project. As for the BOP, in late April a letter was sent to then director Mark Inch with the 14 recommendations that came out of the Task Force. The day before Director Duff was scheduled to discuss the Task Force recommendations with the BOP's main representative to the Task Force, BOP Director Inch resigned, so that put us back a little bit. BOP now has an acting Director, and they are

juggling multiple issues. Judge St. Eve was keeping in monthly contact with BOP trying to keep this on their plate so that the BOP implements some of these recommendations. And Jonathan Wroblewski and Judge St. Eve have been in discussion as well. The BOP is interested in putting this in place, but they have hurdles, including their Union, that they have to jump through. They are already doing some of the recommendations, such as encouraging video teleconferencing when appropriate. But they have not yet put in place the meatier recommendations. Judge St. Eve described continuing efforts to arrange a meeting between Director Duff and BOP's acting leadership. She encouraged the Department of Justice to continue supporting the Task Force recommendations, and to help us push BOP.

Assistant Attorney General Benczkowski thanked Judge St. Eve for her comments, and said the Department will continue to push BOP. He noted, however, that the BOP director reports to the Deputy Attorney General, not to him. Mr. Benczkowski stated that he intended to speak to have a conversation with the Deputy Attorney General to request that he keep this moving forward. He appreciated the work that went into the Task Force, expressed the Department's support, and stated they would continue to push BOP.

Ms. Womeldorf said that there is still considerable desire in some quarters that this Committee move forward with Rule 49.2, which was put on the back burner to see what came out of the Task Force process. There is considerable overlap between the PSF approach and that Rule, and she thought that in prior discussions this Committee thought that the PSF approach would achieve a lot of the objectives behind protecting cooperator information without necessitating a rule. But there are certain constituencies that would like to see a rule with notice and comment and hearings if there is going to be a change of this nature to public access to these kinds of documents. There is still discussion about the question whether the Task Force recommendations moot the Rule. She has been asked by staff of the CACM Committee whether this Committee will have more formal consideration of Rule 49.2 and another vote on that. She informed the staff that she did not know, and would raise it. She observed that Director Duff would not refer the issue back to Criminal Rules, because it is his understanding that it is still on our docket. Judge Kaplan commented that Ms. Womeldorf was indispensable to this process, and we owe her a debt of gratitude.

Professor King asked if Ms. Womeldorf was suggesting that this Committee should decide whether it is going ahead with consideration of Rule 49.2, regardless of whether the Task Force believes that is moot. Ms. Womeldorf answered that was the issue for this Committee to decide. It was not the Task Force's decision whether or not to move forward with a Rule, it is this Committee's decision. But she noted that the Committee may consider that decision to have already essentially been made through the Committee's last discussion, which tabled Rule 49.2 pending Task Force action.

Professor King suggested it would be helpful to hear from Judge Kaplan, who is the chair of the Cooperators Subcommittee, what his views are about whether the Committee needs to do something about that pending proposal on Rule 49.2. Judge Molloy asked Judge Kaplan whether

Rule 49.2, which was tabled, is now moot? Or does it require some actual determination by our Committee?

Judge Kaplan said he was inclined to think the answer to both questions was yes, but he'd like to think about that some more. His present view is that the Committee doesn't need to amend the Rule, but in any case the Committee has to make the decision not to go forward.

Professor Beale suggested that as we don't have Judge Kaplan here at the meeting, there has been no final decision on that report, it is unclear who would have to approve it, and Director Duff is still deciding whether it needs to be referred to other groups, perhaps that decision whether it is time to take this off our agenda could be deferred until our spring meeting. Then we could decide if our rules should reflect the new reality in some way, which would then provide a place for Notice and Comment. But we can put that off, since we held it pending the Task Force action, which isn't quite finished. The agenda book could reflect that the spring will be the time for final action on whether to take it off the agenda or move forward.

Judge Molloy asked Ms. Womeldorf to clarify what would happen if the Committee decided that the Task Force Report takes care of it, and we are not going to amend the rules. Was there nonetheless some pressure to have that discussion and possibly hearings?

Ms. Womeldorf answered that this is the Committee's decision to make. She also explained that concerns about the E-Government Act are what's lurking in the background. Professor Beale reminded the Committee that it is clear under the E-Government Act if a limitation on electronic access is made by rule, there is no problem. Ms. Womeldorf agreed.

Professor King agreed putting a decision off a little while makes a lot of sense and that the E-Government issue is one that the Subcommittee could look at it before it comes back to the full Committee. And it could talk to people who have strong concerns about that, then bring that information back to the Committee so we are not trying to do that on the fly.

Judge Molloy said that when Judge Kaplan finishes his trial, we will bring that issue to the Subcommittee. Professor Beale noted we've lost some members of that Subcommittee and will have to replace them. Judge Molloy thanked Judge Kaplan for the report, so he could return to his trial.

The Committee returned to the request regarding habeas delay. Judge Molloy said those statistics are terrible but that he was not sure our Committee even has jurisdiction to resolve that problem. Professor Beale noted there had been some conversation before the meeting about who would have jurisdiction, and we concluded it was CACM, primarily because they have previously recommended changes be made to the Civil Justice Reporting Act requirements, precisely to create a greater incentive to move faster with bankruptcy appeals and social security cases. That discussion is on page 150 of the Agenda Book. Since our Committee does not have jurisdiction to change those guidelines for reporting the question is whether to make any recommendations to CACM, or recommend that the FJC to study this, or do nothing.

A member observed that 2255 and 2254 cases are reportable on the three-year list, and asked whether there are a lot of them going beyond three years.

Professor King answered yes, at least as of the date the data was collected. There is also a citation in the memo to a decision of a district judge who read the article suggesting the reporting requirement be modified and agreed with it.

A member said she would be remiss if she didn't speak up for the defendants in the 2254 and 2255 cases who are up against AEDPA and are limited on time severely, and then have the court just run on sometimes for years. She can appreciate their frustration. The Committee has the authority to impose a time limit on these, but that is unwise. The size of these cases varies. She asked the judges, does that reporting requirement really impact you moving faster?

Judge Molloy answered that it depends on the district. We get a monthly report from the clerk of court that says here are the cases that have been waiting for 30 days, 60 days, and 90 days. That creates an incentive to get matters off of that list. Arizona does something similar to that. He noted that some of these handwritten petitions can barely be read when they are filed, and the pro se law clerks get the first stab at them. Cases should not be hanging out for two or three years, but putting artificial dates or time limits in a rule would not necessarily solve the problem. With the new work formulas, it looks like pro se law clerks are being cut back, which may affect the screening process.

Judge Campbell said if the question is would putting this on the CJRA report change the behavior of Article III judges, the answer is yes, it would. Not all. But there are a lot of judges who are conscious of that report and work hard to comply with it. So he did think it would change behavior, and perhaps more than putting it in a rule would. He noted he tends to be a hawk on these things, and would love to see it in the report. He'd prefer to see it in a three-month report rather than a six month report, but that would draw strong opposition.

Professor Beale observed that judges are human. If there will be a public list that shows if you are late, almost everything is being measured for the list, and this is the one thing that isn't, then you will try to get to your numbers and the one thing not being measured will get pushed down. That seems undesirable.

Judge Campbell said there are some places where this is a real challenge for the judges. The Eastern District of California, which includes all of the major prisons in the state, is exhibit A. They have five judges, Congress hasn't given them any more judgeships, and they are just buried with prisoner litigation including 2254s and 2255s. So whoever takes on this issue would need to talk to the districts where it is really a challenge. It's sort of the out of sight out of mind idea. If there isn't the CJA report reminding the judge that this motion is pending and something is going to happen if it isn't decided, that motion can remain on the docket for way too long. Our Committee does not have jurisdiction to change the reporting requirement. But if it concludes the issue should be studied, there would be nothing inappropriate in its writing to CACM and say

here is Mr. Peel's recommendation, here are some studies, and we recommend that you look at this.

A member said she favored recommending that it be examined, at least for the reporting. Judges are trying to do good work, but they are balancing things, and the reporting requirement matters.

Another member agreed that if these cases went on the CJRA report, then judges are going to look at it. In the member's district, judges would look at it a lot. And in other districts, that's what keeps them on track. The member was especially interested in getting the views of districts that are overwhelmed with these cases.

Ms. Womeldorf suggested that this could be one of the things the CACM Committee could do as part of its investigation. It is not uncommon to do what Judge Campbell is suggesting, in this case a letter from Judge Molloy to the new chair of the CACM. As a matter of deference to another Judicial Conference committee on matters falling within their jurisdiction, it would probably be disfavored to presume the outcome in the referral. The committee with jurisdiction would have to do the study and talk to the jurisdictions that would be most affected. And CACM also has responsibility for different metrics such as how that weighs into staffing formulas. Possibly measuring this and the delay more precisely than the current system would help the other staffing problem that have been noted. Professor Beale commented that this might even help some districts make the case for more judges.

A member wondered if the letter should mention that we have not investigated those districts with heavy prisoner caseloads, and Ms. Womeldorf agreed a referral letter could mention that, as well as the Falkoff study and Professor King's work. It is fine to call things to another committee's attention, just not to suggest where it should end up.

Another member noted another issue: if there is to be a reporting requirement, what is the triggering event? In his district, 2254s pose very different issues than 2255s, because the records of the local courts in 2254 cases are in Spanish. Getting the local record is a problem, because it has to be translated. And the government takes the position they don't have any money to do the translating. So we wait months and months to get the record. Every district has its own story. But whoever does look into this there is going to be a lot to look into and a lot to consider.

Ms. Womeldorf noted that this discussion will be captured in the minutes, and available to CACM as well.

Another member said he agreed with everything everybody has said. It is a CACM issue, and it is worth looking at. Like most things in life, you get what you measure from people, but it is up to them to decide. Another member agreed. Whether something is on the Biden report is impactful on judges.

Another member observed that on appeal he had not noticed any particular problem in terms of our administration of these cases. He agreed these reporting requirements do change

behavior. Although the courts of appeals don't have the Biden rule, his court does it internally. It shames people, one person has one number and everyone else has something else.

Judge Molloy said he would draft a letter and run it by Ms. Womeldorf and send it to CACM, with Mr. Peel's materials. Judge Molloy thought a vote wasn't needed, but asked for objections and there were none.

In preparation for its consideration of possible changes in Rule 16's provisions concerning expert witnesses, the Committee then heard presentations from the following representatives from the Department of Justice:

Andrew Goldsmith, National Criminal Discovery Coordinator
Zachary Hafer, Chief of the Criminal Division, District of Massachusetts
Ted Hunt, Senior Advisor on Forensic Science, Office of the Deputy Attorney General
Erich Smith, Physical Scientist/Examiner, Firearms-Toolmarks Unit, FBI Laboratory
Jeanette Vargas, Deputy Chief of the Civil Division, Southern District of New York

The presentations covered the Department's development and implementation of new policies governing disclosure, its efforts to improve the quality of its forensic analysis, and its practices in cases involving forensic and non-forensic evidence. They also provided an opportunity to compare discovery in criminal cases with the discovery provided under Civil Rule 26(a).

Professor Beale introduced the next agenda item, a proposal from the Association of Professional Background Screeners, which recommended that the Civil and Criminal Rules, and the architecture of the PACER system, be revised to provide greater information, specifically each criminal defendant's full name and full date of birth. The suggestion was that this information would not be visible to the general public when it accessed PACER, but would be available as a search term so that background screeners would be able to perform their search functions more accurately and efficiently. Professor Beale noted that this is similar to a request that the Association made in 2006 when Criminal Rule 49.1 and the other E-Government Act amendments were promulgated. The Association's request was a little broader at that time. They wanted Social Security numbers, and probably now recognize that that would be a nonstarter. But the Association is still seeking to persuade the Committee that their proposal is good for them and good for society at large because the results of their screening will be more efficient and accurate. Accordingly, they made this request to us and to the Civil Committee, and sought changes in the PACER architecture without perhaps being clear on who would have the necessary authority over the PACER system. The proposal emphasizes that something similar is presently done in the bankruptcy system to identify assets and so on. The Association argues that a similar change could be implemented in civil and criminal cases.

Professor Beale stated that the question before the Committee is whether there is enough interest in this proposal to move it forward. She commented that it is really not the function of the rules to assist such external groups not involved in criminal litigation.

Judge Molloy asked Mr. Hatten for his views. Mr. Hatten expressed the view that this is not a purpose that the PACER system was designed for, and it would not be a good idea to add these types of personal data that might be of interest to hackers. He expressed concern that it would be a slippery slope to begin changing the PACER system in order to benefit a group interested in searching our records. Why not the same for another group? He also noted that the system was undergoing changes. He added that PACER itself has little data and relies on each individual court to supply the information. So this would filter down. The courts would have to enter this type of information in each of their databases, and then PACER would make it available. That would create a small burden on the courts. Mr. Hatten stated that legislation has been introduced that would make CM/ECF a single system, searchable and made available to the states for a fee, but Mr. Hatten was not sure whether it would get serious consideration. He did not see this as a viable purpose of the system.

Judge Molloy asked other members for their views. None favored taking up the proposal. The information provided in bankruptcy serves a different function, and the suggested change did not serve the functions that the Criminal Rules are designed to serve. Judge Molloy agreed that the Committee should not pursue the proposal.

Noting that the spring meeting of the Committee would take place on May 7, 2019, in Alexandria, Virginia, Judge Molloy adjourned the meeting.

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

DAVID G. CAMPBELL
CHAIR

REBECCA A. WOMELDORF
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JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

DEBRA ANN LIVINGSTON
EVIDENCE RULES

MEMORANDUM

TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Debra A. Livingston, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: November 15, 2018

I. Introduction

The Advisory Committee on Evidence Rules (the “Committee”) met on October 19, 2018 at University of Denver Sturm College of Law. On the morning of the meeting, the Committee held a Roundtable discussion on its agenda items with invited experts from the bench, practice, and academia.

The Committee at the meeting discussed ongoing projects involving matters such as possible amendments to Rules 404(b), 702, and 106. It also discussed new proposals involving possible changes to Rules 615 and 607.

A full description of all of these matters can be found in the draft minutes of the Committee meeting, attached to this Report.

II. Action Items

No action items.

III. Information Items

A. Roundtable Discussion on Rules 702, 106, and 615.

The Roundtable discussion on the morning of the meeting involved an exchange of ideas among the panel and Committee members regarding four separate agenda items (all discussed further below): 1) Whether Rule 702 should be amended to address the problem of experts (especially forensic experts) overstating their opinions; 2) Whether Rule 702 should be amended to address decisions in the case law which seem to indicate that some courts are allowing defects in an expert's basis and application to be addressed by the jury, without first finding that those admissibility requirements have been met by a preponderance of the evidence; 3. Whether Rule 106, the rule of completeness, should be amended to prohibit a proponent who makes a misleading presentation of a statement from objecting that the remainder necessary to correct the misimpression is hearsay --- and whether the rule should be amended to specifically cover oral as well as written and recorded statements; and 4) Whether Rule 615 should be amended to provide for discretion to deny a motion to exclude witnesses, to include language on timing and experts, and to provide more clarity about whether a Rule 615 order prevents prospective witnesses from having access to trial testimony outside the courtroom.

The Roundtable discussion provided the Committee with extremely helpful insight, background, and suggestions for change. The Roundtable proceedings will be published in the forthcoming Fordham Law Review.

B. Proposed Amendment to Rule 404(b)

After several years of discussion the Committee proposed at the last Standing Committee meeting that an amendment to Rule 404(b) be released for public comment. The amendment provides several improvements to the notice requirement --- the most important of which is that the prosecutor would be required to "articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose."

The Committee is monitoring the public comment --- only a handful of comments have been received thus far --- and will be considering the comments at its next meeting with the goal of determining whether any changes to the proposal are advisable when the Committee seeks final approval at the next Standing Committee. The Committee has tentatively agreed to change the proposal in accordance with a suggestion made by a Standing Committee member: the word "non-

propensity” will probably be changed to “non-character” because Rule 404(b) uses the term “character” throughout.

C. Possible Amendments to Rule 702

1. Addressing Forensics: The Committee has been exploring how to respond to the recent challenges to and developments regarding forensic expert evidence since its Symposium on forensics and *Daubert* held at Boston College School of Law in October, 2017. A Subcommittee on Rule 702 was appointed to consider possible treatment of forensics, as well as the weight/admissibility question discussed below. The Subcommittee, after extensive discussion, recommended against certain courses of action. The Subcommittee found that: 1. It would be difficult to draft a freestanding rule on forensic expert testimony, because any such amendment would have an inevitable and problematic overlap with Rule 702; 2) It would not be advisable to set forth detailed requirements for forensic evidence either in text or Committee Note because such a project would require extensive input from the scientific community, and there is substantial debate about what requirements are appropriate; and 3) It would not be advisable to publish a “best practices manual” for forensic evidence because such a manual could not be issued formally by the Committee, and would involve the same controversy of what standards are appropriate.

The Committee agreed with these suggestions by the Rule 702 Subcommittee. But the Subcommittee did express interest in considering an amendment to Rule 702 that would focus on one important aspect of forensic (and other) expert testimony --- the problem of overstating results (by stating an opinion as having a “zero error rate” and the like, where that conclusion is not supportable by the methodology). And the Committee agreed to ongoing consideration of such a proposal, assisted greatly by commentary from the experts at the Roundtable discussion.

In addition, the Committee, led by the Subcommittee’s efforts, is considering other ways to provide assistance to courts and litigants in meeting the challenges of forensic evidence. These include assisting the Federal Judicial Center in judicial education.

2. Admissibility/Weight: A year ago, the Committee agreed to consider an amendment to Rule 702 that would address the possibility that a fair number of courts have treated the Rule 702 reliability requirements of sufficient basis and reliable application as questions of weight and not admissibility --- without finding (as is required by Rule 702) that the proponent has met these admissibility factors by a preponderance of the evidence. The Rule 702 Subcommittee conducted extensive research into the case law, in order to determine whether an amendment to Rule 702 was necessary to specify that the court must find these requirements met by a preponderance of the evidence. The Subcommittee did not make a recommendation to the Committee, but it did note that it is especially hard to determine whether courts are applying the admissibility requirements of sufficient basis and reliable application by a preponderance of evidence under Rule 104(a), or rather by the lower standard of prima facie proof set forth in Rule 104(b). Courts rarely state that they are using one standard or the other. And simply stating that a

defect is a “question of weight” is not determinative, because challenges to an expert’s opinion can raise questions of weight regardless of what standard is employed.

The admissibility/weight question was discussed by the Roundtable participants, and the Committee will consider that discussion as well as other input from the Subcommittee at its next meeting. Again, one possibility being considered is for the Committee to take part in education efforts of the FJC.

D. Possible Amendment to Rule 106

Over the last three meetings, the Committee has been considering whether Rule 106 --- the rule of completeness --- should be amended. Rule 106 provides that if a party introduces all or part of a written or recorded statement in such a way as to be misleading, the opponent may require admission of a completing statement to put the initial submission into context. The Committee has focused on whether Rule 106 should be amended in three respects: 1) to provide that a completing statement is admissible over a hearsay objection; 2) to provide that the rule covers oral as well as written or recorded statements; and 3) to provide more specific language about when the rule is triggered (i.e., by a “misleading” statement) and when a completing portion must be admitted (i.e., when it corrects the misleading impression).

The courts are in conflict on the treatment of hearsay objections and oral statements. The Roundtable discussion provided important input on these questions. At its next meeting, the Committee will decide whether to propose an amendment to Rule 106 for release for public comment.

E. Possible Amendments to Rule 615

A former Committee member requested that the Committee consider amendments to Rule 615, the rule on sequestering witnesses. He had three concerns, arising from a recent case over which he presided. They were: 1) The rule provides no discretion for a court to deny a motion to sequester; 2) There is no timing requirement in the rule, so it would be possible for a party to make a “midstream” request for exclusion, after some witnesses had already testified; and 3) There should be an explicit exemption from exclusion for expert witnesses, to substitute for the current vague exemption for witnesses who are “essential to presenting the party’s claim or defense.” These proposed changes were raised at the Roundtable discussion, and the Committee obtained valuable information, especially from the participating judges.

At the meeting, the Committee rejected the proposal that would make sequestration discretionary. It determined that the mandatory nature of the rule was adopted because it is counsel, and not the court, that is likely to be aware about the risk of tailoring trial testimony. Also, discretion still exists in the rule --- given the exceptions to exclusion provided. The Committee further found that the timing problem does not appear to be pervasive, and that courts

have not seemed to have significant problems in applying the “essential” exception to those experts who should be allowed to be present during trial.

But in conducting the necessary research on the operation of Rule 615, the Committee found another issue about the application of Rule 615 that has resulted in a conflict among the courts. The issue involves the scope of a Rule 615 order: does it apply only to exclude witnesses from the courtroom (as stated in the text of the rule) or can it extend outside the confines of the courtroom to prevent prospective witnesses from learning about trial testimony? Most courts have held that a Rule 615 order extends to prevent access to trial testimony outside of court, but other courts have read the rule as it is written. The Committee has agreed to further consider an amendment that would clarify the extent of an order under Rule 615. It noted that where parties can be held in contempt for violating a court order, some clarification of the operation of sequestration outside the actual trial setting itself could be helpful. The Committee’s investigation of this problem is consistent with its ongoing efforts to ensure that the Evidence Rules are keeping up with technological advancement, given the increasing witness access to information about testimony through news, social media, or daily transcripts. The Committee has agreed to formally consider a potential amendment to Rule 615 to deal with the issue of witnesses learning about testimony outside the courtroom in light of these concerns, and the conflict in the courts, at its Spring meeting.

F. Possible Amendment to Rule 607: A Roadmap Rule for Impeachment

The Committee monitors state developments on evidence rules to determine whether there are any variations that might improve the Federal Rules. Rule 616 of the Maryland Evidence Rules provides a “roadmap” on impeachment and rehabilitation of witnesses --- nothing comparable can be found in Article VI of the Federal Rules of Evidence, which provides no specific treatment at all for such forms of impeachment as bias and contradiction.

After consideration, the Committee determined that it would not proceed with an amendment that would add a “roadmap” rule along the lines of Maryland Rule 616. The Committee concluded that the provision read more like a benchbook than a rule of evidence. Moreover, adding such a provision at this stage might well end up conflicting with some federal case law. While a “roadmap” rule might have been useful at the outset, adding it at this point could create transaction costs that outweigh any housekeeping benefit.

G. *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 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. If the Committee determines that it is appropriate to propose amendments to prevent one or more of the Evidence Rules from being applied in violation of the Confrontation Clause, it will propose them for the Standing Committee's consideration --- as it did previously with the 2013 amendment to Rule 803(10).

IV. Minutes of the Fall 2017 Meeting

The draft of the minutes of the Committee's Fall, 2018 meeting is attached to this report. These minutes have not yet been approved by the Committee.

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Advisory Committee on Evidence Rules
Minutes of the Meeting of October 19, 2018
University of Denver Sturm College of Law
Denver, Colorado

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on October 19, 2018 at the University of Denver, Sturm College of Law in Denver, Colorado.

The following members of the Committee were present:

Hon. Debra A. Livingston, Chair
Hon. James P. Bassett
Hon. J. Thomas Marten
Hon. Shelly D. Dick
Hon. Thomas D. Schroeder
Daniel P. Collins, Esq.
Traci L. Lovitt, Esq.
Kathryn N. Nester, Esq., Federal Public Defender
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. David G. Campbell, Chair of the Committee on Rules of Practice and Procedure
Hon. Jesse M. Furman, Liaison from the Committee on Rules of Practice and Procedure (by phone)
Hon. Sara Lioi, Liaison from the Civil Rules Committee (by phone)
Hon. James C. Dever III, Liaison from the Criminal Rules Committee
Hon. James O. Browning

Professor Daniel R. Coquillette, Reporter to the Standing Committee (by phone)
Professor Catherine T. Struve, Associate Reporter to the Standing Committee (by phone)
Professor Daniel J. Capra, Reporter to the Committee
Professor Liesa L. Richter, Academic Consultant to the Committee

Dr. Timothy Lau, Esq., Federal Judicial Center
Dr. Tim Reagan, Esq., Federal Judicial Center
Paul Shechtman, Esq.
Eric G. Lasker, Esq.
Aimee H. Wagstaff, Esq.
Professor Christopher B. Mueller
Ted Hunt, Esq., Department of Justice
Kira Antell, Esq., Department of Justice

Rebecca A. Womeldorf, Esq., Secretary, Standing Committee; Rules Committee Chief Counsel
Shelly Cox, Administrative Analyst, Committee on Rules of Practice and Procedure
Ahmad M. Al Dajani, Esq., Rules Committee Law Clerk

I. Opening Business

Announcements

The Chair opened the meeting by welcoming Kathy Nester, Federal Public Defender for the District of Utah, to the Committee. Judge Livingston noted Kathy Nester's many notable professional accomplishments, including her involvement in important public service and in trying over fifty jury trials. Thereafter, the Committee welcomed Kathy with a round of applause.

The Chair expressed the appreciation of the Committee to Sturm College of Law for hosting the Committee's roundtable discussion (discussed below) and Committee meeting.

Approval of Minutes

A motion was made to approve the minutes of the April 26-27, 2018 Advisory Committee meeting at the Thurgood Marshall Building in Washington D.C. The motion was seconded and approved by the full Committee.

Standing Committee Meeting

The Chair reported on the June 2018 meeting of the Standing Committee. She explained that the proposed amendments to Federal Rules of Evidence 404(b) and 807 are both on track. The Standing Committee unanimously approved the proposed amendment to Federal Rule of Evidence 404(b) for publication and approved Rule 807 for transmission to the Judicial Conference.

Roundtable Discussion

The Chair expressed appreciation to the participants in the roundtable discussion that preceded the Committee meeting. The Committee invited a number of judges, practitioners, and professors to discuss the Committee's agenda items --- possible changes to Rule 702, 106, and 615. The Chair noted that the roundtable discussion raised a number of issues and considerations that would inform the Committee in dealing with these rules.

The roundtable discussion was transcribed and will appear in the Fordham Law Review.

II. Potential Amendments to Rule 702

The Committee is considering two possible amendments to Rule 702. The first is to add language that would prohibit an expert from overstating conclusions. This proposal is primarily prompted by the Committee's consideration of forensic evidence and past instances in which forensic experts have, for example, testified to providing a "scientific" opinion or to an opinion that is "error-free," when the methodology employed does not justify that conclusion. The change would apply to all experts however, as the problem of overstatement could apply to any expert testimony. The second change being considered is to clarify, in the text of the rule, that questions of sufficiency of basis and application are questions of admissibility to be decided by the judge under Rule 104(a) --- meaning by a preponderance of the evidence.

The Chair opened the discussion of Rule 702 by commenting on the interesting and constructive discussion of issues surrounding Rule 702 during the roundtable discussion that preceded the meeting. She stated that she was interested in hearing the reactions of the Committee members to the discussion and suggested that the Committee identify any additional work that the Subcommittee on Rule 702 could perform in anticipation of the Committee's spring meeting.

The Chair commented that there is strong interest in the possibility of amendments to Rule 702, noting that the Lawyers for Civil Justice had already submitted a letter in support of a textual addition of the Rule 104(a) standard, even though no amendments have yet been formally proposed.

Judge Campbell inquired about the concept of amending Rule 702 to clarify that the requirements of the Rule are admissibility requirements for the trial judge to find by a preponderance before admitting expert testimony. He asked whether a trial judge could utilize inadmissible evidence in determining the admissibility of expert testimony under that standard. The Reporter responded that a judge could indeed utilize inadmissible evidence in finding the Rule 702 requirements satisfied, because under Rule 104(a) the judge is not bound by rules of admissibility (other than privilege) in deciding whether challenged evidence is admissible. Judge Campbell asked whether it would make sense to include that point in an Advisory Committee note in the event that a Rule 702 amendment expressly requiring a finding by a preponderance were proposed. The Reporter agreed that it would be a good idea to include such a clarification in a Committee note.

Another Committee member commented on the roundtable discussion of Rule 702, remarking that he had previously been in favor of amending Rule 702 to correct the courts that are misapplying it by treating its requirements as ones of weight for the jury, and that hypotheticals posed by Judge Campbell during the roundtable discussion concerning the proper inquiry for a trial judge assessing the admissibility of expert testimony --- and the ensuing debate surrounding those hypotheticals --- had convinced him that the Committee might need to act to guide the courts in this area. The Committee member then inquired whether an amendment to Rule 702 directed at preventing experts from overstating their conclusions could also serve to cure the existing problems with the Rule 104(a) preponderance standard by way of an addition to the Committee Note. The Committee member suggested that the two issues were sufficiently related, because both dealt with concerns that expert testimony be valid, reliable, and sufficiently grounded in facts or data. The Reporter explained that Judge Schroeder, the Chair of the Rule 702 Subcommittee, had made the same suggestion before the meeting, and in response the Reporter had prepared a proposal that would amend the language of Rule 702 to prohibit overstatement, but that would offer additional guidance regarding application of the Rule 104(a) preponderance standard in the Committee Note. The Reporter handed out the proposal and stated that it would be further developed at the next meeting.

The Chair commented that both of the potential changes to Rule 702 – a change to clarify the application of the Rule 104(a) preponderance standard and one to prohibit overstatement of expert conclusions – would be designed to serve a signaling function for trial judges and lawyers. She remarked that either change could send a strong signal and that making both changes could have a significant impact. She cautioned that there would need to be a compelling case for making both changes at once. A Committee member commented that the trial judges participating in the

roundtable discussion did not seem to favor amendments to Rule 702, while the practicing lawyers seemed more interested in amendments. Another Committee member agreed, noting that the trial judges seemed concerned that an amendment to Rule 702 might signal more change than is intended and that judges seemed more interested in education about admitting expert testimony than in a rule change.

Assuming that the two potential amendments to Rule 702 should be viewed as alternatives, the Chair then inquired which of the two appeared to the Committee to be most helpful. The Reporter suggested that adding the prohibition on overstatement to the language of Rule 702 would be the more meaningful of the two potential amendments given that the Rule 104(a) standard already applies to Rule 702. He noted that the Committee Note could be used to clarify and emphasize the intended operation of Rule 104(a), in addition to explaining the reasons for the overstatement amendment. The Chair agreed, noting that academics are at least in agreement that Rule 104(a) governs the *Daubert* inquiry, while the regulation of expert overstatement is less clear under the existing rule.

The Chair then explored the impact of an amendment that would prohibit expert overstatement on the testimony of forensic experts in criminal cases. She inquired whether such an amendment would prevent forensic experts in disciplines that are not supported by black box testing, whose testimony is routinely admitted under Rule 702 currently, from testifying at all. The Reporter responded that it would not be the intent of an overstatement amendment to exclude those forensic experts. Rather, an overstatement prohibition would be designed to prevent those forensic experts from overpromising and would require accurate testimony as to the limits of their opinions or conclusions. He noted that an overstatement amendment could be phrased in the negative to caution that experts “may not overstate” their conclusions or in the affirmative to require “accurate statements” concerning their results. The Chair then noted that the Department of Justice had already taken steps to correct the problem of overstatement through recent testimonial guidelines and queried what exactly these forensic experts would be permitted to testify to under an amended standard. The DOJ representative to the Committee stated that she was concerned about the vague meaning of “overstatement” in a potential amendment that could generate litigation. Again, the Reporter explained that an overstatement amendment would be designed to curb experts’ tendencies to overpromise. He cited examples of expert testimony regarding cell phone location data, explaining that such experts should be permitted to testify concerning the general location of a cell phone, but should not be allowed to opine as to an individual’s “precise location” based on cell phone location data because the underlying technology cannot at this time reveal precise locations. Basically, an expert should not be permitted to claim that their expertise shows more than it does. That said, the Reporter noted that it is a reality with any new rule that there will be some need for courts to interpret new language. With a well-drafted Committee Note, the Reporter explained that he did not anticipate rampant and costly litigation over an overstatement limitation.

Another Committee member remarked that limiting language in the proposed overstatement amendment would help to clarify the meaning of the amendment and would make it plain that the trial judge need not agree with an expert to admit her testimony, but must ensure that the expert’s testimony is within the realm of reasonable inferences the expert can draw from her methodology. In particular, the potential amendment would prevent an expert from overstating “the conclusions that may reasonably be drawn from the principles and methods used.” Judge Campbell asked whether there was terminology for an amendment that might capture the intent better than the word “overstatement.” The Reporter noted that the concept of “overstatement” was derived from the

PCAST report, but agreed that other language might be effective. Judge Campbell explored the possibility of prohibiting an expert from “exceeding the scope” of his basis. Alternatively, Judge Campbell suggested an amendment to Rule 702 that would provide that an expert may “not state conclusions that cannot reasonably be drawn from the principles and methods used” by the expert. Judge Campbell stated that a trial judge should be applying *Daubert* and evaluating an expert’s basis rather than parsing the words chosen by each expert or regulating the vehemence with which an expert expresses conclusions.

Another Committee member noted that the concern over experts using the “reasonable degree of certainty” language could be addressed through Judge Campbell’s efforts to avoid having trial judges parse the precise language expert witnesses may use in testifying. Judge Schroeder also noted that the amendment might want to reference the expert’s “opinion” rather than the expert’s “conclusions” because the existing language of Rule 702 deals with “opinions” rather than “conclusions.” The Reporter noted that these suggestions were helpful and promised to incorporate the possible alternative language discussed into the agenda materials concerning Rule 702 for the Spring meeting.

The Committee agreed to continue, at the next meeting, its consideration of amendments to Rule 702 that would 1) prohibit experts from stating an opinion that goes beyond what is supported by the expert’s data and methodology, and 2) clarify that the trial judge must find the Rule 702 requirements satisfied by a preponderance of the evidence.

III. Federal Rule of Evidence 106

The Committee next turned its attention to potential amendments to Federal Rule of Evidence 106. In particular, the Committee has been considering the possibility of amending Rule 106 to provide 1) that statements necessary to correct a misleading partial presentation may be admitted even if they would otherwise be inadmissible hearsay and 2) that Rule 106 would cover oral as well as written or recorded statements.

The Federal Public Defender noted that the rule of completion comes up in many criminal cases, in large part as a result of the new technology that the FBI uses to capture conversations. The Chair inquired whether the completion of unrecorded oral statements was ever an issue. The Federal Public Defender noted that she could recall one instance in which her client had made several oral statements in the back of a police cruiser and that the government had tried to admit only part of the statements and she had successfully argued that the entirety of his statements be admitted under Rule 106. She noted that there was no dispute in that case about the content of the defendant’s oral statements, however. That last comment was in response to the extensive discussion among the roundtable participants about how the court should proceed if the proponent denies that the opponent ever made a completing statement.

The Reporter noted that most federal courts, and many state courts, currently permit the completion of partial oral statements under Rule 611(a) and that there does not appear to be a problem with proof of those oral statements or significant disputes regarding their content. Should a dispute about the content of an oral statement arise, the Reporter noted that a trial judge can use Rule 403 to reject completion with a disputed oral statement as too time consuming and not worth

the delay and confusion. He stated that an amendment to extend Rule 106 to oral statements would not change the law in the six circuits that already permit it.

Another Committee member inquired whether Rule 403 was sufficient, without any amendment to Rule 106, to deal with potential unfairness caused by partial oral statements. The Reporter stated Rule 403 is a rule of exclusion, so it could not be used directly to require the admission of a remainder of a statement. The trial court could, perhaps, tell the proponent that the initial portion will be excluded under Rule 403 (as misleading) unless the proponent agrees to the admission of the remainder. But even in that case, the court would have to find that the probative value of the initial portion is *substantially* outweighed by its prejudicial effect. The Reporter concluded that the far more direct result was to allow the completing remainder to be admissible under Rule 106, even over a hearsay objection.

Returning to the questions regarding oral statements, the Chair noted that the legislative history of Rule 106 suggests that the original Advisory Committee decided to limit the Rule to written and recorded statements only due to “practical problems” inherent in including oral statements. The Chair expressed an interest in understanding more about the debate surrounding the original decision to limit Rule 106 to written and recorded statements before proceeding with a proposal to extend the Rule to oral statements. The Reporter stated that the Rules Clerk offered to research this question of legislative history and would present his findings in the agenda book for the next meeting.

The DOJ representative inquired whether the Federal Public Defender usually succeeded in admitting completing portions of a defendant’s statements at trial. The Federal Public Defender responded that judges usually allow completing statements when fairness so requires, but noted that disputes about the timing of the originally admitted statement and the completing statement are common. She noted that prosecutors typically argue that completion should be limited to statements made within one or two sentences of the original statement, while defense counsel take a more expansive approach to completion with statements made at the same time (even if not within one or two sentences of the originally introduced statement).

The DOJ representative argued that the threshold requirement for completion should be that the introduction of the original partial statement is truly misleading. The Reporter stated that one possible amendment alternative, included in the agenda book, would be to add the term “misleading” to the language of Rule 106 to ensure that completion is only required where the original presentation is indeed distorting or misleading --- and that corresponding language could be added to state that completion would be required if the statement corrected the initial misimpression. The Federal Public Defender asked why a new “misleading” limitation would need to be added to the Rule. The DOJ representative responded that the justification for amending Rule 106 to overcome a hearsay objection is that the circumstances in which completion is necessary are very narrow and truly rare. The DOJ experience is that courts are not limiting completion to truly misleading circumstances and that trial courts take a much more expansive view of when a defendant may admit completing statements. Adding a “misleading” limitation to an amended Rule 106 would thus restore equilibrium and ensure that the Committee’s narrow intent with respect to the amendment would be implemented. She noted that the DOJ will oppose any attempt to extend Rule 106 to allow completion of oral statements --- even though oral statements are currently allowed for completion in many federal courts.

The Reporter noted that because many circuits already allow completion of oral statements through Rule 611(a), it would be difficult for the Committee to resolve the conflict in the circuits concerning the admissibility of hearsay to complete without also resolving the circuit split regarding oral statements. This is especially so because a number of courts simply prohibit completion with oral statements, and an absolute distinction between oral and written or recorded statements for completion purposes makes no sense.

A trial judge remarked that completion questions often arise in the context of wiretaps or recorded jail telephone calls and that he has never encountered the issue of completion with respect to oral statements. Still, the Reporter noted that the Committee should resolve the issue of oral statements one way or the other in an amendment proposal. Another Committee member asked whether Rule 807 could be used to admit completing portions of statements that would otherwise be hearsay in place of amending Rule 106 to provide for a limited hearsay exception. The Reporter noted that completing statements are most often made by criminal defendants and that the completing portion omitted by the government's original presentation is typically self-serving for the defendant. In that context, it is highly unlikely that the trustworthiness requirement of Rule 807 would be satisfied with respect to the completing portion of the statement.

The Chair noted that she had always understood that a statement need not be admitted for its truth in order to complete a partial statement or to correct a misimpression because the completing portion could be admitted for its nonhearsay purpose of providing needed context. The Reporter replied that even if "context" were a solution (and it is not in many courts) it would not be a fair outcome. If the completing portion were allowed only for context, the party benefitting from the completion could not argue the truth of the completing statement during closing arguments, meaning that the party that introduced the original misleading partial statement would retain an advantage in being able to argue the truth of the misleading portion of the statement. Because the party who offers a misleading statement is committing a wrong, the Reporter argued that it is unfair to allow that party to benefit from its own wrong. The Federal Public Defender commented that if the prosecution opened the door to the statement with a misleading presentation, the defense should be able to use the portion necessary to complete that statement for its truth as well. The Reporter queried why completion shouldn't truly level the playing field between the parties with respect to the statements, by permitting arguments that both are true.

Another Committee member agreed with the Chair that a completing statement could be admitted for context only and need not be taken as true to perform its completing function of placing the original statement in context. That Committee member suggested that Rule 106 should not overrule a hearsay objection to a defendant's admission of a completing statement. Rule 106 could allow the completing portion of the statement to be admitted for its nonhearsay purpose of showing context only and a defendant could choose to testify if he or she wished to offer a self-serving statement for its truth. But others argued that a completing statement is useful for "context" only if it is true. Another Committee member observed that a criminal defendant cannot be required to testify and certainly wouldn't testify to a statement to show context only; nor should the criminal defendant have to risk impeachment by testifying to correct a misimpression that was created by the government. The Reporter questioned whether admitting a completing statement for its nonhearsay purpose in proving context only was adequate to level the playing field, raised concerns about the limiting instruction that would have to accompany a completing statement admissible only for its nonhearsay purpose, and posed other problems for a criminal defendant

wanting to testify to his own self-serving statements (including that they would be excluded as prior consistent statements).

The Department of Justice representative queried whether it would be fair to admit a completing self-serving statement for its truth given that the prosecution would have no right to cross-examine the defendant declarant to determine whether the self-serving portion of the statement was a lie. The Reporter acknowledged the prosecution's inability to cross-examine the defendant, but suggested that the prosecution waives its right to object to the defendant's completing hearsay statement if it introduced a misleading portion of the defendant's statement.

The Chair noted that the truly problematic case would be one in which a court found a statement necessary to correct a misleading and incomplete partial presentation of the statement but then excluded it altogether. She suggested that it would seem unlikely that the court and litigants would spend time arguing about the admission of a completing statement for its truth or only for context once a decision was made to admit it. The Reporter noted that in one circuit, the completing portion is admissible for the limited nonhearsay purpose of providing context, but that others allow the completing portion to be admitted for its truth, while others hold that the Rule cannot overcome a hearsay objection. He concluded therefore that an amendment to allow a completing statement to be admitted for context only would change the law in every circuit but one.

Even if the Committee determined that Rule 106 should be amended to eliminate a hearsay objection to a completing statement, one Committee member noted that the scope of such an amendment would still need to be determined. The Committee could propose an amendment that would allow the statement to be admitted over a "hearsay objection" specifically or it could propose a more generic amendment that would allow completion with a statement even when it is "otherwise inadmissible." The Committee member noted that the latter amendment would be broader and might allow completion over objections other than hearsay. That Committee member expressed concern about the unintended consequences of the broader amendment that would defeat any and all objections to a completing statement offered under Rule 106, and expressed a preference for a narrower amendment tailored to a hearsay objection only. The Reporter noted that it is a hearsay objection that is currently used to defeat completion and that a narrower amendment limited to hearsay objections would focus courts on the precise problem that created the need for a change.

Another Committee member reiterated that it would be important to limit Rule 106 to circumstances in which the original partial presentation of the statement was specifically "misleading" if Rule 106 were amended to create a hearsay exception. He suggested that the use of the word "fairness" in current Rule 106 might not be adequate to capture the intent of the Rule if it were amended to provide a hearsay exception. In particular, a party should not be able to argue that it is simply "unfair" that the hearsay rule prevents his presentation of some out of court statements to gain admission under Rule 106. Only if a party's opponent has presented a partial statement in a misleading way that demands correction should the Rule 106 hearsay exception apply. The Reporter agreed that the term "misleading" better captures the concerns Rule 106 is designed to remedy. The Federal Public Defender suggested that if a defendant gave one version of events on one occasion and another version at some other time, she would still argue that it is "misleading" to introduce only of the two statements even though they were made at different times. The Chair noted that an amendment that would allow introduction of any other statements

made at other times would expand Rule 106 and the current caselaw significantly. The Federal Public Defender responded that defense lawyers would interpret the term “misleading” more broadly than prosecutors would.

Another participant queried whether it would make sense to leave Rule 106 alone and to add a hearsay exception to Rule 803 to deal with completing statements. He noted the hearsay objection is the primary concern under the current Rules and that placing the remedy in a hearsay provision could make more sense and would focus judges more closely on the hearsay issue. The Reporter noted that Rule 802 precludes the admission of hearsay unless “these rules” (meaning the Evidence Rules as a whole) provide otherwise, such that an amendment to overcome a hearsay objection to completing statements does not have to appear in Article Eight of the Rules and could be placed in Rule 106. Still, he promised to discuss the possibility of incorporating an amendment into Rule 803 in the memorandum for the next meeting.

Another Committee member remarked that the issue of completion is most commonly litigated in the context of a criminal defendant’s recorded confession. He noted that a defendant may deny involvement in the alleged crime for the first couple hours of recorded conversations only to confess in the latter part of the recording. The Committee member opined that the prosecution will want to admit only the later inculpatory portion of the recorded statement while the defense will want to put in the whole thing. A hearsay objection would suffice to exclude the early self-serving portion of such a recorded confession under existing law and any amendment that would change that result and allow the entire recording to be admitted would have a significant impact on criminal cases every day. Judge Campbell suggested that perhaps an amendment could be drafted to guard against such expansive views of the Rule 106 completion right. In particular, he suggested language that would clarify that a party’s original presentation of a statement or a portion thereof must create a misleading or distorted view of that statement before completion will be permitted. For example, an amended Rule 106 might say: “If a party introduces all or part of a written or recorded statement so as to create a misleading impression about the statement, an adverse party may require the introduction, at that time, of any other part – or any other written or recorded statement by the same person – that corrects the misleading impression.”

The Committee determined that it would continue its consideration of potential amendments to Rule 106 at its Spring meeting. The Reporter promised to report back on potential Rule 106 amendments at the Committee’s spring meeting in light of the discussion and proposals raised.

IV. Federal Rule of Evidence 615 and Sequestration of Witnesses

Judge John Woodcock, a former Committee member, requested that the Committee consider amendments to Rule 615, the rule on sequestering witnesses. He had three concerns, arising from a recent case over which he presided. They were: 1) The rule provides no discretion for a court to deny a motion to sequester; 2) There is no timing requirement in the rule, so it would be possible for a party to make a “midstream” request for exclusion, after some witnesses had already testified; and 3) There should be an explicit exemption from exclusion for expert witnesses, to substitute for the current vague exemption for witnesses who are “essential to presenting the party’s claim or defense.” These proposed changes were raised at the roundtable discussion, and the Committee obtained valuable information, especially from the participating judges.

At the meeting, the Chair acknowledged that Judge Woodcock had some very valid points about improving its operation. Still, she noted that the current Rule had been drafted to constrain a trial judge by making sequestration mandatory, while preserving some discretion in the exceptions. The mandatory nature of the rule was adopted because it is counsel, and not the court, that is likely to be aware about the risk of tailoring trial testimony. The Chair noted how successful the Federal Rules of Evidence have been and cautioned that amendments that make them more complicated and cumbersome could erode their value. She stated that she would want to observe more of a problem in the daily operation of Rule 615 before recommending the proposed amendments to the Rule. Committee members agreed that Rule 615 would not be improved by allowing for court discretion; that the timing problem is not pervasive; and that courts have not had significant problems in applying the “essential” exception to those experts who should be allowed to be present during trial.

The Reporter noted that in researching Judge Woodcock’s suggestion he came upon another issue about the application of Rule 615 that has resulted in a conflict among the courts. The issue involves the scope of a Rule 615 order: does it apply only to exclude witnesses from the courtroom (as stated in the text of the rule) or can it extend outside the confines of the courtroom to prevent prospective witnesses from learning about trial testimony? Most courts have held that a Rule 615 order extends to prevent access to trial testimony outside of court, but other courts read the rule as it is written. Where parties can be held in contempt for violating a court order, some clarification of the operation of sequestration outside the actual trial setting itself could be helpful. A Committee member noted that an amendment to address the problem of witnesses learning about testimony outside the courtroom should be drafted simply, to avoid excess verbiage that would complicate Rule 615 and make it difficult to memorize and apply. That Committee member suggested a straightforward amendment providing that a trial judge “must” order witnesses excluded from the courtroom upon request, but providing that a trial judge “may” also order measures to prevent witnesses from learning about trial testimony outside the courtroom, whether from talking with other witnesses or from reading the news. The Reporter noted that changing the focus of Rule 615 to prevent witnesses from “learning” of the testimony of other witnesses rather than from simply “hearing” the testimony (as has been done in Pennsylvania) could help to extend the policy of sequestration beyond the courtroom.

Another Committee member agreed that a Rule 615 exclusion order should remain mandatory but thought that an order concerning out of court witness communication should be discretionary. As to language, the Committee member pointed out that merely adding the word “learn” to the language of existing Rule 615 (or replacing the word “hear” with the term “learn”) would not adequately cover out of court information because the current version of Rule 615 is tied to “exclusion” from the courtroom only. (So saying that “the court must order the witness excluded so that she cannot hear or learn of other witnesses’ testimony” doesn’t deal with out of court contacts because it only deals with “learning” due to courtroom presence). The Committee member suggested adding a new sentence to Rule 615 that would say something like: “At its discretion, the court may issue further orders to prevent witnesses from learning out of court about the testimony of other witnesses.” Other Committee members agreed that exclusion from the courtroom should remain mandatory, but that measures to prevent witnesses from learning of testimony beyond the courtroom should be discretionary with the trial judge.

The Chair pointed out that an amendment to extend Rule 615 protection outside the courtroom may be consistent with the Committee's ongoing efforts to ensure that the Evidence Rules are keeping up with technological advancement, given the increasing witness access to information about testimony through news, social media, or daily transcripts. The Committee agreed to consider a potential amendment to Rule 615 to deal with the issue of witnesses learning about testimony outside the courtroom in light of these concerns, and the conflict in the courts, at the Spring meeting. The Committee agreed not to proceed with any other amendments to Rule 615.

The Federal Public Defender reported that trial judges sometimes refuse to issue orders preventing a witness from conferring with their own counsel during a recess when a break is taken in the middle of a cross-examination. She suggested that the principle of sequestration is the one invoked by the courts in the case law preventing consultation with counsel midstream during an examination, but that this protection is not express on the face of the Rule. Therefore, she suggested that the Committee consider also amending Rule 615 to make express a prohibition on a witness's consultation with counsel during a recess taken in the midst of an examination. The Reporter questioned whether the issue of conferring with counsel is a Rule 615 issue directed at protecting witnesses from hearing the testimony of other witnesses. He suggested that this concern about witness coaching during an examination was not a Rule 615 concern and that an amendment directed to that issue would not belong in Rule 615. Another Committee member suggested that it would be a Rule 615 problem for a lawyer to convey the content of another witness's testimony to a trial witness, but that general coaching did not seem to be within the Rule 615 protections.

V. A Roadmap Rule for Impeachment

The Reporter next raised the possibility of adding a new Evidence Rule to Article Six to cover methods of impeachment, such as bias, sensory perception, and contradiction, that are not covered by the Federal Rules. He noted that Professor Lynn McLain of the University of Baltimore School of Law had done a significant amount of work to add such a provision as Rule 616 of the Maryland Evidence Rules and that the Maryland Rule provided a roadmap on impeachment and rehabilitation of witnesses. The Reporter emphasized that the Committee would have to ensure that any such rule comported with all of the federal case law regarding impeachment and rehabilitation, and opined that if such a rule would be adopted it might be preferable to add it to Rule 607 of the Federal Rules as a roadmap at the beginning of the provisions regarding impeachment. All that said, he inquired whether the Committee had any interest in proceeding with a roadmap impeachment provision as essentially a good housekeeping matter.

One Committee member suggested that the Maryland provision was a bit cumbersome, reading more like a benchbook than a rule of evidence. Another participant agreed that the roadmap rule seemed like a table of contents and expressed concern about drafting a provision that would not conflict with any of the existing tenets of impeachment in these areas. After further discussion, the Committee determined that it would not proceed with an impeachment roadmap rule.

VI. Rule 404(b) Public Comment

The Reporter reminded the Committee that the proposed amendment to Rule 404(b) had been published for public comment. He further noted that there are public hearings scheduled in January with respect to the proposal and that the public comment period would close in February, 2019.

He informed the Committee that it had received two pertinent comments concerning the Rule 404(b) proposal to date: 1) a suggestion from a member of the public to include a reference to a continuance or other protective measures in the event of late notice for good cause (as was done in the recent proposal to amend Rule 807) and 2) a suggestion from a Standing Committee member to eliminate the term “propensity” in the proposed amendment in favor of the term “character” currently used in existing Rule 404(b)(1).

With respect to the first suggestion, the Reporter noted that there may be an argument for including a reference to a continuance or other protective measures in the text of the proposed amendment to Rule 404(b) to align the amendment with the recent proposal to amend Rule 807. On the other hand, he explained that Rule 404(b) already has a good cause exception to the existing notice requirement and that there is case law surrounding that good cause exemption and protective measures necessary in the event of late notice (making a rule change in the Rule 404(b) context unnecessary). Rule 807 had no good cause exception to its notice requirement and the proposed amendment is introducing one for the first time. In that different context, it may make sense to include more direction regarding protective measures, including continuances, than it does in the Rule 404(b) context. However, the Reporter suggested that the Committee might consider adding to the Note the same provision regarding continuances that was placed in the Note to Rule 807.

As to the suggestion to change the word “propensity” to the term “character,” the Reporter noted that the term “propensity” came from the Seventh Circuit’s decision in the *Gomez* case that led to the consideration of Rule 404(b), but that a change to the term “character” may make sense in order to keep the language consistent throughout the Rule.

The Committee will discuss the public comment received and any potential alterations to the proposed amendment to Rule 404(b) as a result of those comments at the spring meeting.

VII. Closing Matters

The Chair thanked the Reporter for the excellent work in putting together the agenda materials, thanked Judge Schroeder and the Subcommittee on Rule 702 for their efforts, and the entire Committee for the very constructive exchange. The meeting was adjourned.

Respectfully Submitted,

Daniel J. Capra
Liesa L. Richter

TAB 7

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TAB 7A

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Legislative Update

Item 7A will be an oral report.

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TAB 7B

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JUDICIARY STRATEGIC PLANNING (INFORMATION)

Long-range and strategic planning are among the oversight and policy advisory functions of Judicial Conference committees (including the Committee on Rules of Practice and Procedure and the five advisory rules committees). Planning efforts are facilitated and coordinated by the Executive Committee of the Conference, which designates a planning coordinator. Chief Judge Carl E. Stewart (Fifth Circuit), a member of the Executive Committee, currently serves as judiciary planning coordinator.

On the recommendation of the Executive Committee, the Conference approved an updated *Strategic Plan for the Federal Judiciary* in September 2015. If you are not familiar with the *Strategic Plan*, you can review it here: <http://www.uscourts.gov/statistics-reports/strategic-plan-federal-judiciary>

The implementation of the *Strategic Plan* relies heavily upon the work of Conference committees, and each year, committees are asked to report on strategic initiatives that align with the strategies and goals of the *Strategic Plan*.¹

At its June 2018 meeting, this Committee approved a report on the progress of its work in furtherance of the *Strategic Plan*. Progress reports from all committees were provided to Chief Judge Stewart. Based on these reports, in August 2018, Chief Judge Stewart provided an update to the Executive Committee on the progress of efforts to implement the *Strategic Plan*. A list of committee strategic initiatives in support of the *Strategic Plan* is included as Attachment 1.

This item reports on a September 12, 2018 long-range planning meeting of committee chairs and members of the Executive Committee. Committee chairs attend long-range planning meetings before most Judicial Conference sessions to confer on judiciary-wide trends and discuss long-range planning issues that cut across committee lines.

The September 2018 meeting, chaired by Chief Judge Stewart, featured an update on the implementation of the *Strategic Plan*, a panel discussion on the judiciary's efforts to study and address racial bias, and a panel on judiciary efforts to improve diversity. A report of the meeting is included as Attachment 2.

¹ Strategic initiatives are projects, studies, or other efforts that have the potential to make significant contributions to the accomplishment of a strategy or goal in the *Strategic Plan*. Strategic initiatives are distinct from the ongoing work of committees, for which there are already a number of reporting mechanisms, including committee reports to the Judicial Conference.

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Summary of Committee Strategic Initiatives

| Committee | Initiative |
|---|---|
| <i>Audits and Administrative Office Accountability</i> | Update of the judiciary's cyclical audit program for court units and federal public defender organizations |
| | Internal controls outreach and training program |
| <i>Bankruptcy</i> | Update of the bankruptcy judgeship survey administration approach |
| | Bankruptcy judgeship vacancy pilot program |
| | Implementation of the multi-district designation statute |
| | Pilot project to study the potential “horizontal” consolidation of two or three bankruptcy courts |
| | NEW: Promoting and improving diversity on the federal bankruptcy bench |
| <i>Budget</i> | Coordination and implementation of the judiciary’s cost-containment program |
| | Outreach and education program for members of Congress and their staffs |
| <i>Codes of Conduct</i> | Provision of confidential ethics advisory opinions to judges and judicial employees on request |
| | Review and update of ethics publications for judges and judicial employees |
| | Expansion of ethics outreach and education programs for judges and judicial employees |
| | NEW: Response to the Report of the Federal Judiciary Workplace Conduct Working Group within the Committee’s jurisdiction |

| Committee | Initiative |
|--|---|
| <i>Court Administration and Case Management</i> | Cost-containment study of organizational models for handling the judiciary’s administrative work |
| | Implementation of the next generation case management/electronic case file system (NextGen CM/ECF) |
| | Case management assistance for the most congested courts with case processing difficulties |
| | Juror utilization improvements |
| <i>Criminal Law</i> | Monitoring of research on judge-involved supervision programs (BROADENED FROM PREVIOUS FOCUS ON COURT RE-ENTRY PROGRAMS) |
| | Implementation of evidence-based practices in the federal probation and pretrial services system |
| | Transformation to an outcome-based organization with a comprehensive measurement system |
| <i>Defender Services</i> | Establishment of federal defender organizations in all districts |
| | Support and advocacy for fair compensation for panel attorneys |
| | Support for the use of effective case-budgeting practices |
| | Development and implementation of litigation support strategies |
| | Communication with DOJ to streamline its death penalty authorization protocol |
| | Promotion of panel attorney access to expert and other services |
| | Monitoring of the implementation of federal defender organization staffing formulas |
| | Development and deployment of an electronic CJA voucher processing system |
| | NEW: Increasing diversity among federal defender organization attorneys and staff and among panel attorneys |

| Committee | Initiative |
|--|---|
| <i>Federal-State Jurisdiction</i> | Identification of issues and recurring problems in federal jurisdictional statutes that could be addressed by statutory amendments |
| | Enhancements to federal-state cooperation (EXPANDED TO INCLUDE STATE COURT EFFORTS TO STUDY OR ADDRESS RACIAL FAIRNESS AND IMPLICIT BIAS) |
| | Participation in civic engagement initiatives |
| <i>Financial Disclosure</i> | Development of a national system for electronic filing and management of financial disclosure reports |
| | Implementation of a national system for electronic filing and management of financial disclosure reports |
| <i>Information Technology</i> | Implementation and improvement of next generation case management systems |
| | Implementation of a judiciary data strategy and governance plan to integrate national systems and manage information from an enterprise-wide perspective |
| | Implementation of full enterprise national-level hosting and cloud computing services for courts |
| | Implementation of a next generation communications network supporting the transmission of voice, video, and data over a single, secure network |
| | Support for unified communications for mobile computing, document sharing, collaboration, and continuing operations in an emergency |
| | Protection of the judiciary's data communication network, underlying infrastructure, and applications from physical and cyber threats and hazards |
| <i>Intercircuit Assignments</i> | Pilot program to facilitate the more aggressive use of intercircuit assignments by systematically pairing districts in a targeted way |
| | Incorporation of magistrate and bankruptcy judge assignments into the Intercircuit Assignments Database System (ICADS) |

| Committee | Initiative |
|--|--|
| <i>International Judicial Relations</i> | Outreach to the international development community, U.S. government officials, and key organizations engaged in international rule of law and development work |
| | Improvement of information about security programs and resources for judges, court executives, and staff traveling overseas |
| | Establishment of recommended practices and protocols for the use of electronic equipment at international destinations |
| <i>Judicial Branch</i> | Pursuit of compensation and benefits enhancements for judges |
| | Support and encouragement for circuit initiatives that enhance the well-being of judges |
| | Provision of information about the judiciary, and hosting of local court visits for members of Congress and their staffs |
| | Increase in contacts between the judiciary and Congress that are not directly related to the judiciary's legislative goals |
| | Enhancements to the public's understanding of federal judiciary |
| | Encouragement of participation by judges in public and civic education activities |
| <i>Judicial Conduct and Disability</i> | Offer of training for judges and court staff on handling and responding to judicial conduct and disability complaints (UPDATED TO INCORPORATE TRAINING IN FURTHERANCE OF THE WORKPLACE CONDUCT WORKING GROUP'S RECOMMENDATIONS) |
| | Enhancements to online public information about judicial conduct and disability (UPDATED TO INCLUDE EFFORTS TO UPDATE WEBSITES FOLLOWING IMPLEMENTATION OF WORKING GROUP'S RECOMMENDATIONS) |
| | Assistance for the Judicial Branch Committee on its judicial health and wellness programs |

| Committee | Initiative |
|----------------------------------|---|
| <i>Judicial Resources</i> | Improvements in the diversity of the judiciary workforce |
| | Pursuit of comprehensive judgeship legislation |
| | Pursuit of targeted judgeship legislation to provide relief to courts with extremely high workloads |
| | Recruitment, training, and retention of a workforce with broader competencies |
| | Assessment of pilot program in which court law clerks are provided to district courts with the highest congestion ratings and workloads |
| | Improvement in the precision of the assessment methodology for the development of staffing formulas |
| <i>Judicial Security</i> | Support for the development and implementation of emergency management plans, procedures, and tools for court units and federal defender organizations |
| | Issuance of facility access cards across the judiciary |
| | Planning for upgrades to physical access control systems in judiciary facilities |
| | Improvements in the ability of court units to limit access by contract workers to restricted court space |
| | NEW: Formation of Interagency Judicial Security Council to improve communication and collaboration on court security matters among federal court security stakeholders |
| <i>Magistrate Judges</i> | Provision of information, suggestions, and recommendations to courts on effective magistrate judge utilization practices |
| | Encouragement of the meaningful participation of magistrate judges in court governance |
| | Integration of additional statistical reporting into CM/ECF to facilitate the consideration of possible alternatives to certain part-time magistrate positions |
| | Support for efforts to ensure a high caliber of magistrate judges and increase the diversity of magistrate judges |
| | Identification and pursuit of cost containment and/or cost avoidance in the magistrate judge program area |

| Committee | Initiative |
|---|--|
| <i>Rules of Practice and Procedure</i> | Implementation of the results of the 2010 Civil Litigation Conference |
| | Identification and implementation of opportunities to take advantage of technological advances |
| | Analysis and promotion of recent rules amendments |
| | Communication and collaboration with organizations outside the judiciary to improve the public’s understanding of the federal judiciary |
| | Preservation of the judiciary’s core values by ensuring that the work of the rules committees has a positive impact on the judiciary’s strategic goals, even when rule amendments are not being proposed |
| <i>Space and Facilities</i> | Evaluation and achievement of improvements in the delivery of services that the judiciary receives from the General Services Administration |
| | Reduction in the judiciary’s space footprint by means including the “No Net New” policy, the implementation of the three percent space reduction target, and an Integrated Workplace Initiative, which demonstrates a modern, cost-effective, and more agile option to traditionally designed work spaces (PREVIOUSLY REPORTED AS TWO SEPARATE INITIATIVES) |
| | Comprehensive review and update to the <i>U.S. Courts Design Guide</i> |
| | NEW: Development of criteria to objectively evaluate requests for replacement space in non-resident courthouses |

**SUMMARY REPORT
LONG-RANGE PLANNING MEETING
SEPTEMBER 12, 2018**

The September 12, 2018 Long-Range Planning Meeting was facilitated by Chief Judge Carl E. Stewart, a member of the Judicial Conference Executive Committee who serves as the judiciary's planning coordinator. Participants included chairs and other representatives of Conference committees, members of the Executive Committee, and the Director of the Federal Judicial Center (page 313 lists all participants).

The meeting included an update on committee efforts to implement the *Strategic Plan for the Federal Judiciary*, with Chief Judge Stewart thanking the committee chairs for reporting on these efforts. In response to the Executive Committee's prioritization of elements of the *Strategic Plan* that are aligned with efforts to examine and improve workplace conduct safeguards, Chief Judge Stewart noted that several committees reported on long-term communication and training initiatives related to recommendations of the Federal Judiciary Workplace Conduct Working Group. In addition to many immediate and short-term actions that have been taken, the Committee on Judicial Conduct and Disability has incorporated the working group's recommendations into its strategic initiatives on training and website enhancements, and the Committee on Codes of Conduct has added a strategic initiative reflecting its long-term response to the working group's recommendations.

The meeting focused on judiciary efforts to study and mitigate the impact of racial bias as well as efforts to improve diversity within the judiciary. After consultation with Conference committees, the Executive Committee has agreed to utilize the strategic planning approach for the consideration of committee actions to study and address these topics. Several committee chairs reported on these efforts, as did Federal Judicial Center (FJC) and Administrative Office (AO) representatives.

Judiciary's Efforts to Address and Study Racial Bias

Judge Jeremy D. Fogel, Director of the FJC, discussed Center programs and/or conferences for judges, employees, and panel attorneys addressing the topics of implicit bias and racial fairness. The FJC has identified about 80 programs addressing these topics.

Judge Fogel noted that implicit bias is a difficult subject matter for judges. He emphasized the importance of honest and candid conversations about life experiences; how perception is impacted by the past; and how the mind makes certain assumptions. Judge Fogel also discussed how the delivery of many FJC programs are designed to include hands-on experiences in order to better ensure the retention of content following the conclusion of the program. For example, the Phase II Orientation for District Judges (2018) incorporated tours of the Smithsonian National Museum of African American History and Culture. Judge Fogel

reported frank and productive discussions following the tour.

Lori A. Green, Chief of the Training Division in the Administrative Office's Defender Services Office (DSO), described training programs and conferences that raise awareness of racial fairness issues in criminal cases and provide guidance to counsel on how to raise, discuss, and address racial issues in Criminal Justice Act representations. Green noted the difficulties in raising issues concerning race in courts. To improve communication on these issues, DSO hosts conferences on race and ethnicity in federal criminal practice for federal defender staff and panel attorneys. Green noted that since 2015 DSO has hosted seven conferences on these issues for both capital and non-capital counsel. Participants in these conferences have been trained, among other skills, to recognize disparate treatment of clients based on race and to utilize statistics as a tool to discuss racial issues.

Green stressed the importance of judicial panels at these conferences because judicial participation provides federal defenders and panel attorneys the rare ability to interact with judges to address practice issues.

Jason A. Cantone, Senior Research Associate, Federal Judicial Center, provided an overview of current academic research on the effectiveness of implicit bias reduction training programs. Cantone addressed the critical question of whether these programs actually work and, if they do, how training can lead to long-lasting changes over time. Cantone first provided an overview of the science of implicit bias, noting that scores on tests like the Implicit Associations Test do not necessarily predict how people behave. Cantone also summarized recent empirical psychological studies. In one study, where a group of researchers examined 17 different types of implicit bias reduction training approaches, they found that 8 approaches were effective at reducing implicit bias. Cantone described that some of the most successful approaches use scenarios where people are presented with information that counters typical stereotypes about a group. Another study treated implicit bias as a bad habit that can be broken through a combination of awareness of the bias, concern about the effects of the bias, and utilization of strategies to reduce the bias. Cantone also cautioned that implicit bias is not just about race and that biases can pervade views of a variety of disadvantaged groups.

Judge Richard R. Clifton, Chair of the Committee on Federal-State Jurisdiction, discussed the importance of drawing on the experience of state courts in addressing racial fairness and undertaking implicit bias initiatives. Judge Clifton described public engagement pilot projects initiated by the National Center for State Courts (NCSC) to learn more about how courts can best engage the public to overcome social inequities and bias in the court system. One such effort is a three-part series, *Courting Justice*, on PBS which features supreme, appellate, and trial court judges interacting with community members to gain different perspectives on how the court system can better deliver justice for all. Additionally, surveys were sent to court and civic leaders exploring topics such as implicit bias on the part of judges, lack of diversity on juries, and the lack of diversity on the bench.

Judge Clifton also discussed the importance of state-federal judicial councils and referenced the Federal Judicial Center pocket guide, *Enhancing Cooperation Through State-Federal Judicial Councils* (2017), as a useful tool.

Strengthening the Judiciary's Commitment to Diversity

Judge Catharina Haynes, Chair of the Committee on the Administration of the Bankruptcy System's Diversity Working Group, described the Committee's efforts to increase diversity on the bankruptcy bench. Judge Haynes discussed the importance of diversity from the perspective of a daughter of two immigrants raised in a multicultural home. In the context of the judiciary, Judge Haynes noted that diversity creates better, richer jurisprudence; promotes the public's confidence in the judicial system; contradicts stereotypes; and provides role models.

Judge Haynes described a new initiative of the Bankruptcy Committee to host roundtables where law students and young attorneys interface with federal judges and learn pathways to the bench. The Bankruptcy Committee sponsored its first event – "Pathways to the Federal Bench: Who Me? A Bankruptcy Judge?" – on December 6, 2017. The Bankruptcy Committee is planning a national event based upon the same platform. Judge Haynes disseminated a flyer providing information on the national event – "Road to the Federal Bench: Who, me? A Bankruptcy Judge?" – tentatively scheduled for October 24, 2019. *See Attachment.* Nineteen cities have been selected as sites for the event, with Washington, DC serving as the site of the live panel and roundtables. Judge Haynes encouraged interested federal judges to participate in this program.

Judge Haynes also discussed the importance of merit selection panels incorporating diversity among members, a uniform vetting process, and uniform questions. Judge Haynes referenced a Brennan Center for Justice publication, *Building A Diverse Bench: Selecting Federal Magistrate and Bankruptcy Judges*, as a useful tool.

Judge Raymond J. Lohier, Jr., Chair of the Committee on Defender Services, discussed the Committee's efforts on diversity, noting the importance of diverse representation for criminal defendants. Judge Lohier described fellowship programs of the Defender Services Committee and DSO to improve the pipeline of diverse individuals serving as counsel to criminal defendants. One such program is the Capital Fellowship Program. In addition, Judge Lohier described local outreach efforts such as visits to local law schools.

Judge Lohier also discussed the Model CJA Plan, revised in 2016, which encourages district CJA Committees to engage in recruitment efforts to increase diversity among panel members. Judge Lohier highlighted the lack of demographic data with respect to the 15,000 attorneys who serve as CJA panel attorneys. A survey conducted by the Ad Hoc Committee to Review the Criminal Justice Act Program chaired by Judge Kathleen Cardone (W.D. Tex.) provided some helpful information, but current data is needed. Judge Lohier noted that the acquisition of current data on the composition of panel attorneys is an important objective of the

Defender Services Committee.

Judge Roslynn R. Mauskopf, Chair of the Committee on Judicial Resources, discussed the Committee's consistent commitment to improving diversity within the judiciary and highlighted several initiatives undertaken to improve diversity. As one example, eight years ago, the Judicial Resources Committee partnered with the Just the Beginning Foundation – A Pipeline Organization to create the JRC-JTB Summer Internship Program. The goal of the program is to place minority, underrepresented, and/or economically disadvantaged law students in summer internships. In 2018, 43 intern placements were made with 38 judges. Since the inception of the program, 15 JRC-JTB interns have been hired as federal judicial law clerks.

Judge Mauskopf also described the Judicial Resources Committee's judicial outreach and recruiting program, which includes attendance at career fairs and legal recruiting events.

Finally, Judge Mauskopf discussed the Judicial Resources Committee's practice, together with the Committee on the Administration of the Magistrate Judges System, of sending letters to chief judges of courts with magistrate judge vacancies reminding the courts to consider diversity in the selection process. The letter encourages the inclusion of women and minorities on merit selection panels; reminds merit selection panels to give due consideration of all qualified individuals without respect to race; and suggests the circulation of vacancy announcements widely to attract a diverse pool of applicants.

Judge Richard Seeborg, Chair of the Committee on the Administration of the Magistrate Judges System, described a new seven-minute video created for merit selection panels. A portion of the video highlights the nuts and bolts of the selection process while another portion focuses on diversity. The video features a mock merit selection panel comprised of diverse individuals. Additionally, Judge Seeborg referenced an AO pamphlet, *The Selection, Appointment, and Reappointment of United States Magistrate Judges* (available on JNET), sent to merit selection panels which encourages courts to continue efforts to achieve diversity during all aspects of the magistrate judge selection process.

Nancy Dunham, the AO's Fair Employment Practices Officer, described a Model Intern Hiring Diversity Pilot. The AO has approved 10 paid internships for no less than two years. The purpose and goal of the pilot is to increase the diversity of the judiciary workforce by employing college, graduate, and/or law students of varying backgrounds and to focus on providing substantial experiences in a U.S. courthouse with a judge or senior official as the intern's primary point of contact and mentor. The AO's Office of Fair Employment Practices is working with court partners in 5 Southern states: Alabama, Mississippi, Georgia, Florida, and Louisiana. The Director's Leadership Program Resident will work to expand the pilot to 5 additional states.

Participants in the September 2018 Long-Range Planning Meeting

Executive Committee

Hon. Merrick B. Garland, Chair
Hon. Carl E. Stewart, Planning Coordinator
Hon. Robert J. Conrad, Jr.

Hon. Federico A. Moreno
Hon. Sidney R. Thomas
Hon. Martha Vazquez
Hon. Robert A. Katzmann

Committee on Audits and Administrative Office Accountability

Hon. Helen E. Burris, Chair

Committee on the Administration of the Bankruptcy System

Hon. Karen E. Schreier, Chair
Hon. Catharina Haynes

Committee on the Budget

Hon. John W. Lungstrum, Chair

Committee on Codes of Conduct

Hon. Rebecca B. Smith, Chair

Committee on Court Administration and Case Management

Hon. Audrey G. Fleissig, Incoming Chair

Committee on Criminal Law

Hon. Ricardo S. Martinez, Chair

Committee on Defender Services

Hon. Raymond J. Lohier, Jr., Chair

Committee on Federal-State Jurisdiction

Hon. Richard R. Clifton, Chair

Committee on Financial Disclosure

Hon. Anthony John Trenga, Chair

Committee on Intercircuit Assignments

Hon. Royce C. Lamberth, Chair

Committee on Judicial Resources

Hon. Roslynn R. Mauskopf, Chair

Committee on Judicial Security

Hon. David R. Herndon, Chair

Committee on the Administration of the Magistrate Judge System

Hon. Richard Seeborg, Chair

Advisory Committee on Appellate Rules

Hon. Michael A. Chagares, Chair

Advisory Committee on Civil Rules

Hon. John D. Bates, Chair

Advisory Committee on Criminal Rules

Hon. Donald W. Molloy, Chair

Committee on Space and Facilities

Hon. Susan R. Bolton, Chair

Lee Ann Bennett

Deputy Director, Administrative Office

Jeremy D. Fogel

Director, Federal Judicial Center

James S. Cooke,

Deputy Director, Federal Judicial Center

Brian Lynch

Long-Range Planning Officer,
Administrative Office

Nancy Dunham

Fair Employment Practices Officer,
Administrative Office

Lori A. Green

Chief, Training Division, Defender Services
Office, Administrative Office

Jason Cantone,

Senior Research Associate,
Federal Judicial Center

Administrative Office staff supporting the
Judicial Conference and its Committees
also attended the Long-Range Planning Meeting.

SAVE THE DATE!

October 24, 2019

As part of its efforts to foster diversity in the bankruptcy bench and bar, the Judicial Conference of the United States Committee on the Administration of the Bankruptcy System presents:

ROADWAYS TO THE FEDERAL BENCH:

WHO, ME?

A BANKRUPTCY JUDGE?



Anticipated Locations:

Washington, D.C.
Atlanta, GA
Boston, MA
Chicago, IL
Cincinnati, OH
Dallas/Fort Worth, TX
Denver, CO
Detroit, MI
Houston, TX
Los Angeles, CA
Miami, FL
Minneapolis, MN
New York City, NY
Philadelphia, PA
Phoenix, AZ
St. Louis, MO
Raleigh/Durham, NC
San Francisco, CA
Seattle, WA

****LIVE BROADCAST FROM WASHINGTON, D.C.
**LOCAL ROTATING ROUNDTABLE DISCUSSIONS
AMONG FEDERAL BENCH, BAR, AND LAW STUDENTS.**

TAB 7C

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MEMORANDUM

DATE: December 13, 2018

TO: Standing Committee on Rules of Practice and Procedure

FROM: Catherine T. Struve

RE: Rulemaking procedures and outside submissions

As mentioned at the Standing Committee's June 2018 meeting, one of the items on the agenda for the Standing Committee's January 2019 meeting is a discussion of the procedures for handling submissions outside the standard public comment period, including those addressed directly to the Standing Committee. Judge Campbell, Dan Coquillette, Rebecca Womeldorf, Julie Wilson, and I recently conferred with the Advisory Committee Chairs and Reporters about this topic. With the benefit of their guidance, I set out below some relevant considerations and I enclose a sketch of language that might be posted on the www.uscourts.gov website to inform the public about the handling of submissions. As noted below, the sketch is quite tentative and is meant to illustrate – as a basis for discussion – one possible approach. The ultimate choice of approach will depend on how the Committee weighs a variety of competing (and sometimes countervailing) considerations.

Part I of this very brief memo sketches the issue, and Part II outlines the principles that animate the enclosed draft website language; Part III concludes.

I. The issue

The issue that arose in connection with the June 2018 meeting was this: When submissions are addressed directly to the Standing Committee to discuss a proposal that an advisory committee will be presenting at an upcoming Standing Committee meeting, what should be done with those submissions – and, in particular, how and when should they be made available to the members of the Standing Committee?

On one hand, some considerations might weigh in favor of including such submissions in the Standing Committee's agenda book. The 1988 amendments to the Rules Enabling Act were designed to promote openness and public access, so public input on the rulemaking process is both essential and consonant with the statutory scheme. Additionally, including late-breaking submissions in the Standing Committee agenda book provides a transparent way to accommodate submissions that might otherwise be circulated informally to fewer than all Committee members. Inclusion in the book ensures both that such submissions are available to all Committee members and

that they are available to the public. We wish to avoid driving such input underground; the goal is to be transparent and inclusive.

On the other hand, it is necessary to have an orderly process for submitting public input.¹ The existing Judicial Conference policies² channel public submissions first to the Secretary of the Standing Committee and from there directly to the leadership of the relevant advisory committee(s). The policies appear to reflect an assumption that such submissions should be considered, in the first instance, by the advisory committee. And that assumption is grounded in no less an authority than the Rules Enabling Act itself: 28 U.S.C. § 2073(b) directs that the “standing committee on rules of practice, procedure, and evidence ... shall review each recommendation of any [advisory committees appointed under 28 U.S.C. § 2073(a)(2)] and recommend to the Judicial Conference rules of practice, procedure, and evidence and such changes in rules proposed by a committee appointed under subsection (a)(2) of this section as may be necessary to maintain consistency and otherwise promote the interest of justice.” 28 U.S.C. § 2073(b).

It seems highly desirable that this be the presumptive approach. The advisory committee chairs and reporters are subject matter experts, and they will be well-positioned to assess both the nuances of a given comment and whether the gist of that comment has already been considered (and accounted for) in the advisory committee’s prior deliberations.

More generally, it seems desirable for the advisory committee chair and reporter to take the lead in framing the topics that an advisory committee presents for discussion. If the Standing Committee were to make a frequent practice of augmenting its agenda book with submissions received from outside the rulemaking process, this could distract from the submissions by the committees themselves, could make the books longer and potentially repetitive (given that the advisory committees’ own materials are likely to summarize public input received prior to the preparation of those materials), and could incentivize an “arms race” among outside groups that are unwilling to let an opposing viewpoint go un rebutted in an agenda book.

II. Whether and how to formulate a response

There are a number of reasons why it could be useful to formulate, in advance, a set of practices for dealing with future off-cycle submissions.³ Advance formulation

¹ So, for example, public comment on published rules proposals is important and welcomed, but submissions are to be made within the specified window of time in order to allow the Committee chair and reporter(s) time to analyze submissions in advance of the relevant advisory committee meeting.

² See <http://www.uscourts.gov/rules-policies/about-rulemaking-process/laws-and-procedures-governing-work-rules-committees-0> .

³ The Rules Enabling Act says that “[t]he Judicial Conference shall prescribe and publish the procedures for the consideration of proposed rules under this section.” 28 U.S.C. §

creates the opportunity for deliberation about best practices, and helps to facilitate consistent treatment of input across time and among commenters. The practices, once delineated, could be posted on the uscourts.gov website. Public posting would promote transparency, help to further educate the public about the rulemaking process, and help to ensure equal access to the rulemaking process for all interested persons.

On the other hand, formulating a response to this issue presents some complexities. To determine the circumstances under which the Standing Committee should consider an off-cycle submission, it is necessary also to consider the mechanisms for channeling public input to the advisory committees in the first instance. Additionally, in formulating a practice for handling materials addressed directly to the Standing Committee, it is useful to distinguish between the two stages of the rulemaking process – first, preparation of a proposal for publication for comment, and second, preparation of a proposal for final approval.

Assuming that one could arrive at a set of practices that accommodate these considerations, there are separate concerns that arise with respect to specifying details concerning how and when the public may submit input to the rulemaking process. One would not wish the specified practices to be so rigid that they foreclose or deter the public from providing input that could supply a needed corrective, no matter at what point in the process the need for the corrective arises. A different concern might be that a detailed listing of instances when off-cycle input might be accepted or even welcomed could inspire commenters to proffer off-cycle input without a good reason for the off-cycle timing – i.e., to proffer belated input that could readily have been channeled into the standard public comment window.

A. Prior to publication for comment

Where a proposal has not yet been published for comment, the case for including in the Standing Committee agenda book submissions addressed directly to the Standing Committee seems weakest. Unless the proposal emerging from the preceding advisory committee meeting is materially different from any of the options discussed in the agenda book for that advisory committee meeting, it is likely that any relevant input could have been (and, perhaps, was) submitted directly to the advisory committee for its consideration at the meeting.⁴ In addition, because a comment period will ensue if the rule proposal moves forward, any unusually-timed submissions can be docketed among,

2073(a). Because the practices discussed here seem consistent with current Judicial Conference policy, there appears to be no need to ask the Judicial Conference to amend that policy. Rather, as the enclosed draft suggests, the changes discussed here could be implemented via guidance posted on the www.uscourts.gov website.

⁴ Note that this assumption connects to the question, addressed later in this memo, about whether there should be formal constraints on communications addressed to an advisory committee between the publication of an advisory committee agenda book and the advisory committee meeting.

and duly considered along with, the other public comments.⁵ One possible counter-argument is that, even though publication for comment is inherently provisional, it is still momentous. The Standing Committee does not publish a proposal merely to “test the waters” with respect to an insufficiently-thought-through proposal. But it seems very unlikely that submissions addressed directly to the Standing Committee would be necessary in order to caution the Standing Committee against publishing half-baked ideas for public comment. Any proposal that is controversial enough to attract such submissions would predictably be flagged by the advisory committee itself as one that has sparked disagreement.

B. After publication for comment

Where a proposal has been through public comment and is presented for final approval, the considerations differ. On one hand, the finality of the proposed action weighs in favor of accepting input, even belated input, if the input points out a previously-unrecognized problem. On the other hand, the prior public comment period will have provided a formal occasion for all interested parties to make their views known. And there is some risk that post-publication input might evade the testing of adversarial scrutiny by other interested commenters. The practices of the rulemaking committees should be designed where possible to incentivize commenters to provide their input during that public comment period.

Thus, it could be useful to adopt a presumption that submissions addressed directly to the Standing Committee will be treated similarly whether they concern a proposal that has yet to be published for comment or a proposal that is being presented for final approval – namely, they will be forwarded to the relevant advisory committee. But, especially with proposals presented for final approval, that presumption might be rebutted where there is a sufficiently good reason for the lateness of the submission. Thus, for example, if the proposal presented for final approval differs from that which was published for comment, this could weigh in favor of considering input addressed to the Standing Committee on the aspects of the proposal that are changed by the revisions.⁶

⁵ If necessary, a note could be appended to those submissions to alert readers to the fact that the submission was drafted before the proposal was officially put out for comment; that might be useful in cases where a proposal evolves on its journey through the Standing Committee.

⁶ The occasions for this may not be frequent, given that substantial post-publication changes result in republication “unless the advisory committee determines that republication would not be necessary to achieve adequate public comment and would not assist the work of the rules committees.” *See* § 440.20.50(b) of the Judicial Conference policy.

However, infrequent does not mean insignificant. An example is the 2015 amendment to Civil Rule 37(e). The Advisory Committee made substantial changes to the proposed rule after the public comment period, but decided that republication was unnecessary. *See* the Civil Rules Committee’s Spring 2014 report to the Standing

(But, if the changed aspect of the proposal was clearly signaled in the advisory committee's agenda book,⁷ one might hope that the commenter would express its views in time for them to be considered at the advisory committee meeting.) Or if some change in external circumstances (a development in relevant law or in relevant social facts) postdates the advisory committee's action, this would weigh in favor of considering input addressed to the Standing Committee.

C. Connection to advisory committee practices, and concerns about specifying detailed rules

The considerations noted above lead, in turn, to a question about practice in the advisory committees: Should there be a formal cutoff date for submissions addressed to the advisory committees prior to their meeting date(s)? The intuitions, noted above, about how to deal with submissions addressed directly to the Standing Committee flow from the assumption that public input is best assessed, in the first instance, by the advisory committee. And that is true not only of comments that can be made during a comment period but also of input that might be sparked by the proposals made, or arguments outlined, in the advisory committee agenda book.⁸ On this view, it might be healthier for the system if the more-frequently-used safety valve were out-of-time submissions addressed to the advisory committee (rather than out-of-time submissions addressed to the Standing Committee).

But, even if one grants the advantages of a more permissive approach to off-cycle, unsolicited public input directed to the advisory committees (compared with the approach to such input when directed to the Standing Committee), there are reasons for care in formulating that approach, and further reasons for caution in attempting to memorialize the approach in guidance on the uscourts.gov website. As two readers summed up the competing concerns, “we don't want to encourage/incentivize late comments and certainly not end runs around the advisory committees. But in some cases it may make sense to consider late comments, especially in unusual circumstances like a really important/correct point that has been missed.” As another reader noted, interested

Committee at 46, available at http://www.uscourts.gov/sites/default/files/fr_import/CV05-2014.pdf. See also the Civil Rules Committee's Spring 2014 minutes at 32 (noting that “[t]he published proposal ... gave full notice of everything that remains in the rule ...”), available at http://www.uscourts.gov/sites/default/files/fr_import/CV04-2014-min.pdf.

⁷ This might not always be the case. Again, the 2015 amendment to Civil Rule 37(e) provides an example. The post-publication proposal set out in the Civil Rules Committee's spring 2014 agenda book garnered criticism, and the relevant subcommittee instead proposed a different draft that the Civil Rules Committee voted to send forward. See the Civil Rules Committee's spring 2014 minutes, *supra* note 6, at 22, 31.

⁸ As an example, public submissions made to the Civil Rules Committee in response to the Committee's agenda books proved useful to that Committee as it developed its recently-published proposals to amend Civil Rule 30(b)(6).

observers might not be able to anticipate how the advisory committee might revise a proposal set out in an agenda book. Belated comments might be justified when they follow on the heels of such changes; and where necessary, the relevant advisory committee may have the capacity to review such late input through email circulation.

The advisory committee chairs need discretion to shape the agendas for their meetings. The advisory committee chairs and reporters cannot be called upon to drop other tasks in order to assess immediately the merits of an unexpected submission, especially one tendered on the eve of a meeting. In order to avoid privileging the views of more-sophisticated, better-resourced commenters (who could develop private knowledge of how off-cycle submissions are received), some degree of transparency may be desirable concerning the handling of submissions to the advisory committees outside the public comment period. On the other hand, formalizing and publicizing a process for receiving such off-cycle submissions might unduly encourage them and might detract from the chair's discretion to determine a meeting agenda.

Pursuant to the Judicial Conference policy,⁹ all public submissions are docketed and made available on the web.¹⁰ This availability via internet may provide a way to serve the goals of transparency and accessibility without unduly cluttering (or distorting how issues are framed in) advisory committee agenda books. For example, an advisory committee chair might ask the Rules Committee Support Office to email advisory committee members to notify them, prior to a meeting, if any submissions have been docketed and posted that relate to items in the agenda book for the committee's impending meeting. Such a practice might be combined with a cut-off date – for example, the email might highlight only submissions received at least 10 days prior to the date of the advisory committee meeting. Would such a cutoff, though, unduly advantage better-resourced organizations – which could more readily digest agenda book materials with celerity and which could also send a representative to attend the advisory committee meeting in order to try to speak in person if they missed the cutoff for written comments? (The latter issue, in turn, connects to yet another issue – namely, whether and when a chair might decide to permit in-person comments from members of the public during an advisory committee meeting.)

An alternative approach might be more fluid and hortatory. It might refrain from detailing specific cutoffs and processes, and might instead stress the principles by which the rulemaking committees seek to operate: For example, it might focus the public's attention on the preference for vetting input through the relevant advisory committee(s); the need to be mindful of the timing so as to permit adequate consideration by the relevant advisory committee whenever possible; and the goal of ensuring that all competing views are heard.

⁹ See § 440.20.60(c) of the Judicial Conference policy.

¹⁰ See <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/rules-suggestions> and <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/archived-rules-comments/archive-proposed-rule> .

III. A sketch of one possible approach

The enclosed sketch sets out one possible approach to these issues. The sketch may not succeed in addressing all of the (sometimes competing) goals and concerns noted above; but its shortcomings may also, I hope, provide a useful basis for discussion.

Encl.

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Draft of possible language for posting on the Rules Committee website (n.b.: footnotes in this document are designed to present questions for your consideration; they are not part of the sketch itself):

The language could be provided via a link added to the existing list of resources “About the Rulemaking Process,” currently at <http://www.uscourts.gov/rules-policies> :

About the Rulemaking Process

Laws and Procedures Governing the Work of the Rules Committees

How the Rulemaking Process Works

How to Suggest a Change to Federal Court Rules and Forms

[How to Submit Input on a Pending Proposal](#)

Committee Membership Selection

Open Meetings and Hearings of the Rules Committee

Permitted Changes to Official Bankruptcy Forms

The new “How to Submit Input” link could link to a web page that said, for example:

How to Submit Input on a Pending Proposal

Public input is an integral part of the rulemaking process. Public input helps participants in that process assess the need for, and likely effect of, proposed changes to the rules. To the extent possible, the process centralizes public input in the formal six-month window of time that occurs when a proposal is published for comment. (See [How the Rulemaking Process Works](#).) During that window, comments are submitted via regulations.gov, and the notice publishing proposals for comment provides a link to the dedicated web page created for that purpose. For more detail on proposals published for comment, click [here](#).

When to Provide Input

Submitting your comments during the formal¹ comment period ensures that the reporter for the relevant advisory committee can incorporate your input into the summary of public comments that will

¹ This draft uses the term “formal comment period” to distinguish publication for comment from other times when members of the public might provide input on a rulemaking proposal. Clarity might, however, come at a cost: one reader has suggested that referring to the “formal” comment period might highlight (and thus encourage attempts to use) opportunities for commenting outside the preferred time window.

inform the advisory committee’s discussion of whether to proceed with a proposed rule change. The formal comment period is the standard, and the encouraged, mode for public input on pending proposals. (Public input may also be solicited outside the formal comment period (whether through informal requests for public input, mini-conferences, conference calls with interested groups, or otherwise); a recent example was a request for public input on whether to restyle the Bankruptcy Rules. But the standard method for soliciting public input is the formal comment period.)

Sometimes, however, commentators wish to provide input to the advisory committee before or after that window.² There is no guarantee that a submission outside the formal comment window will be considered by the advisory committee at a given time, but efforts are made to take account of such submissions as the opportunity permits. To provide the best chance that a submission will receive timely consideration, it should³ be presented while there is still an adequate opportunity for the advisory committee to benefit from the comment in its deliberations at the relevant advisory committee meeting.

[When we circulated a prior version of this sketch to the Advisory Committee Chairs and Reporters, we included a few questions at this point: Should this discussion add more detail about the timing of submissions to an advisory committee? Should it set a presumptive cutoff date (for example, ten days prior to the relevant meeting) after which post-agenda-book, pre-meeting suggestions will likely not be brought to the attention of Committee members? Should it stress that pre-meeting input is likely to be useful only if it is submitted prior to the 11th hour? No response expressed clear support for including greater detail (cf. footnote 2, supra); but one response did note that it could be helpful to “caution[] people that they need to take into account the timeliness of the submission (so that Committee members have sufficient opportunity to consider it before a meeting).”]

How to Provide Input

While submissions should be timed to permit consideration by the relevant advisory committee, they should not be presented directly to that committee. Instead, submissions should be addressed to the Secretary of the Committee on Rules of Practice and Procedure (“Standing Committee”). A submission presented outside a formal comment period can be sent to the email or mail address shown below; the

² Should this passage include further detail? Without taking a position on that question, one advisory committee reporter observed that “[d]istinctions could be drawn between comments submitted before the advisory committee decides whether to recommend a rule for publication, comments made after the recommendation but before publication, comments during the publication period, and comments on the response of the advisory committee and Standing Committee to revisions after publication.”

³ The use of “should” in this draft reflects an attempt to steer commenters toward the preferred avenues and times for comment while avoiding undue rigidity. Some readers may view “should” as too permissive; to such readers, the public guidance should use mandatory language (“must”), which could be offset in practice by retaining discretion in the rulemaking committees to consider input submitted in contravention of that mandatory language. Other readers might view the primary risk (of a draft such as this) to be setting an unduly rigid framework that might close off opportunities for necessary public input; to those readers, the main cause of uneasiness with this draft might instead be its attempt to specify in undue detail the circumstances in which public input might occur outside the formal comment period.

Secretary will then docket the submission and forward it to the appropriate advisory committee. Unsolicited submissions should not be presented directly to any other participant in the rulemaking process, and if an unsolicited submission is presented to another such participant, it will be forwarded to the Secretary for processing.⁴ This procedure is designed to ensure the orderly and transparent consideration of committee business.

Consideration, in the First Instance, by the Advisory Committee

As explained above, the goal of seeking public comment is to permit that comment to inform the relevant advisory committee's development of proposals. By statute, Congress has tasked the Standing Committee with reviewing the recommendations and proposals made by the advisory committees. See 28 U.S.C. § 2073(b). Submissions should therefore be presented at a time when the advisory committee can address them in its deliberations.

For this reason, submissions intended for consideration in the first instance by the Standing Committee are disfavored.

Except in extraordinary circumstances, submissions directed to the Standing Committee regarding an advisory committee's decision to recommend a rule amendment for publication will not be considered by the Standing Committee in determining whether to proceed with publication. Instead, if the Standing Committee decides to publish the proposed rule, the submission will be treated as a comment and docketed on regulations.gov once the official comment period opens. In the meantime, the submission will also be shared with the chair of the relevant advisory committee.

Similarly, except in extraordinary circumstances, public submissions directed to the Standing Committee regarding an advisory committee's decision to recommend a rule for final approval following publication will not be considered by the Standing Committee. Circumstances that would lead the Standing Committee to consider a submission at that point in the process are expected to be rare. One example might be a submission directed to new language that was neither part of a proposal when it was formally published for comment nor part of any revised proposal shown in the post-comment-period advisory committee agenda book; if the new language does not result in re-publication of the proposal for a further public comment period, then there could be reason for the Standing Committee to consider a late-in-the-process submission when considering whether to give final approval to the proposal. Another circumstance might be when a change in relevant law postdates the meeting at which the advisory committee voted to recommend the proposal for final approval. Submissions not occasioned by such an extraordinary circumstance will be treated as new suggestions and forwarded to the relevant advisory committee for consideration.

All public submissions will be maintained by the Administrative Office of the Courts and will be available to the public. At the discretion of a committee's chair, public submissions may be reproduced in full, referenced, or summarized in a committee's agenda book; for the reasons noted above, typically this would occur, if at all, in the agenda book for a meeting of an advisory committee (not in that for a meeting of the Standing Committee).

⁴ This idea is included to help avoid situations where an interested entity lobbies an individual committee member. But does it sweep too broadly? Certainly, committee members can and do learn from a diverse range of sources, including comments posted on weblogs or listserves.

Submit Input on a Pending Proposal

If the proposal is currently published for comment, please see the instructions available [here](#).
Otherwise, submit your input as follows:

By Email: RulesCommittee_Secretary@ao.uscourts.gov (link sends e-mail)

By Mail:

Rebecca A. Womeldorf, Secretary

Committee on Rules of Practice and Procedure

Administrative Office of the United States Courts

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Washington, D.C. 20544