ADVISORY COMMITTEE
ON
APPELLATE RULES

San Antonio, Texas

April 5, 2019

TAB 1

TAB 1A

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ADVISORY COMMITTEE ON APPELLATE RULES

Meeting of April 5, 2019

San Antonio, Texas

I. Greetings and Background Material

II. Report on Proposed Amendments Submitted to Supreme Court

Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39

III. Approval of Minutes of October 26, 2018 Meeting (Action Item)

IV. Discussion of Matter Published for Public Comment (Action Item)

Proposed Amendments to Rules 35 and 40

V. Discussion of Matters Before Subcommittees (Action Items)

A. Rule 3 and the merger rule (16-AP-D)

B. Rule 42(b) and agreed dismissals (17-AP-G)

C. Rules 35 & 40 comprehensive review (18-AP-A)

VI. Update on Matters Being Held Awaiting Supreme Court Decisions

A. Rule 4(a)(5)(C) and *Hamer* (no # yet)
B. Departed Judges (18-AP-D)

VII. Discussion of Recent Suggestion

Privacy and the Railroad Retirement Act (18-CV-EE & 18-AP-E)

VIII. New Business

Next meeting: October 30, 2019, in Washington, DC

TAB 1B

	FRAP Item	Proposal	Source	Current Status
6	08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08 Discussed and retained on agenda 10/15 Discussed and retained on agenda 4/16 Discussed and retained on agenda 10/16 Draft approved for submission to Standing Committee 5/17 Draft approved for publication by Standing Committee 6/17 Draft published for public comment 8/17 Final approval for submission to Standing Committee 4/18 Approved by Standing Committee 6/18 Approved by Judicial Conference 9/18 Submitted to Supreme Court 10/18
6	08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 4/09 Discussed and retained on agenda 4/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 4/15 Discussed and retained on agenda 10/15 Discussed and retained on agenda 4/16 Discussed and retained on agenda 10/16 Draft approved for submission to Standing Committee 5/17 Draft approved for publication by Standing Committee 6/17 Draft published for public comment 8/17 Final approval for submission to Standing Committee 4/18 Approved by Standing Committee 6/18 Approved by Judicial Conference 9/18 Submitted to Supreme Court 10/18
6	11- AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 4/13 Discussed and retained on agenda 10/15 Discussed and retained on agenda 4/16 Discussed and retained on agenda 10/16 Draft approved for submission to Standing Committee 5/17 Draft approved for publication by Standing Committee 6/17 Draft published for public comment 8/17 Final approval for submission to Standing Committee 4/18 Approved by Standing Committee 6/18 Approved by Judicial Conference 9/18 Submitted to Supreme Court 10/18

	FRAP Item	Proposal	Source	Current Status
6	11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 9/12 Discussed and retained on agenda 4/13 Discussed and retained on agenda 4/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 4/15 Discussed and retained on agenda 10/15 Draft approved 4/16 for submission to Standing Committee Approved for publication by Standing Committee 6/16 Revised draft approved 5/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 6/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 9/17 Post Standing Committee 1/18, Rule 25(d)(1) amendment removed from Supreme Court package for reconsideration in spring 2018 Final approval of subsection (d)(1) for submission to Standing Committee 4/18 Approved by Standing Committee 6/18 Approved by Judicial Conference 9/18 Submitted to Supreme Court 10/18
6	15-AP-D	Amend FRAP 3(a)(1) (copies of notice of appeal) and 3(d)(1) (service of notice of appeal)	Paul Ramshaw, Esq.	Discussed and retained on agenda 10/15 Discussed and retained on agenda 4/16 Discussed and retained on agenda 10/16 Draft approved 5/17 for submission to Standing Committee Draft approved for submission to Standing Committee 5/17 Draft approved for publication by Standing Committee 6/17 Draft published for public comment 8/17 Final approval for submission to Standing Committee 4/18 Approved by Standing Committee 6/18 Approved by Judicial Conference 9/18 Submitted to Supreme Court 10/18
4	18-AP-B	Rules 35 and 40 – regarding length of responses to petitions for rehearing	Department of Justice	Discussed at 4/18 meeting Proposed draft for publication approved for submission to Standing Committee 4/18

	FRAP Item	Proposal	Source	Current Status
				Draft approved for publication by Standing Committee 6/18
1	16-AP-D	Rule 3(c)(1)(B) and the Merger Rule	Neal Katyal	Discussed at 11/17 meeting and a subcommittee formed to consider issue Discussed at 4/18 meeting and continued review Discussed at 10/18 meeting and continued review
1	17-AP-G	Rule 42(b)–discretionary "may" dismissal of appeal on consent of all parties	Christopher Landau	Discussed at 11/17 meeting and a subcommittee formed to review Discussed at 4/18 meeting and continued review Discussed at 10/18 meeting and continued review
1	18-AP-A	Rules 35 and 40 – Comprehensive review	Department of Justice	Discussed at 4/18 meeting and subcommittee formed Discussed at 10/18 meeting and continued review
1	None assigned yet	Consider if time limits in Rules should be better aligned with the statute, in light of *Hamer*, 138 S. Ct. 13 (2017)	Christopher Landau	Discussed at 4/18 meeting and subcommittee formed Discussed at 10/18 meeting and tabled pending *Nutraceutical*
1	18-AP-D	Do not count votes of judges who have left office before delivery of order or opinion to clerk	Stephen Sachs	Considered at 10/18 meeting and subcommittee formed to consider if *Yovino* denied
1	18-AP-E	Provide privacy in Railroad Retirement Act cases as in Social Security cases	Railroad Retirement Board	Initial consideration at 4/20 meeting
0	18-AP-C	Use only first name and last initial of parties in Social Security and immigration cases	Committee on Court Administration and Case Management	Considered and removed from agenda at 10/18 meeting
0		Review of rules regarding appendices	Committee	Discussed at 11/17 meeting and a subcommittee formed to review Discussed at 4/18 meeting and removed from agenda Will reconsider in 4/21

0 removed from agenda
1 pending before AC prior to public comment
2 approved by AC and submitted to SC for publication
3 out for public comment
4 pending before AC after public comment
5 final approval by AC and submitted to SC
6 approved by SC
7 approved by SCOTUS

TAB 1C

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COMMITTEES ON RULES OF PRACTICE AND PROCEDURE
CHAIRS and REPORTERS

Chair, Committee on Rules of Practice and Procedure ***(Standing Committee)***	**Honorable David G. Campbell** United States District Court Sandra Day O'Connor United States Courthouse 401 West Washington Street, SPC 58 Phoenix, AZ 85003-2156
Reporter, Committee on Rules of Practice and Procedure	**Professor Catherine T. Struve** University of Pennsylvania Law School 3501 Sansom Street Philadelphia, PA 19104

Chair, Advisory Committee on Appellate Rules	**Honorable Michael A. Chagares** United States Court of Appeals United States Post Office and Courthouse Two Federal Square, Room 357 Newark, NJ 07102-3513
Reporter, Advisory Committee on Appellate Rules	**Professor Edward Hartnett** Richard J. Hughes Professor of Law Seton Hall University School of Law One Newark Center Newark, NJ 07102

Chair, Advisory Committee on Bankruptcy Rules	**Honorable Dennis Dow** United States Bankruptcy Court Charles Evans Whittaker United States Courthouse 400 East Ninth Street, Room 6562 Kansas City, MO 64106
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Chair, Advisory Committee on Civil Rules	**Honorable John D. Bates** United States District Court E. Barrett Prettyman United States Courthouse 333 Constitution Avenue, N.W., Room 4114 Washington, DC 20001
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Chair, Advisory Committee on Evidence Rules	**Honorable Debra Ann Livingston** United States Court of Appeals Thurgood Marshall United States Courthouse 40 Centre Street, Room 2303 New York, NY 10007-1501
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	Judge Pamela Pepper	***(Bankruptcy)***
Liaison for the Advisory Committee on Bankruptcy Rules	**Judge William J. Kayatta, Jr.**	***(Standing)***
Liaisons for the Advisory Committee on Civil Rules	**Peter D. Keisler, Esq.**	***(Standing)***
	Judge A. Benjamin Goldgar	***(Bankruptcy)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Jesse M. Furman**	***(Standing)***
Liaisons for the Advisory Committee on Evidence Rules	**Judge Carolyn B. Kuhl**	***(Standing)***
	Judge Sara Lioi	***(Civil)***
	Judge James C. Dever III	***(Criminal)***

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TAB 1D

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 March 2019

TAB 1E

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 3, 2019 | Phoenix, AZ

The Judicial Conference Committee on Rules of Practice and Procedure ("Standing Committee" or "Committee") held its winter meeting in Phoenix, Arizona, on January 3, 2019. The following members participated in the meeting:

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
Judge William Kayatta, Jr.
Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Carolyn B. Kuhl
Judge Amy St. Eve (by telephone)
Elizabeth J. Shapiro, Esq.[1]
Judge Srikanth Srinivasan

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules
Judge Michael A. Chagares, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules
Judge Dennis R. Dow, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura Bartell, Associate Reporter

Advisory Committee on Criminal Rules
Judge Donald W. Molloy, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Civil Rules
Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Evidence Rules
Judge Debra Ann Livingston, Chair
Professor Daniel J. Capra, Reporter

Providing support to the Committee were:

Professor Catherine T. Struve (by telephone)
Reporter, Standing Committee
Rebecca A. Womeldorf
Secretary, Standing Committee
Professor Daniel R. Coquillette
Consultant, Standing Committee
Professor Bryan A. Garner
Style Consultant, Standing Committee
Professor Joseph Kimble
Style Consultant, Standing Committee
Ahmad Al Dajani
Law Clerk, Standing Committee

Rules Committee Staff
Bridget Healy (by telephone)
Scott Myers
Julie Wilson

Federal Judicial Center
John S. Cooke, Director
Dr. Tim Reagan, Senior Research Associate

[1] 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.

OPENING BUSINESS

Judge Campbell called the meeting to order and welcomed everyone to Phoenix, Arizona. He recognized the newest member of the Standing Committee, Judge William J. Kayatta, Jr., who sits on the U.S. Court of Appeals for the First Circuit. An attorney for many years in Maine, Judge Kayatta served in various capacities with the Maine Bar and the American Bar Association. Judge Campbell next welcomed Judge Kent A. Jordan, a new member of the Advisory Committee on Civil Rules who sits on the U.S. Court of Appeals for the Third Circuit.

Judge Campbell also recognized participants who are serving in new capacities including: Judge Dennis Dow – who began his tenure as Chair of the Advisory Committee on Bankruptcy Rules last October; Director John Cooke – who recently replaced Judge Fogel as Director of the Federal Judicial Center (FJC); and Professor Catherine Struve, who became the Standing Committee's Reporter as of the first of the year. Judge Campbell thanked Professor Dan Coquillette for his service as Reporter and announced that Professor Coquillette would continue to serve the Standing Committee in a consulting capacity. He presented a framed certificate of appreciation to Professor Coquillette on behalf of the Judicial Conference of the United States and signed by the Chief Justice.

Rebecca Womeldorf directed the Committee to the chart summarizing the status of proposed rules amendments at each stage of the Rules Enabling Act process. The chart includes three-and-a-half pages of rules that went into effect on December 1, 2018. Also included are changes (to the Appellate and Bankruptcy Rules) that continue the rules committees' joint project of accommodating electronic filing and service. The Judicial Conference approved these rules in September 2018 and transmitted them to the Supreme Court the following month. The Court will consider the package and transmit any approved rules to Congress no later than May 1, 2019. Provided Congress takes no action, these rules will go into effect on December 1, 2019.

APPROVAL OF THE MINUTES FROM THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on a voice vote: **The Committee approved the minutes of the June 12, 2018 meeting.**

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met on October 26, 2018, in Washington, DC. The Advisory Committee presented five information items.

Information Items

Rules 35 & 40 – Petitions for Panel and En Banc Rehearing, and Initial Hearing En Banc. At the June 2019 Standing Committee meeting, the Advisory Committee plans to seek the Standing Committee's final approval to amend Rules 35 and 40. These amendments, which concern length

limits applicable to responses to a petition for rehearing, are currently published for public comment.

The Advisory Committee is also considering additional changes to Rules 35 and 40 aimed at reconciling discrepancies between the two rules. These discrepancies trace back to a time when parties could petition for panel rehearing but only "suggest" rehearing en banc. The Advisory Committee has identified three possible approaches that further revisions might take. One approach would be to align Rules 35 and 40 more closely with each other. A second approach would use Rule 21 (extraordinary writs) as a model for revising both Rules 35 and 40. A third approach would be to consolidate the provisions governing both types of rehearing (panel and en banc) in a revised Rule 40, leaving revised Rule 35 to cover only initial hearing en banc.

Rule 3 – Notices of Appeal and the Merger Rule. At the next Standing Committee meeting, the Advisory Committee will seek approval to publish amendments to Rule 3 for public comment. These amendments would address the relationship between the contents of the notice of appeal and the scope of the appeal. The Advisory Committee's research revealed that when a notice of appeal from a final judgment also designates a specific interlocutory order, some courts (invoking the "expressio unius" canon) take the view that the additional specification limits the scope of appellate review to the designated interlocutory order.

Judge Chagares explained how the proposed amendments would address this issue. First, because the merger rule provides that interlocutory orders become appealable once they merge into a final judgment, adding the term "appealable" to Rule 3(c)(1)(B) would indicate that a party need only specify the judgment or order that grants an appellate court jurisdiction over the matter. Second, the amendments would add two rules of construction for notices of appeal. The first rule of construction rejects the *expressio unius* approach that some courts use to limit the scope of appellate review. The second clarifies, for purposes of civil appeals, that courts should construe a notice designating an order resolving all remaining claims as designating the final judgment, whether or not the final judgment is set out in a separate document.

Judge Chagares asked members of the Standing Committee for their views on two issues: whether the text of Rule 3 should explicitly discuss the merger rule, and whether removing the phrase "part thereof" from Rule 3(c)(1)(B) would help to avoid encouraging undue specificity in notices of appeal.

A judge member asked whether framing the proposals as rules of construction undermines their binding effect. Why say that additional specificity in the notice "must not be construed to limit" the notice's scope rather than simply saying that such specificity "does not limit" the notice's scope? Another participant asked whether such phrasing would remove an appellant's ability to intentionally limit the scope of the appeal. Professor Hartnett agreed that the goal is not to foreclose intentional limitations, but rather to protect an appellant from *unintentionally* limiting the appeal's scope through the inclusion of superfluous detail in the notice.

A judge member stated that courts should interpret the notice of appeal so as to bring up for review as much as possible; the parties' appellate briefing suffices to narrow the issues. A different member noted that allowing appellants to curtail their appeal in the notice can conserve

resources for the parties because it alerts the opposing party to the narrowed scope of the appeal. The member expressed support for a rule change to displace the *expressio unius* approach, and also suggested that framing the amendments as rules of construction would leave an appellant with the option to limit the notice's scope if the appellant desires.

The same member asked whether the Advisory Committee considered citing in the Committee Note the cases that the amendment would overrule. Professor Coquillette noted that citing cases in a Committee Note is a risky endeavor because case law continues to develop, and one cannot amend the Committee Note without a corresponding rule change. Sometimes, though, a Committee Note cites cases in order to illustrate the problems that a rule or amendment is addressing. Another judge member asked whether it might be worthwhile to incorporate the merger rule into the Rule 3 text. Judge Chagares explained that the Advisory Committee did not want to risk freezing the merger rule's development by explicitly defining it in rule text.

A style consultant suggested revising the second rule of construction to use "is" rather than "must be construed as." Judge Campbell asked whether the second rule of construction is inconsistent with Civil Rule 58 since it refers to "a designation of the final judgment" even in instances when Civil Rule 58 requires that the judgment be set out in a separate document and this requirement has been disregarded. Professor Cooper said that a court's failure to enter a Civil Rule 58 judgment in a separate document does not defeat finality, and therefore, the clause's directive to treat a reference to an order adjudicating all remaining claims as a reference to the final judgment is not a problem. He also remarked that the phrase "an appealable order" is fraught with the potential for confusion that could create a host of problems, and noted his support for referring to the merger rule without attempting to define it in the rule text. This approach, he suggested, would make clear that the merger rule applies without constraining its development.

Finally, Professor Coquillette reflected on a suggestion to reorder and renumber Rule 3's subparts. He noted that renumbering a rule can raise practical legal research problems which is why the traditional practice has been to maintain the same numbering. Even when abrogating a rule, he observed, the practice is to state that the rule is abrogated rather than remove it and renumber the set. Professor Cooper recalled that, in restyling the Civil Rules, the rule makers made sure to leave untouched the "iconic" subdivision numbers – for example, Civil Rule 12(b)(6) – but Appellate Rule 3's subdivisions, he suggested, were not in that "iconic" category.

Rule 42(b) – Voluntary Dismissals and Judicial Discretion. The Advisory Committee is considering whether granting voluntary dismissals should be mandatory under Rule 42(b). Rule 42(b) provides that the clerk "may" dismiss an appeal if the parties file a signed dismissal agreement. Under this formulation, attorneys have noted that they cannot guarantee their clients that the court will dismiss the appeal if the parties file a dismissal agreement. Judge Chagares noted that one argument in favor of mandating dismissals is that prior to restyling, Rule 42(b) stated that the clerk "shall" dismiss the appeal – a term that arguably did not leave the courts any discretion. On the other hand, some have argued that requiring a court to grant a stipulated dismissal when an opinion has already been prepared and is ready for filing would waste judicial resources.

A judge member expressed support for making the rule mandatory to provide clarity for the parties. Another judge member stated that it would be improper to allow a court to file an opinion once the dispute is no longer justiciable. But the member distinguished stipulated dismissals that do not require any further action by the court from those that do. Some types of cases – such as Fair Labor Standards Act cases – require court review of settlements. Where an action by the court is needed, such as a remand for the district court to review a proposed settlement, courts should have the discretion to decide whether to take the action proposed in the parties' agreement. But when no further action (other than dismissing the appeal) is needed, mandatory dismissal is appropriate.

A style consultant noted that the choice between mandatory and permissive terms is a substance issue, not a style issue. Professor Gibson pointed out that in Part VIII of the Bankruptcy Rules – a subset of the Bankruptcy Rules modeled after the Appellate Rules – Bankruptcy Rule 8023 mandates dismissal of an appeal to a district court or bankruptcy appellate panel if the parties file a signed dismissal agreement, specify allocation of costs, and pay any fees.

Potential Amendment to Rule 36 – Effect of Votes Cast by Former Judges. Also under consideration is an amendment to Rule 36 that would provide a uniform practice for handling votes cast by judges who depart the bench before an opinion is filed with the clerk's office. Judge Chagares noted that a case pending before the Supreme Court raises the issue, and the Advisory Committee will refrain from further action pending resolution of that case.

Other Matters Under Consideration. Judge Chagares noted that the Supreme Court's decision in *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017), distinguished time limits imposed by rule from those imposed by statute. The Court characterized time limits set only by court-made rules as non-jurisdictional procedural limits. The Advisory Committee is considering whether this decision raises practical issues for the rules but will refrain from acting on any issues until the Court decides *Nutraceutical Corp. v. Lambert*, No. 17-1094, which asks the Court to address whether Civil Rule 23(f)'s 14-day deadline for filing a petition for permission to appeal is subject to equitable exceptions.

Finally, Judge Chagares noted that the Advisory Committee received a letter from the Committee on Court Administration and Case Management (CACM Committee) requesting that all Rules Committees ensure that the rules provide privacy safeguards in social security and immigration matters. The Advisory Committee concluded that this request did not require action to amend the Appellate Rules.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dennis Dow and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met on September 13, 2018, in Washington, DC. The Advisory Committee sought approval of one action item and presented two information items.

Action Item

Restyling the Federal Rules of Bankruptcy Procedure. Professor Bartell reported the results of a spring 2018 survey that was both posted on the internet and sent to judges, court clerks, and stakeholder organizations. The survey responses revealed widespread support for restyling the Federal Rules of Bankruptcy Procedure to make them clearer and easier to understand. The Advisory Committee accordingly sought the Standing Committee's approval to begin the restyling process.

She explained that the unique nature of bankruptcy procedure means that restyling poses a risk of unintended consequences resulting from inadvertent changes to the substance of the rules. As a result, the Advisory Committee recommended that the restyling process go forward on the condition that the Advisory Committee, not the Style Consultants, retains final authority to recommend any modifications to the Standing Committee for final approval.

Judge Dow noted that the Advisory Committee, in collaboration with the Style Consultants, drafted a restyling protocol. The protocol outlines the timing, grouping, and phasing of the restyling process, identifies methods for tracking comments and revisions to the rules, and establishes policies to ensure that the style consultants can meaningfully participate in the restyling process.

The protocol also addresses the style consultants' concerns regarding the use of statutory terms. Judge Dow explained that statutory terms are used throughout the rules because the rules are closely tied to the Bankruptcy Code. That said, the Advisory Committee pledged not to reject a proposed change solely because existing language tracked statutory language, unless the change would have an adverse effect on daily bankruptcy practice.

The Style Consultants expressed their satisfaction with the restyling protocol that the Advisory Committee continues to develop. Judge Dow further noted that the Advisory Committee is not seeking the Standing Committee's approval of the draft protocol because it is subject to ongoing revisions.

Judge Campbell expressed his view that the Advisory Committee should have final say on what to recommend to the Standing Committee. He explained that the Standing Committee generally would not overrule the Advisory Committee's recommendations on matters of substance within bankruptcy expertise. That said, Judge Campbell noted that the Standing Committee retains its authority to review, discuss, and modify any recommendations made by the Advisory Committee. Judge Dow agreed with Judge Campbell's views on this issue.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the commencement of the effort to restyle the Federal Rules of Bankruptcy Procedure with the understanding that the Advisory Committee retains authority to decide whether to recommend any restyled rule to the Standing Committee for publication and, ultimately, final approval.**

Judge Campbell mentioned how helpful it had been to obtain the guidance of a number of current and former rulemaking colleagues who had participated in the restyling of other sets of rules. That guidance had stressed, inter alia, the desirability of keeping members of Congress apprised of the restyling project, and had suggested that this would be particularly important with respect to the Bankruptcy Rules. It was noted that, in contrast to the other sets of rules, the Rules Enabling Act framework does not provide that Bankruptcy Rules amendments supersede contrary statutory provisions.

Judge Campbell also suggested that a primer on bankruptcy law for the stylists and members of the Standing Committee might be helpful to the restyling process. A judge member noted that it would be helpful to have the primer before the next meeting at which restyled bankruptcy rules will be considered.

Information Items

Expansion of Electronic Notice and Service. Professor Gibson noted that the Advisory Committee has been considering ways to increase the use of electronic notice and service in bankruptcy courts. In addition to adversary proceedings, notice is often required in other aspects of a bankruptcy case, and notice by mail has proven costly for the judicial system as well as the parties. The Advisory Committee is considering ways to reduce costs (while still meeting the requirements of due process) by shifting to electronic noticing and service.

One suggestion from the CACM Committee is to mandate electronic notice for certain high-volume notice recipients. Professor Gibson explained that the Advisory Committee declined to act on an earlier version of this suggestion because the Bankruptcy Code provides some parties with the right to insist upon mail delivery at a particular mailing address. The current CACM Committee suggestion, however, explicitly recognizes that such parties retain the statutory right to opt for delivery at a stated physical address. Accordingly, the Advisory Committee is reexamining the idea and may have a proposal for publication this summer.

Suggested Amendment to Bankruptcy Official Form 113 – Chapter 13 National Plan. Another suggestion under consideration concerns instructions provided on the national form for chapter 13 plans. The form currently asks debtors to indicate whether the plan includes certain important provisions using two alternative checkbox answers to three questions on the front page. The instructions state that if the debtor marks the "Not Included" checkbox or marks both "Not Included" and "Included" checkboxes, then the relevant provision will not be effective.

The suggestion points out that the instructions do not address what happens if the debtor marks neither box. Professor Gibson explained that if one of the listed provisions is included in the plan, but the debtor fails to check the box stating that it is included in the plan, then the provision should be ineffective because the blank checkbox failed to alert creditors to the provision's presence. She noted that while the Advisory Committee agrees with the suggestion, the form is relatively new. The Advisory Committee thus will defer proceeding with the proposed amendment in order to see whether experience under the new form and related rules suggests the need for additional adjustments.

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 last met on November 1, 2018, in Washington, DC. The Advisory Committee presented several information items, including reports on behalf of its Multidistrict Litigation (MDL) and Social Security Disability Review subcommittees.

Information Items

Rule 30(b)(6) – Deposition Notices or Subpoenas Directed to an Organization. Judge Bates reported that the Advisory Committee received comments regarding its proposed changes to Rule 30(b)(6), and twenty-five witnesses will testify on the matter at a hearing scheduled for January 4, 2019. The subcommittee will hold the hearing at the Sandra Day O'Connor United States Courthouse in Phoenix, Arizona.

Judge Bates noted that most comments focus on proposed language requiring the party taking the deposition and the organization to confer about the identity of the witness(es) the organization will designate to testify on behalf of the corporation. Some submissions raised concerns that this will cause an unwarranted intrusion into the corporation's prerogative to designate who will testify. The Advisory Committee looks forward to hearing further input from stakeholders regarding the matter.

Judge Campbell invited those at the meeting to attend the hearing.

Rule 73(b)(1) – Consent to Magistrate Judge. The Advisory Committee's Report details three issues that have been raised about the procedure for consenting to referral for trial before a magistrate judge. One issue – concerning a question of consent by late-added parties – has been set aside. Another issue – relating to the means for obtaining consent after an initial random referral of a case to a magistrate judge – is still being considered. A third issue relates to the lack of anonymity, under the CM/ECF system, concerning consents to trial before a magistrate judge.

Judge Bates explained that the CM/ECF system currently notifies the judge assigned to the case whenever a party files its individual consent. This automatic notification defeats the anonymity provision of Rule 73(b)(1) that allows a district judge or magistrate judge to be informed of a party's consent only if all parties consent. During its April 2019 meeting, the Advisory Committee will review options for preserving anonymity in this process.

Rule 7.1 –Disclosure Statements. Also under consideration are changes to Rule 7.1 that would require a non-governmental corporation that seeks to intervene to file a corporate disclosure statement. These changes parallel pending proposals to amend the Appellate and Bankruptcy Rules.

The Advisory Committee is also considering a proposal relating to the disclosure of the names and citizenship of members in a limited liability company (LLC) or similar entity. Judge

Bates explained that the citizenship of LLCs, partnerships, and similar entities depends on the citizenship of their members. As a result, disclosing the citizenship of an entity's members is necessary for determining the existence of a federal court's subject matter jurisdiction in diversity cases. But, Judge Bates noted, in some cases a member of a partnership or LLC is itself a partnership or an LLC. The Advisory Committee is considering the extent to which citizenship disclosures should extend up the chain of ownership in such cases. Judge Bates noted that, in considering whether to propose requiring additional disclosures, the Advisory Committee is taking into consideration the underlying reason for the disclosure. It is important to know whether the goal is to demonstrate the court's subject matter jurisdiction or to provide judges with information necessary to make recusal decisions.

A judge member noted that a rule alerting judges and parties to the necessity of pleading citizenship in diversity cases would be helpful, so long as it accounts for the variation in entity types. Judge Campbell agreed. He noted that standing orders are often used to remind parties pleading diversity jurisdiction that they need to take into consideration the citizenship of members in an LLC or partnership. He also noted that lawyers representing such entities often miss this crucial step.

Judge Bates noted, as well, a third type of disclosure issue that has come to the Advisory Committee's attention. This third issue has to do with third-party litigation funding (TPLF). Here a concern might be that judges need information concerning TPLF in order to know whether they have a recusal issue. Though it is very unlikely that judges would invest in well-known third-party litigation funders, the dynamic nature of the field raises the possibility that a company not known for engaging in such funding might in fact turn out to do so. Judge Bates noted that the Advisory Committee could look into the TPLF disclosure issue or could wait for practice to evolve further.

Judge Campbell suggested that the Advisory Committee might initially train its focus on the question of disclosures relevant to diversity jurisdiction, while also continuing to study TPLF. An inter-committee project on recusal-related disclosures, though, might not be warranted at this time.

Timing of Final Judgments in Cases Consolidated under Rule 42(a). Judge Bates said that the Advisory Committee has taken up consideration of the effect of consolidation under Civil Rule 42(a) on final judgment appeal jurisdiction. In *Hall v. Hall*, 138 S. Ct. 1118 (2018), the Supreme Court held that an individual case consolidated under Rule 42(a) maintains its independent character, such that a judgment resolving all claims as to all parties in that case is an appealable final judgment, regardless of whether proceedings are ongoing in the other consolidated cases. Chief Justice Roberts, writing for the Court, noted that the appropriate Rules Committees could address any practical problems resulting from this holding.

Professor Cooper noted that the salient rules are Rule 42(a), which provides for consolidation, and Rule 54(b), which governs the entry of a partial final judgment. In considering whether and how to amend these rules in light of *Hall v. Hall*, the goal should be to minimize the risk that parties to a consolidated case might unwittingly forfeit their appeal rights out of confusion as to the effect of the consolidation.

Judge Bates noted that a subcommittee would be formed to consider these matters and that the subcommittee would benefit from the involvement of Judges Jordan and Chagares.

MDL Subcommittee. Judge Bates stated that the MDL Subcommittee, chaired by Judge Dow, has consulted various stakeholders and narrowed the subjects on which it will consider possible rulemaking. While some advocate rulemaking to govern MDL proceedings others stress the need to retain judicial flexibility and innovation in this area. The subcommittee has yet to reach any conclusions.

There are six topics under the subcommittee's consideration. These are:

1) Early procedures to winnow out unsupportable claims;
2) Interlocutory appeals;
3) Formation and funding of plaintiffs' steering committees (PSCs);
4) Trial issues;
5) Settlement promotion and review; and
6) TPLF.

1) *Winnowing Unsupportable Claims*. Judge Bates noted that certain laws require companies to report claims made against them, including unsupportable claims made in MDLs. Judge Bates explained that a number of MDL judges currently winnow unsupportable claims by requiring the submission of plaintiff fact sheets. These sheets are specific to the MDL under consideration and lack uniformity. He also noted that using these sheets to eliminate unsupportable claims early in the proceeding is difficult and requires that the court and parties expend substantial time and effort. Other suggestions under consideration include expanded initial disclosure requirements, Rule 11 sanctions, master complaints, requiring each plaintiff in an MDL to pay a filing fee, and/or requiring early consideration of screening tools.

2) *Interlocutory Appellate Review*. Some stakeholders have asked the subcommittee to consider expanding the opportunities for interlocutory appellate review of orders addressing potentially outcome-determinative issues including, but not limited to, preemption and the admissibility of expert testimony under *Daubert*. Judge Bates noted that the scope of this problem is not yet apparent and that the input received by the subcommittee imparts a healthy skepticism regarding this topic.

The subcommittee needs further information to resolve crucial questions including, but not limited to, whether appellate review should be mandatory or discretionary, what role trial courts should have in certifying issues for appellate review, and how to determine which orders will be subject to interlocutory appellate review. If the subcommittee decides to move forward, Judge Bates explained that it would do so in coordination with the Advisory Committee on Appellate Rules.

A judge member expressed support for an interlocutory appeal mechanism, to the extent that the avenue currently provided by 28 U.S.C. § 1292(b) is inadequate. That said, the member opposed expedited review because the timing of appellate decision making is affected by many variables that are difficult to control. One such variable is determining which cases to delay in

exchange for expediting review of an MDL ruling. Judge Bates noted that not expediting the appeal would cause further delay, and that delay impairs the MDL's efficiency and harms the parties. Judge Campbell agreed, stating that each interlocutory appeal in an MDL could take several years to resolve, and that if more than one such appeal occurs they could add up to many years of delay. Another member observed that key rulings may occur at different stages of the litigation; perhaps it would be possible to identify a single time when an interlocutory appeal might bring such rulings up for review. A different member suggested that the parties could brief questions of timing, so as to inform the courts' determinations about the proper balance between the need for appellate review and the risk of delay.

Another member expressed strong support for interlocutory appeals in MDLs, reasoning that, by definition, MDLs are important. Legal issues such as preemption or failure to state a claim can give rise to critical rulings with huge settlement values. The goal, this member suggested, is to reach the right result. And some courts of appeals, he reported, have been known to refuse to take up an issue that the district court has certified for interlocutory review under 28 U.S.C. § 1292(b).

A judge member, citing his experience presiding over an MDL, expressed skepticism that the challenges of MDL management are susceptible to rulemaking reforms. MDL judges, he stressed, need flexibility because every MDL is different. He suggested that sorting issues into dispositive and non-dispositive categories would help the subcommittee determine which issues are suitable for interlocutory appellate review, and he noted that more use could be made of the Section 1292(b) mechanism.

3) *Plaintiff Steering Committees*. A member suggested that the subcommittee should consider providing guidance for the appointment of lead counsel and PSCs. It might be helpful to examine the lead-plaintiff-appointment provisions in the Private Securities Litigation Reform Act (PSLRA). By analogy to the PSLRA's rebuttable presumption in favor of appointing the plaintiff with largest financial interest, he suggested, perhaps there should be a presumption in favor of appointing the lawyer with the largest number of cases in the MDL. The member stated that if the judge appoints too many law firms to the PSC, this may increase the complexity and expense of managing the MDL.

A judge member disagreed with the proposed presumption in favor of appointing to the PSC the lawyer with the largest number of cases; such a presumption, he argued, could exacerbate the problem of unsupported claims. This member said that he would not oppose possible amendments to Civil Rules 16 and/or 26 to require early discussion of screening tools such as plaintiff fact sheets (though he is not sure that such amendments are necessary).

Another judge member suggested that California state-court practice with PSC selection may be instructive. In California, she explained, the plaintiffs' lawyers organize themselves, subject to court approval; this approach relies on the plaintiffs' bar's knowledge concerning which lawyers conduct themselves fairly.

4) *Trial Issues*. Judge Bates noted several trial issues that are currently being considered by the subcommittee. One issue is whether MDL judges should have the authority to require party

witnesses to appear at trial to testify live. Another issue is whether a transferee court should only hold bellwether trials with the consent of all parties.

5) *Settlement Promotion, Review, and Approval*. The subcommittee is also evaluating whether it could provide a structure for courts to review settlements in MDL proceedings. Judge Bates distinguished MDL settlements from class action settlements (which are subject to court review and approval under Civil Rule 23(e)): whereas each plaintiff in an MDL is represented by his or her own counsel and can consult that counsel about a settlement's advisability, that is not the case in a class action. The subcommittee is considering whether any aspects of MDL settlement are suitable topics for rulemaking, or whether other measures, such as updates to the Manual on Complex Litigation, would be more appropriate.

A judge member suggested that an apparent lack of interest from stakeholders does not provide a reason to drop the topic of settlement from the subcommittee's agenda. This member observed that the ALI's Principles of the Law of Aggregate Litigation reflect concern for the lack of voice that individual plaintiffs may have in nonclass aggregate settlements.

6) *TPLF*. TPLF is a growing field with varied subparts. Funders might finance the prosecution of a case by a plaintiffs' firm, might finance individual plaintiffs' claims, or might finance the defense of a lawsuit. Some funding arrangements may raise concerns about who has control over the litigation.

Judge Bates noted that the Advisory Committee is looking at this issue through the MDL prism, though it is not a discrete MDL issue. One approach would be to focus on what disclosures may be necessary for purposes of judges' assessment of recusal issues. A question facing the subcommittee is whether the scope of the disclosure should be limited to the fact of funding and identity of the funder, or should include terms of the finance agreement as well. Another question is whether discovery in this area should be permissible.

Professor Coquillette cautioned that these issues are closely interwoven with the laws regulating lawyers. For example, this past fall the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 484, "A Lawyer's Obligations When Clients Use Companies or Brokers to Finance the Lawyer's Fee." This opinion addresses the financing of individual plaintiffs' claims and explains that when the plaintiff's counsel becomes involved in such financing, a great many of the ABA's Model Rules of Professional Conduct come into play. Professor Coquillette said that the Rules Committees' last foray into areas affecting the rules of professional conduct united every state bar association against them.

Subcommittee on Social Security Disability Review. A suggestion from the Administrative Conference of the United States asked the Advisory Committee to create rules governing cases in which an individual seeks district court review of a final decision of the Commissioner of Social Security. A subcommittee, chaired by Judge Lioi, created to address this suggestion has not yet concluded its work. Judge Bates noted that the most significant issues arising in these cases concern considerable administrative delay within the Social Security Administration as well as variation among districts in both local practices and rates of remand. The Social Security

Administration strongly supports the proposal for national rules, while the Department of Justice appears neutral on this topic. Claimants' attorneys generally oppose the idea of national rules, but if such rules are to be adopted they have views on what the rules' content should be. There is a real question whether any proposed rules would reduce the government's staffing burdens. And there is a question whether reducing the government's staffing burdens is an appropriate goal for the rulemakers. Judge Bates further noted that whatever rules the subcommittee might recommend, if any, still need to be considered by the Advisory Committee.

Professor Cooper reported that the subcommittee is approaching consensus on what the rules would look like if they were to be proposed. The subcommittee currently envisions (for discussion purposes) a narrow set of rules focused on pleading, briefing, and timing. There is a lingering tension between two possible models for the pleading rules. One, patterned after the appellate process, would cast the complaint as a limited document with the simplicity of a notice of appeal and would provide that the government's answer is to consist of the administrative record. In this model, further particulars would develop during briefing. The other model would provide for additional detail in both the complaint and the answer. As to briefing, one question is whether the plaintiff should be required to submit a motion for the relief requested in the complaint along with the brief.

A judge member reported that magistrate judges in his district were concerned about a uniform rule because approaches vary depending on the facts and circumstances of the individual case – such as whether the plaintiff has a lawyer or not. These circumstances may affect the judge's approach to (for example) the order and timing of briefing. In this member's view, flexibility is necessary to ensure adequate representation for parties proceeding pro se. Participants observed that there are variations both across and within districts concerning the extent to which these cases are referred to magistrate judges.

Judge Bates noted that the subcommittee is close to reaching a recommendation whether to abandon the effort or move forward. It will continue to include various stakeholders in the process and will ask for feedback and suggestions.

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 October 10, 2018, in Nashville, Tennessee. The Advisory Committee presented five information items.

Information Items

Rule 16 – Expert Disclosures. The subcommittee, chaired by Judge Kethledge, is currently considering whether Rule 16 should be amended to expand pretrial discovery of expert testimony in criminal cases – a change that would bring Rule 16 closer to the more robust expert discovery requirements in Civil Rule 26. Judge Molloy announced plans for a mini-conference. This conference presents an opportunity for the Rule 16 Subcommittee to receive input from

prosecutors, private practitioners, and federal defenders around the country about whether an amendment is warranted and, if so, what its content should be.

Task Force on Protecting Cooperators. Judge Amy St. Eve provided an update on the progress of the task force. The task force's work is complete, and its reports and recommendations were finalized and delivered to Director Duff. These reports recommended practices to be implemented by the Bureau of Prisons (BOP) in ensuring the safety of cooperators. One recommendation asks the government to start tracking whether assaults on prisoners are related to the victim's status as a cooperator. The BOP wishes to avoid collecting this information within correctional institutions, so the information would instead be collected by the DOJ into an anonymized database that would be securely stored within the DOJ.

Another recommendation is that courts should store plea and sentencing documents in separate case subfolders with public access restricted to those physically present at the courthouse. Doing so allows the Clerk of Court to maintain an access log that would be useful in any investigations arising from retaliation against cooperators. Director Duff has referred this recommendation to the CACM Committee.

Judge Molloy noted that there continue to be concerns about the balance between protecting cooperators, on one hand, and government transparency and the public's right to information, on the other.

Rule 43(a) – Defendant's Presence at Plea and Sentencing. The Advisory Committee received a suggestion concerning the Rule 43(a) requirement that a defendant be physically present in court at plea and sentencing. In *United States v. Bethea*, 888 F.3d 864 (7th Cir. 2018), the Seventh Circuit vacated a judgment of conviction due to the district court's decision to conduct the plea and sentencing proceeding with the defendant appearing by videoconference; the defendant's serious health issues made him susceptible to injury from even limited physical contact. The Seventh Circuit determined that Rule 43(a) by its terms permits no exceptions to the requirement of physical presence in the courtroom at sentencing and suggested that "it would be sensible" to amend Rule 43(a). In considering whether to propose an explicit exception in the rule, the Advisory Committee is investigating the frequency with which such extenuating circumstances occur.

Time for Ruling on Habeas Motions (Suggestion 18-CR-D). The Advisory Committee received a suggestion to require that judges decide habeas motions within 60-90 days. Judge Molloy explained the Advisory Committee's view that this is more of a systemic problem resulting from the fact that habeas petitions and Section 2255 motions are exempt from the reporting requirements of the Civil Justice Reform Act (CJRA). The Advisory Committee discussed the impact of these delays and decided to refer the suggestion to the CACM Committee to evaluate whether this exemption from the CJRA's reporting requirements should be reconsidered.

Disclosure of Defendants' Full Name and Date of Birth. The Advisory Committee received a suggestion to revise applicable rules and the PACER search structure so that users could search PACER using a defendant's full name and/or date of birth. The suggestion argues that providing this search capacity would enable background screening services to perform their

functions accurately and efficiently. A similar suggestion was rejected in 2006, and the Advisory Committee likewise decided not to pursue the current proposal.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston and Professor Capra delivered the report of the Advisory Committee on Evidence Rules, which last met on October 19, 2018, in Denver, Colorado. The Advisory Committee presented four information items.

Information Items

Rule 702 – Admission of Expert Testimony. A September 2016 report issued by the President's Council of Advisors on Science and Technology contained a host of recommendations for federal agencies, DOJ, and the judiciary, relating to forensic sciences and improving the way forensic feature-comparison evidence is employed in trials. This prompted the Advisory Committee's consideration of changes to Rule 702.

In fall 2017, the Advisory Committee held a conference on Rule 702 and forensic feature-comparison evidence. Subsequently a subcommittee was formed to study what the Advisory Committee might do to address concerns relating to forensic evidence; Judge Schroeder chairs the subcommittee. The subcommittee recommended against attempting to draft a freestanding rule governing forensic expert testimony, because such a rule would overlap problematically with Rule 702. The subcommittee also advised against trying to craft Rule or Note language setting out detailed requirements for forensic evidence, and it concluded that a "best practices manual" could not be issued as a formal product of the Advisory Committee. The Advisory Committee concurred in these assessments, but it will explore judicial education measures to undertake in collaboration with the FJC.

The subcommittee did suggest considering whether to amend Rule 702 to address the problem of expert witnesses overstating their conclusions, and the Advisory Committee is proceeding with that suggestion. A roundtable discussion held during the last Advisory Committee meeting asked for input from practitioners on an amendment that would target the overstatement problem. The debate produced a variety of diverging views among civil and criminal practitioners. As a result, the Advisory Committee is carefully weighing the effects such an amendment would have for expert evidence across the spectrum of legal practice.

Another amendment under consideration would emphasize that Rule 702's admissibility requirements of sufficient basis and reliable application present Rule 104(a) questions that must be determined by the court using a preponderance standard.

One member raised a concern with the feasibility of creating a rule addressing the accuracy of expert opinion because it would be difficult to craft a rule that would tell experts how to present a test's error rate. Judge Livingston explained that black-box studies provide an error rate associated with some types of expert evidence. She noted that studies had not considered every aspect of expert evidence, and it would be difficult to determine standards for evaluating expert opinions where the data are murky.

Judge Campbell noted that it is a real challenge to articulate in a rule what constitutes an overstated opinion, and the Advisory Committee is working on fleshing out its definition of the term "overstatement." Another participant noted that the DOJ has been strongly opposed to such a rule and asked whether the DOJ changed its position. The DOJ's representative noted that the word "overstatement" was fraught with confusion. She explained that the DOJ is working with the subcommittee to craft a rule addressing this issue. The DOJ is also implementing a set of internal directives, targeting overstatement, that regulate how Department scientists can phrase their opinions when testifying at trial.

Finally, Professor Capra noted that the Advisory Committee is considering several approaches, some of which were suggested by Judge Campbell. One suggestion is to state that experts may not overstate the conclusion that can be drawn from the methodology they employ. Another suggestion is to state that the expert's conclusion should accurately relate the methods used. Articulating the standard in a rule remains a challenge that the Advisory Committee continues to study.

Rule 106 – The Rule of Completeness. Judge Livingston said that the Advisory Committee is considering a suggestion to amend Rule 106 to provide that oral statements, in addition to written or recorded statements, fall within the rule's scope. Another change would provide that a completing statement is admissible under this Rule notwithstanding hearsay objections. Judge Livingston noted that this is not the first time the Advisory Committee has considered amending Rule 106, and it previously declined to act on a similar suggestion.

She also noted a few additional concerns including that a cure might have the unintended consequence of creating another hearsay exception permitting parties to introduce an out of court statement whenever a party can persuade the court that a statement should, in fairness, be considered given the admission of another statement. Another concern is that an amendment adding oral statements to Rule 106 risks disrupting the presentation of evidence with side litigation on whether a completing oral statement was actually made.

Proposed Amendment to Rule 404(b) – Bad-Act Evidence. Professor Capra stated that the Advisory Committee received two comments so far on the proposed amendment to Rule 404(b). The proposed amendment would require that prosecutors in a criminal case provide more notice of their intent to offer bad-act evidence and would require the notice to articulate support for the non-propensity purpose of the evidence. Professor Capra predicted that the Advisory Committee would replace the term 'non-propensity' with 'non-character' since 'character' is used throughout the rule.

Proposed Amendment to Rule 615 – Excluding Witnesses from Court. Professor Capra said that the Advisory Committee decided against acting on some suggestions, but other suggestions for amending Rule 615 remain pending. The Advisory Committee decided against acting on a suggestion proposing that the rule provide for judicial discretion in determining whether a witness should be excluded, reasoning that the purpose of exclusion is to prevent witnesses from tailoring their testimony according to what other witnesses testified. Accordingly, the parties are in the best position to determine whether a witness should be excluded. The

Advisory Committee also decided against acting on another suggestion concerning issues of timing and dealing with experts under this rule because case law research did not reveal any significant problems.

In studying these suggestions, however, the Advisory Committee came to consider a few other changes. The original purpose for excluding witnesses from trial was to prevent witnesses from tailoring their testimony according to the testimony of prior witnesses. However, technological developments have made mere exclusion from trial less than completely effective because the testimony of prior witnesses is now accessible beyond the courtroom. Professor Capra noted that most courts hold that a Rule 615 order extends to an excluded witness's access to trial testimony outside the courtroom. However, some courts have held that such orders do not extend beyond the courtroom unless the parties specifically ask the judge to extend the order. One change would clarify how courts should determine the extent of a Rule 615 order and provide judges with discretion to extend orders beyond the courtroom.

Judge Campbell asked whether a rule amendment would have the effect of overruling circuits who have held otherwise. Professor Capra said it would and, for this reason, the Advisory Committee is carefully considering this amendment.

Finally, Judge Campbell noted that the Advisory Committee at its October meeting considered but decided against recommending a rule that would provide a roadmap for impeachment and rehabilitation of witnesses, similar to a rule adopted by the State of Maryland.

OTHER COMMITTEE BUSINESS

Procedure for Handling Comments Made Outside the Ordinary Process. Professor Struve noted a recurring issue regarding public submissions outside the formal public comment period, including submissions addressed directly to the Standing Committee.

There are instances when the Standing Committee receives submissions that discuss a proposal that an advisory committee will be presenting at an upcoming Standing Committee meeting. The context might be a proposal of an amendment for publication, or it might be a proposal of an amendment for final approval after the public comment period has expired. It would be desirable to publish a policy for handling such comments.

Professor Struve asked Standing Committee members and other participants for feedback on the memo and tentative draft included in the agenda materials. One judge member observed that it is useful to be transparent about the process, but that it would be better to require off-cycle submitters to show cause why their input is off-cycle. Judge Campbell responded by pointing out proposed language in the agenda book that listed examples of reasons that might suffice to show such cause. The participant responded that it would be preferable to make more explicit that a person wishing to make an off-cycle submission must make a showing of why their submission is off-cycle. When the discussion later returned to the language in that paragraph, one participant observed that if someone at the last minute spots a glitch in a proposal, the rulemakers would want to take account of that insight. Professor Struve observed that the language in the agenda book did not account for that scenario. Another participant questioned that paragraph's use of the term

"extraordinary circumstances," and pointed out that it is not extraordinary for a proposal's language to be amended after the publication of the advisory committee's agenda book. A participant wondered if "good cause" would be a better term than "extraordinary circumstances." One participant argued that it would be better if the paragraph did not provide examples of instances that could justify an off-cycle submission.

Another thread in the discussion related to the norms for Committee members in settings where discussion turns to a matter that is currently before the Committee. A judge member asked what level of formality Committee members should undertake; when does a communication with an outsider to the Committee process trigger the constraints outlined in the materials (e.g., forwarding comments to the Standing Committee's Secretary)? Professor Struve suggested distinguishing between communications made to a Committee member qua Committee member and communications that are part of a more general discussion (e.g., on a listserve or at a conference). Professor Coquillette observed that there is a distinction between someone lobbying a Committee member and someone engaging in a general discussion. Subsequently, a participant proposed defining the term "submission" in the proposed website language; such a definition, this participant suggested, could help to address this issue. Professor King noted that her practice, after receiving a comment on a rule amendment, was to provide the sender with a link to the rules committee website and to explain the submission process. She suggested that members can use this technique to educate the public on how to participate in the process.

Judge Campbell thanked participants for their input, which will be incorporated into any proposal put forward at the June meeting.

Legislative Report. Julie Wilson delivered the legislative report. She noted that the 116th Congress convened on January 3, 2019. Any legislation introduced in the last Congress will have to be reintroduced. The Rules Committee Staff will continue to monitor any legislation introduced that would directly or effectively amend the federal rules.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Campbell thanked the Committee's members and other attendees for their preparation and contributions to the discussion. The Committee will next meet on June 25, 2019, in Washington, DC. He reminded members that at this next meeting the Committee would resume its discussion (noted in the preceding section of these minutes) regarding submissions made outside the public comment period.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

TAB 1F

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Agenda E-19 (Summary)
Rules
March 2019

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

This report is submitted for the record and includes information on the following for the Judicial Conference:

Agenda E-19
Rules
March 2019

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 January 3, 2019. 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, 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 Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve (by telephone), the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Joseph Kimble, and Professor Bryan A. Garner, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy (by telephone), Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Ahmad Al Dajani, Law Clerk to the Standing Committee; Judge John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC); and Judge Kent A. Jordan, member of the Advisory Committee on Civil

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

In addition to its general business, including a review of the status of pending rules amendments in different stages of the Rules Enabling Act process, the Committee received and responded to reports from the five rules advisory committees and engaged in discussion of three information items.

FEDERAL RULES OF APPELLATE PROCEDURE

The Advisory Committee on Appellate Rules presented no action items.

Information Items

Possible Amendment to Rule 3 – the Content of Notices of Appeal

At its fall 2018 meeting, the Advisory Committee continued discussion of possible amendments to clarify the content of notices of appeal under Rule 3. Some cases apply an *expressio unius* rationale to conclude that a notice of appeal that designates a final judgment plus one interlocutory order limits the appeal to that order. Other courts treat a notice of appeal that designates the final judgment as reaching all interlocutory orders that merged into the judgment, even if the notice of appeal also references a specific interlocutory order in addition to the judgment.

The Advisory Committee is considering whether Rule 3 should contain some statement of the merger rule – the rule that earlier interlocutory orders merge into the final judgment. The Advisory Committee is also considering whether the phrase "or part thereof" should be deleted from Rule 3(c)(1)(B)'s directive that an appellant "designate the judgment, order, or part thereof being appealed" because the phrase has been read to require the designation of each order sought to be reviewed. The Advisory Committee is mindful that any amendment to Rule 3 would

require an amendment to Form 1 (the form notice of appeal). Finally, as part of its consideration of Rule 3, the Advisory Committee is considering whether to address problems in appeals from orders denying reconsideration.

Proposal to Amend Rule 42(b) – Agreed Dismissals

The Advisory 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." Some have suggested that a dismissal in these circumstances should be mandatory. Prior to the 1998 restyling of the rules that intended no substantive change, Rule 42(b) used the word "shall" instead of "may" dismiss. Rule 42(b) also provides that "no mandate or other process may issue without a court order." The Advisory Committee believes that the key distinction is between situations in which the parties seek nothing but a dismissal of the appeal, and situations in which the parties seek some judicial action in addition to dismissal.

Where the parties seek additional judicial action, the parties cannot control that judicial action. However, where the parties seek nothing but a simple dismissal of the appeal, mandatory dismissal might be appropriate, if not constitutionally compelled.

The Advisory Committee will continue to discuss whether the rule should mandate dismissal upon presentation to the clerk of an agreed dismissal request. If it decides to recommend that dismissal be made mandatory in some or all such circumstances, one approach would be simply to change the existing word "may" in Rule 42(b) to "must" or "will." Another option would be to revise the rule more thoroughly to mirror Supreme Court Rule 46, which provides more detailed guidance than current Rule 42(b) on the appropriate treatment of dismissal agreements or motions, including the circumstances under which dismissal is mandatory.

Comprehensive Review of Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Rehearing)

The proposed amendments to Rules 35 and 40 that were published for public comment in August 2018 would create length limits for responses to petitions for rehearing. The consideration of those proposed changes prompted the Advisory Committee to consider the significant disparities between Rules 35 and 40. The disparities 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 parties could "suggest" rehearing en banc. The Advisory Committee continues to consider different approaches to harmonize the two rules.

Given that many local rules address the relationship between panel rehearing and rehearing en banc, the Advisory Committee will consider whether there are local practices that should be adopted in Rules 35 and 40.

Counting of Votes by Departed Judges

Finally, the Advisory Committee has started considering how to handle the vote of a judge who leaves the bench, whether by death, resignation, impeachment, or expiration of a recess appointment. The question arises when an opinion has been drafted or a judge has voted in conference, and the judge leaves the bench before the opinion is filed by the court. This is a recurrent issue, and one treated differently across the circuits. One possibility is to amend Rule 36 to provide that an opinion may issue if it has been delivered to the clerk for filing before the judge leaves the bench. A subcommittee has been formed to consider this issue. The Committee recognizes that a case currently pending before the Supreme Court may affect this issue.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

The Advisory Committee on Bankruptcy Rules presented one action item for the Standing Committee regarding restyling of the Federal Rules of Bankruptcy Procedure, but no action is needed by the Judicial Conference at this time.

Information Items

Restyling of the Federal Rules of Bankruptcy Procedure

At its fall 2017 meeting, the Advisory Committee established a Restyling Subcommittee to consider restyling the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The proposed project follows similar restyling of 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 decision, the Restyling Subcommittee worked with the FJC and the Standing Committee's style consultants to solicit feedback from the bankruptcy community. A survey, along with a restyled version of Rule 4001(a) offered as an exemplar of the final product, was sent to all bankruptcy judges and clerks of court, as well as leaders of interested organizations. A link to the survey was also posted on the federal judiciary's website.

The FJC received and analyzed completed surveys from 307 respondents, including 142 bankruptcy judges, 40 bankruptcy clerks, 19 respondents from organizations, and 109 members of the public. Over two-thirds of all respondents in every category supported restyling of the Bankruptcy Rules. Some respondents expressed concern that restyling could introduce unintended consequences, and that project members should take great care to avoid changes in a rule's meaning. Given the positive response to the survey, the Restyling Subcommittee recommended going forward with the project, consistent with the unique features of the Bankruptcy Rules.

The Bankruptcy Rules have not previously been restyled because bankruptcy is particularly statute-driven, and many rules echo statutory language. Bankruptcy is a highly technical area of practice, and one particularly prone to terms of art as well as generally understood terms, concepts, and procedures. To ensure consistency and clarity in the revised rules, the Restyling Subcommittee recommended, and the Advisory Committee agreed, that the linkage between the Bankruptcy Code and the Bankruptcy Rules should presumptively be retained, even if application of restyling guidelines might arguably improve or simplify existing statutory language.

The Advisory Committee recommended that the Standing Committee authorize commencement of the restyling process with the understanding that the Advisory Committee retains authority to decide whether to recommend any restyled rule to the Standing Committee for publication and, ultimately, final approval. The Standing Committee discussed the considerable deference due to the Advisory Committee in restyling and accepted the Advisory Committee's recommendation, noting that final approval of the Advisory Committee's recommendation rests, as always, with the Standing Committee.

The Advisory Committee provided a tentative timeline for restyling the rules, which anticipates publishing the restyled rules for public comment in three batches beginning in August 2020 as follows:

Parts I and II of the Rules	August 2020 – February 2021
Parts III, IV, V, and VI of the Rules	August 2021 – February 2022
Parts VII, VIII, and IX of the Rules	August 2022 – February 2023

Although the Advisory Committee expects to restyle the rules in batches and obtain public comment on each group as it is restyled, none of the restyled rules would become effective until all groups have been approved. Absent delays and assuming approvals by the

Conference and the Supreme Court, and no contrary action by Congress, the full set of restyled rules would go into effect December 1, 2024. These dates are aspirational, however, and may change as the project develops.

Expansion of the Use of Electronic Noticing and Service

In August 2017, proposed amendments to two rules and one Official Form that were intended to expand the use of electronic noticing and service in the bankruptcy courts were published for public comment. Rule 2002(g) (Addressing Notices) would allow notices to be sent to email addresses designated on filed proofs of claims and proofs of interest, and Official Form 410 would be amended to add a checkbox for opting into email service and noticing. As published, the amendments to Rule 9036 (Notice or Service Generally) would allow clerks and parties to provide notices or serve most documents through the court's electronic-filing system on registered users of that system. It also would allow service or noticing on any person by any electronic means consented to in writing by that person.

In response to publication, several comments raised substantial issues about the proposed amendments. Those issues fall 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 consideration of the comments and the logistics of implementing the proposed email opt-in procedure, the Advisory Committee voted at its spring 2018 meeting to hold back the amendments to Rule 2002(g) and Official Form 410, but to move forward with the amendments to Rule 9036, with minor revisions. The Standing Committee recommended and the Judicial Conference approved the proposed amendments to Rule 9036 in September 2018, and that revised rule is on track to go into effect December 1, 2019.

After the spring 2018 Advisory Committee meeting, the Committee on Court Administration and Case Management (CACM Committee) submitted a suggestion for a further

amendment to Rule 9036 that would require mandatory electronic service on most "high volume notice recipients," a category that would initially be composed of entities that receive more than 100 court-generated paper notices from one or more courts in a calendar month. The CACM Committee's suggestion built upon a 2015 suggestion submitted by the Administrative Office's (AO) Bankruptcy Judges Advisory Group, the Bankruptcy Clerks Advisory Group, and the Bankruptcy Noticing Working Group. The prior suggestion was rejected as being inconsistent with § 342(e) and (f) of the Bankruptcy Code, which allow a chapter 7 or 13 creditor to insist upon receipt of notices at a particular physical address. The CACM Committee's version of the proposed mandatory electronic service requirement would be "subject to the right to file a notice of address pursuant to § 342(e) or (f) of the Code."

The CACM Committee strongly urged the adoption of the high-volume-notice-recipient program in order to achieve substantial savings. The AO has estimated that the savings could reach $3 million or more a year.

The Advisory Committee's Subcommittee on Business Issues is evaluating the CACM Committee's suggestion as well as revisions to proposed Rule 2002(g) and Official Form 410 that address the concerns raised in the comments. The subcommittee hopes to present drafts for Advisory Committee review at its spring 2019 meeting.

FEDERAL RULES OF CIVIL PROCEDURE

The Advisory Committee on Civil Rules presented no action items.

Information Items

The Advisory Committee met on November 1, 2018. Discussion focused primarily on reports from two subcommittees tasked with long-term projects, as well as consideration of new suggestions related to expanding the scope of disclosure statements in Rule 7.1.

Multidistrict Litigation Subcommittee

Since November 2017, a subcommittee has been considering suggestions that specific rules be developed for multidistrict litigation (MDL) proceedings. Over the past year, the subcommittee has engaged in a substantial amount of fact gathering, in part with valuable assistance from the Judicial Panel on Multidistrict Litigation (JPML). The outreach has included participating in several conferences hosted by different constituencies, including transferee judges. The purpose of the fact gathering is to identify issues on which rules changes might focus. While the subcommittee's work remains in an early stage, the information gathered thus far has allowed it to identify six issues for consideration: (1) early procedures to winnow out unsupportable claims; (2) interlocutory appellate review; (3) formation and funding of plaintiff steering committees; (4) trial issues (e.g., bellwether trials); (5) settlement promotion, review, and approval; and (6) third party litigation funding. Going forward, the subcommittee will continue to gather information with the assistance of the JPML and the FJC.

Social Security Disability Review Subcommittee

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 from both claimant and government representatives, as well as the Advisory Committee and Standing Committee, the subcommittee developed draft rules to assist in focusing the discussion. While the subcommittee has not determined whether to recommend new rules, there is a growing consensus that the scope of any such rules would be limited to cases seeking review of a single administrative record, and would focus on pleading, briefing, and timing.

Disclosure Statements

Expanding the scope of the disclosure statements required by Civil Rule 7.1 and the analogous provisions in Appellate Rule 26.1, Bankruptcy Rule 8012, and Criminal Rule 12.4 has been the subject of several suggestions in recent years. The Advisory Committee has determined to move forward with a suggestion that it amend Rule 7.1 to include a nongovernmental corporation that seeks to intervene, a change that will parallel the proposed amendments to Appellate Rule 26.1 (approved by the Conference at its September 2018 session and forwarded to the Supreme Court on October 24, 2018) and Bankruptcy Rule 8012 (published for public comment on August 15, 2018). At its November 2018 meeting, the Advisory Committee also kept on its agenda a suggestion to address the problem of determining the citizenship of a limited liability company (or similar entity) in diversity cases by requiring that the names and citizenship of any member or owner of such an entity be disclosed.

Proposed Amendment to Rule 30(b)(6) Published for Public Comment

On August 15, 2018, a proposed amendment to Rule 30(b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, was published for public comment. The proposed amendment requires the parties to confer about the number and descriptions of the matters for examination, and the identity of each witness the organization will designate to testify. The comment period closes on February 15, 2019. A public hearing was held in Phoenix, Arizona on January 4, 2019. Twenty-five witnesses presented testimony. A second hearing is scheduled to be held in Washington, DC on February 8, 2019. Fifty-five witnesses have asked to testify.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no action items.

Information Items

The Advisory Committee met on October 24, 2018. A large portion of the meeting was devoted to discussion of the work of the Rule 16 Subcommittee. The Advisory Committee also determined to retain on its agenda a suggestion to amend Rule 43.

Expert Disclosures

As previously reported, the Advisory Committee added to its agenda two suggestions from district judges that pretrial disclosure of expert testimony in criminal cases under Rule 16 be expanded to more closely parallel the more robust expert disclosure requirements in Civil Rule 26. The Advisory Committee devoted a portion of its October 2018 meeting to a presentation by the Department of Justice on its development and implementation of new policies governing disclosure of forensic and non-forensic evidence.

The Rule 16 Subcommittee will consider whether an amendment is warranted and, if so, what features any recommended amendment should contain. To assist in its work, the subcommittee is planning to hold a mini-conference this spring. Participants will include prosecutors, private practitioners, and federal defenders.

Defendant's Presence at Plea and Sentencing

At its October 2018 meeting, the Advisory Committee created a subcommittee to consider the panel's suggestion 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 sentencing.

Although the Advisory Committee has twice rejected suggestions that it expand the use of video conferencing for pleas or sentencing, members concluded the issue should be revisited

given the explicit invitation in *Bethea*. The subcommittee is tasked with assessing the need for a narrow exception to the requirement of physical presence, how such an exception could be defined, what safeguards would be necessary, including the procedures needed to ensure a knowing and intelligent waiver, and how to accommodate the right to counsel when the defendant and counsel are in different locations.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no action items.

Information Items

The Advisory Committee met on October 19, 2018. At that meeting, the Advisory Committee conducted a roundtable discussion with a panel of invited judges, practitioners, and academics regarding four agenda items, including two proposed amendments to Rule 702, proposed amendments to Rule 106, and proposed amendments to Rule 615. Each is discussed below. The roundtable discussion provided the Advisory Committee with helpful insight, background, and suggestions.

Possible Amendments to Rule 702

Addressing Forensics. The Advisory Committee has been exploring the appropriate response to the recent scientific studies regarding the potential unreliability of certain forensic evidence. A subcommittee was appointed to consider possible treatment of forensics, as well as the weight/admissibility question discussed below. After extensive discussion, the subcommittee concluded that it would be difficult to draft a new freestanding rule on forensic expert testimony because any such rule would have an inevitable and problematic overlap with Rule 702. Further, the subcommittee concluded it would not be advisable to set forth detailed requirements

regarding forensic evidence in rule text because substantial debate exists in the scientific community as to appropriate requirements.

The Advisory Committee agreed with the subcommittee's recommendations and is considering ways other than rule changes to assist courts and litigants in meeting the challenges of forensic evidence. These include assisting the FJC with judicial education. The Advisory Committee continues to consider a proposal to amend Rule 702 to focus on one important aspect of expert testimony: the problem of overstating results (for example, by stating an opinion as having a "zero error rate" when that conclusion is not supportable by the methodology).

Admissibility/Weight. The Advisory Committee is also considering an amendment to Rule 702 that would address some courts' apparent treatment of the Rule 702 requirements of sufficient basis and reliable application as questions of weight rather than admissibility, without finding that the proponent has met these admissibility factors by a preponderance of the evidence. Extensive case law research suggests confusion on whether courts should apply the admissibility requirements of a preponderance of evidence under Rule 104(a), or the lower standard of prima facie proof under Rule 104(b). Based on the roundtable discussion and other information, the Advisory Committee will continue to consider whether an amendment to Rule 702 is necessary to clarify that the court must find these admissibility requirements met by a preponderance of the evidence.

<u>Possible Amendment to Rule 106</u>

Over its last three meetings, the Advisory 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 correct the misimpression. The Advisory Committee has focused on whether Rule 106 should be amended to provide: (1) that a

completing statement is admissible over a hearsay objection; (2) that the rule covers oral as well as written or recorded statements; and (3) 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 roundtable discussion provided important input on these questions.

Possible Amendments to Rule 615

The Advisory Committee considered a suggestion to amend Rule 615, the rule on sequestering witnesses. The suggestion noted three concerns: (1) the rule provides no discretion for a court to deny a motion to sequester; (2) there is no timing requirement for when a party must invoke the rule, so it would be possible for a party to make a mid-trial request for exclusion of witnesses from the courtroom 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 Advisory Committee obtained valuable information, especially from the participating judges.

The Advisory Committee rejected the proposal to make sequestration discretionary. The mandatory nature of the rule was adopted because it is counsel, and not the court, that is likely to be aware of the risks of tailoring trial testimony. Also, discretion still exists in the rule given the exceptions to exclusion provided. Similarly, the Advisory Committee determined that the concerns regarding timing and an explicit exemption from exclusion for expert witnesses were not pervasive or significant issues.

In researching the operation of Rule 615, the Advisory Committee found another issue that has produced a conflict among the courts. The issue involves the scope of a Rule 615 order

and whether it applies only to exclude witnesses from the courtroom, as stated in the text of the rule, or extends outside the confines of the courtroom to prevent prospective witnesses from being advised of trial testimony. The Advisory Committee has agreed to further consider an amendment that would clarify the extent of an order under Rule 615.

Proposed Amendment to Rule 404(b) Published for Public Comment

On August 15, 2018, the Advisory Committee published for public comment a proposed amendment to Rule 404(b), the rule that addresses character evidence of other crimes, wrongs, or acts. The proposal would expand the prosecutor's notice obligations by requiring that the prosecutor "articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose." Three comments have been submitted thus far.

OTHER ITEMS

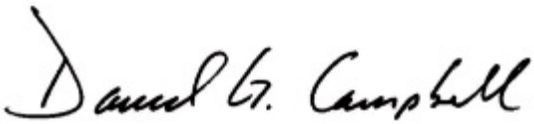
The Standing Committee's agenda also included three information items. First, the Committee was briefed on the status of legislation introduced in the 115th Congress that would directly or effectively amend a federal rule of procedure.

Second, the Committee engaged in a discussion of whether to develop procedures for handling submissions outside the standard public comment period, including those addressed directly to the Standing Committee rather than to the relevant advisory committee. Based on that discussion, the Reporter to the Committee will draft proposed procedures to be discussed at the June 2019 meeting.

Third, Committee members were provided with materials summarizing the September 12, 2018 long-range planning meeting of Conference committee chairs and members of the Executive Committee, as well as the status of the strategic initiatives meant to support

implementation of the *Strategic Plan for the Federal Judiciary* that have been identified by each Judicial Conference committee.

Respectfully submitted,



David G. Campbell, Chair

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

TAB 1G

Pending Legislation that Would Directly or Effectively Amend the Federal Rules
116th Congress

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Protect the Gig Economy Act of 2019	**H.R. 76** *Sponsor:* Biggs (R-AZ)	CV 23	**Bill Text:** https://www.congress.gov/116/bills/hr76/BILLS-116hr76ih.pdf **Summary (authored by CRS):** This bill amends Rule 23 of the Federal Rules of Civil Procedure to expand the preliminary requirements for class certification in a class action lawsuit to include a new requirement that the claim does not allege misclassification of employees as independent contractors. **Report:** None.	• 1/3/19: Introduced in the House; referred to the Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Justice
Injunctive Authority Clarification Act of 2019	**H.R. 77** *Sponsor:* Biggs (R-AZ)	CV	**Bill Text:** https://www.congress.gov/116/bills/hr77/BILLS-116hr77ih.pdf **Summary (authored by CRS):** This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit. **Report:** None.	• 1/3/19: Introduced in the House; referred to the Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security
Litigation Funding Transparency Act of 2019	**S. 471** *Sponsor:* Grassley (R-IA) *Co-Sponsors:* Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC)	CV 23	**Bill Text:** https://www.congress.gov/116/bills/s471/BILLS-116s471is.pdf **Summary:** Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action." **Report:** None.	• 2/13/19: Introduced in the Senate; referred to Judiciary Committee

TAB 2

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

October 24, 2018

M E M O R A N D U M

TO: Scott S. Harris, Clerk of the Supreme Court of the United States

FROM: David G. Campbell

SUBJECT: Summary of Proposed Amendments to the Federal Rules

This memorandum summarizes proposed amendments to the Rules of Appellate, Bankruptcy, and Criminal Procedure, the Rules of Evidence, 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. The Judicial Conference of the United States approved these amendments on September 13, 2018, and they are now submitted to the Supreme Court for review. If adopted by the Court and transmitted to Congress by May 1, 2019, these amendments will take effect on December 1, 2019, absent congressional action.

I. Federal Rules of Appellate Procedure 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39

As you may recall from last year's amendments, the Civil Rules Advisory Committee proposed a national rule mandating electronic filing and service in civil cases. This led the other rules advisory committees to review their respective rules on filing and service, and resulted in amendments to the Appellate, Bankruptcy, and Criminal Rules that were also approved last year. This year's package includes further amendments to the Appellate Rules that conform to the change to electronic service and that address the need for proofs of service in light of this change. The Appellate Rules Committee also proposes changes to the party disclosures required in appellate cases. Both the Appellate Rules Advisory Committee and the Standing Committee unanimously approved the proposed amendments discussed below.

A. Rule 3

The proposed amendments to Rule 3 (Appeal as of Right—How Taken) reflect the move to electronic service. The proposed amendments to subsection (d)(1) change the words "mailing" and "mails" to "sending" and "sends," and delete language requiring certain forms of service.

B. Rule 5

The proposed amendments to Rule 5(a)(1) (Appeal by Permission) revise the rule to no longer require that a petition for permission to appeal "be filed with the circuit clerk with proof of service." This reflects the change to service by electronic means. As amended, Rule 5(a)(1) provides that "a party must file a petition with the circuit clerk and serve it on all other parties."

C. Rule 13

The proposed amendment to Rule 13 (Appeals from the Tax Court) reflects the move to electronic filing. The proposed amendment to subsection (a)(2) allows the appellant to send a notice of appeal by means other than mail.

D. Rule 21

The proposed amendments to Rule 21 (Writs of Mandamus and Prohibition, and Other Extraordinary Writs) implement stylistic changes and replace the phrase "with proof of service" in Rule 21(a) and (c) with the phrases "serve it" and "serving it."

E. Rule 25

The proposed amendments to Rule 25(d)(1) (Filing and Service) eliminate unnecessary proofs of service when electronic filing is used. A previous version of the Rule 25(d)(1) amendment was approved by the Judicial Conference and submitted to the Supreme Court in 2017, but was withdrawn by the Standing Committee to allow for minor revisions. The revised proposal implements the amendments' original goal but also addresses the possibility that a document might be filed electronically and yet still need to be served on a party who does not participate in the court's electronic-filing system (most often a pro se litigant).

F. Rule 26

The proposed amendments to Rule 26 (Computing and Extending Time) delete the term "proof of service" from Rule 26(c) and clarify 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)."

G. Rule 26.1

The proposed amendments to Rule 26.1 (Corporate Disclosure Statement) revise disclosure requirements designed to help judges decide if they must recuse themselves: subdivision (a) is amended to require disclosures regarding 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; and 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.

H. Rule 28

The proposed amendment to Rule 28 (Briefs) changes the term "corporate disclosure statement" to "disclosure statement" to conform to the corresponding amendment to Rule 26.1 described above.

I. Rule 32

The proposed amendments to Rule 32 (Form of Briefs, Appendices, and Other Papers) change the term "corporate disclosure statement" to "disclosure statement" to conform with proposed amendments described above. In addition, Rule 32(f) is revised to refer to "proof of service" rather than "the proof of service" given the proposed amendments to Rule 25(d)(1), to account for the frequent occasions in which there would be no such proof of service. Rule 32(f)'s list of items excluded from length computation was revised for stylistic consistency.

J. Rule 39

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

II. Federal Rules of Bankruptcy Procedure 4001, 6007, 9036, and 9037

Both the Bankruptcy Rules Advisory Committee and the Standing Committee unanimously approved the proposed amendments to the Bankruptcy Rules discussed below.

A. Rule 4001

Rule 4001(c) (Obtaining Credit) sets forth requirements for obtaining court approval of postpetition credit in a bankruptcy case, including the filing of a motion containing detailed disclosures and information. The proposed amendment makes Rule 4001(c) inapplicable to chapter 13 cases. The Advisory Committee concluded that most of the required disclosures were developed for issues relevant in chapter 11 cases and that these disclosures are unnecessary and unduly burdensome in chapter 13 cases.

TAB 3

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. Dodszuweit, 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 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 and Marotta 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. Dodszuweit 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. Dodszuweit 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 would 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) take a broader approach that would revise both Rule 35 and Rule 40, drawing on Rule 21, which might provide a good model; or 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. Dodszuweit 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?

Judge 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). The Rule 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, take an intermediate position, and 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 Civil 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. Dodszuweit 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. Dodszuweit, 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. Dodszuweit 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. Dodszuweit 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, 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 4

TAB 4A

TAB 4A1

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To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Date: March 5, 2019

Re: Published Proposed Amendments to Rules 35 & 40 (18-AP-B)

The proposed amendments to Rules 35 & 40, as published for public comment, follow this memo. Only one public comment has been received. Aderant CompuLaw states:

> We agree with the proposed amendment to Appellate Rule 40(a)(3). Because a petition for rehearing en banc and a petition for panel rehearing share a filing deadline and may for certain purposes be considered a single document, it will promote consistency and avoid confusion if Appellate Rule 35 and Appellate Rule 40 utilize the same terminology.

Unless members of the committee have new concerns, I suggest that the proposed amendments be finally approved for submission to the Standing Committee.

TAB 4A2

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

MEMORANDUM

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

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

RE: Report of the Advisory Committee on Appellate Rules

DATE: May 22, 2018

I. Introduction

The Advisory Committee on the Appellate Rules met on Friday, April 6, 2018, in Philadelphia, Pennsylvania. * * * * *

Fourth, it approved proposed amendments for which it seeks approval for publication. These proposed amendments, discussed in Part V of this report, relate to length limits applicable to responses to petitions for rehearing (Rules 35 and 40).

* * * * *

V. Action Item for Approval for Publication

The Committee seeks approval for publication of proposed amendments to Rules 35 and 40. These amendments would create length limits applicable to responses to petitions for rehearing. Under the existing rules, there are length limits applicable to petitions for rehearing, but none stated for responses to those petitions. While some courts of appeals routinely include a length limit in the order permitting the filing, and experienced practitioners understand that in the

absence of such an order the length limits for the petitions themselves apply, the Committee believes that it would be good to have the length limit stated in the rules themselves.

The Committee also 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 would change Rule 40 to make it consistent with Rule 35, with both using the term "response."

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 o~~ 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.

* * * * *

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[1]

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.

* * * * *

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

(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.

* * * * *

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.

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 o~~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.

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 5

TAB 5A

To: Advisory Committee on the Appellate Rules

From: Edward Hartnett, for subcommittee on Rule 3 and the merger rule

Date: March 11, 2019

Re: FRAP 3 and merger rule (16-AP-D)

The Advisory 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.

At the October 2018 meeting of the Advisory Committee, the subcommittee presented 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.

In considering this proposal, the Advisory Committee discussed 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.

The Committee also discussed 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 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 some circumstances.

In addition, the Committee discussed 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.

The Committee also discussed where any amendments should be placed in Rule 3, comparing the advantages of a clean organizational structure to possible disruption of legal research.

At the January 2019 meeting of the Standing Committee, several members voiced support—in at least one case, strong support—for including the merger rule in the text of Rule 3, using language such as "is not limited" rather than "must not be construed." On the other hand, there was some support on the Standing Committee for creating a rule of construction. The advantage of this approach would be that it would facilitate the ability of an appellate to limit a notice of appeal, and that there is value in enabling an appellant to do so. One value served, in some cases, is to enable an appellee to decide whether it is necessary to cross appeal.

The subcommittee's most recent discussion focused on four issues:

1) Whether to include the merger rule in the text of Rule 3.

The subcommittee reached a consensus that the text of Rule 3 should refer to the merger rule—rather than simply state a rule of construction—but not attempt to define it.

2) Whether to delete the phrase "or part thereof" from Rule 3(c)(1)(B).

The subcommittee also reached a consensus on a way to deal with the problems caused by this phrase while recognizing the value of allowing an appellant to deliberately narrow the scope of the notice of appeal: Remove the "or part thereof" language from Rule 3(c)(1)(B), but add a separate provision that allows for an appellant to explicitly carve-out a limited appeal.

3) Whether to add the word "appealable" to Rule 3(c)(1)(B).

The subcommittee did not reach consensus on this issue.

Those who favored adding the word "appealable" believe that the current language encourages litigants to designate everything that they hope to have the court of appeals review, because too often they miss the distinction between appealable and reviewable. By calling for the notice of appeal to designate the appealable order, the appellant will be encouraged to designate only the order that itself may be appealed.

Those who disagreed feared that adding the word "appealable" might confuse lawyers—particularly in situations where a trial lawyer files the notice of appeal and hands the case off to an appellate specialist. They also suggested that as long as other changes repudiated the *expressio unius* inference, there was no need to add the word "appealable."

This memo includes alternatives for the committee to consider. The only difference between Option A and Option B is that option A uses the phrase "appealable order," while Option B uses the phrase "order that supports appellate jurisdiction."

4) Whether to address notices of appeal from orders denying reconsideration?

Some members of the subcommittee feared that addressing motions denying reconsideration would be biting off too much at once. Others see this area as a significant problem, and note that there may be reluctance to amend Rule 3 once and then revisit it again in short order. As a result, putting the reconsideration issue off now would mean that it would be some time before that issue would likely be considered.

This memo includes a suggestion on how the issue might be addressed at this time.

The subcommittee did not discuss the issue of where any amendments should be placed. However, since this issue arose at both the prior meeting of the Advisory Committee and at the meeting of the Standing Committee, this memo also includes a draft for consideration (Option C) that would reorganize Rule 3 and place the

provisions that elaborate on each of the Rule's requirements immediately after each requirement.

Although this memo presents three alternatives for the Advisory Committee to consider, it presents only one draft comment, keyed to the first alternative. If the Advisory Committee opts for either of the other alternatives, minor changes to the comment would be required.

In addition, this memo presents amendments to Form 1 (the form notice of appeal). It suggests a Form 1A, to deal with the typical case of an appeal from a final judgment, and a Form 1B, to deal with the case of an appeal from an appealable order. Form 1B is keyed to the first alternative, and if the Advisory Committee opts for something other than the first alternative, minor changes to the Form would be required.

The following passage from a recent Supreme Court opinion underscores the value of this project:

> It is also important to consider what it means—and does not mean—for trial counsel to file a notice of appeal.
>
> "Filing such a notice is a purely ministerial task that imposes no great burden on counsel." *Flores-Ortega*, 528 U.S. at 474. It typically takes place during a compressed window: 42 days in Idaho, for example, and just 14 days in federal court. See Idaho Rule App. Proc. 14(a) (2017); Fed. Rule App. Proc. 4(b)(1)(A). By the time this window has closed, the defendant likely will not yet have important documents from the trial court, such as transcripts of key proceedings, see, e.g., Idaho Rules App. Proc. 19 and 25; Fed. Rule App. Proc. 10(b), and may well be in custody, making communication with counsel difficult, *see Peguero v. United States*, 526 U.S. 23, 26 (1999). And because some defendants receive new counsel for their appeals, the lawyer responsible for deciding which appellate claims to raise may not yet even be involved in the case.
>
> Filing requirements reflect that claims are, accordingly, likely to be ill defined or unknown at this stage. In the federal system, for example, a notice of appeal need only identify who is appealing; what "judgment, order, or part thereof" is being appealed; and "the court to which the appeal is taken." Fed. Rule App. Proc. 3(c)(1). Generally speaking, state requirements are similarly nonsubstantive.
>
> A notice of appeal also fits within a broader division of labor between defendants and their attorneys. While "the accused has the ultimate authority" to decide whether to "take an appeal," the choice of what specific arguments to make within that appeal belongs to appellate

> counsel. *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *see also McCoy v. Louisiana*, 584 U. S. ——, ——, 138 S.Ct. 1500, 1507–08, (2018). In other words, filing a notice of appeal is, generally speaking, a simple, nonsubstantive act that is within the defendant's prerogative.

Garza v. Idaho, No. 17-1026, 2019 WL 938523, at *4–5 (U.S. Feb. 27, 2019) (footnotes omitted).

Option A

Federal Rule of Appellate Procedure 3

* * *

(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:

(i) the judgment from which the appeal is taken~~,~~, or

(ii) the appealable order from which the appeal is taken~~, 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) A notice of appeal that designates the judgment or appealable order from which the appeal is taken includes all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate any such order in the notice of appeal.

(5) A notice of appeal in a civil case includes the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:

(A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or

(B) an order described in Rule 4(a)(4)(A).

(6) A notice of appeal may limit the scope of the appeal to one or more parts of a judgment, or to one or more parts of an appealable order, only by expressly stating that the scope of the appeal is so limited. Absent such an express statement, additional designations do not limit the scope of the appeal.

~~(4)~~ (7) 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.

~~(5)~~ (8) Forms 1A and 1B in the Appendix of Forms are ~~is a~~ suggested forms of ~~a~~ notices of appeal.

Option B

Federal Rule of Appellate Procedure 3

* * *

(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:

(i) the judgment from which the appeal is taken, or

(ii) the order that supports appellate jurisdiction from which the appeal is taken~~, 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) A notice of appeal that designates the judgment or order from which the appeal is taken includes all orders that merge for purposes of appeal into the designated judgment or order. It is not necessary to designate any such order in the notice of appeal.

(5) A notice of appeal in a civil case includes the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:

(A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or

(B) an order described in Rule 4(a)(4)(A).

(6) A notice of appeal may limit the scope of the appeal to one or more parts of a judgment, or to one or more parts of an appealable order, only by expressly stating that the scope of the appeal is so limited. Absent such an express statement, additional designations do not limit the scope of the appeal.

~~(4)~~ (7) 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.

~~(5)~~ (8) Forms 1A and 1B in the Appendix of Forms are ~~is a~~ suggested forms of ~~a~~ notices of appeal.

Option C

Federal Rule of Appellate Procedure 3

* * *

(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~~

(A) 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".

~~(2)~~ (B) 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)~~ (C) 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.

(2) The notice of appeal must ~~(B)~~ designate:

- the judgment from which the appeal is taken, or

- the appealable order from which the appeal is taken~~, or part thereof being appealed~~.;

(A) A notice of appeal that designates the judgment or appealable order from which the appeal is taken includes all orders that merge for purposes of appeal into the designated judgment or order. It is not necessary to designate any such order in the notice of appeal.

(B) A notice of appeal in a civil case includes the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:

(i) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or

(ii) an order described in Rule 4(a)(4)(A).

(C) A notice of appeal may limit the scope of the appeal to one or more parts of a judgment, or to one or more parts of an appealable order, only by expressly stating that the scope of the appeal is so limited. Absent such an express statement, additional designations do not limit the scope of the appeal.

~~and~~

(3) The notice of appeal must ~~(C)~~ name the court to which the appeal is taken.

(4) 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.

(5) Forms 1A and 1B in the Appendix of Forms are ~~is a~~ suggested forms of ~~a~~ notices of appeal.

Committee Note

The notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the court of appeals. It therefore must state who is appealing, what is being appealed, and to what court the appeal is being taken.

Because the jurisdiction of the court of appeals is established by statute, an appeal can be taken only from those district court decisions from which Congress has authorized an appeal. In most instances, that is the final judgment, see 28 U.S.C. §1291, but some other orders are considered final within the meaning of 28 U.S.C. §1291, and some interlocutory orders are themselves appealable. See 28 U.S.C. §1292. Accordingly, Rule 3(c)(1) currently requires that the notice of appeal "designate the judgment, order, or part thereof being appealed." The judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated.

However, 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. Such an interpretation overlooks a key 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 merge into the judgment or order on appeal. 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 appropriate 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 "(i) the judgment from which the appeal is taken, or (ii) the appealable order from which the appeal is taken"—and the phrase "or part thereof" is deleted. 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.

Whether due to misunderstanding or a misguided attempt at caution, some notices of appeal designate both the judgment and some particular 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.

However, there are circumstances in which an appellant may deliberately choose to limit the scope of the notice of appeal, and it is desirable to enable the appellant to convey this deliberate choice to the other parties.

To alert readers to the merger principle, without attempting to codify it, a new provision is added to Rule 3(c): "A notice of appeal that designates the judgment or appealable order from which the appeal is taken includes all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate any such order in the notice of appeal."

To remove the trap for the unwary, while enabling deliberate limitations of the scope of appeal, another new provision is added to Rule 3(c): "A notice of appeal may limit the scope of the appeal to one or more parts of a judgment, or to one or more parts of an appealable order, only by expressly stating that the scope of the appeal is so limited. Absent such an express statement, additional designations do not limit the scope of the 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, a new provision is added to Rule 3(c): "A notice of appeal in a civil case includes the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties."

Frequently, a party who is aggrieved by a final judgment will make a motion in the district court instead of filing a notice of appeal. Rule 4(a)(4) permits a party who makes certain motions to await disposition of those motions before appealing. But some courts treat a notice of appeal that designates only the order disposing of such a motion as limited to that order, rather than bringing the final judgment before the court of appeals for review. (Again, such an appeal might be brought before or after the judgment is set out in a separate document under Federal Rule of Civil Procedure 58.) To reduce the unintended loss of appellate rights in this situation, a new provision is added to Rule 3(c): "A notice of appeal in a civil case includes the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order described in Rule 4(a)(4)(A)." 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).

These new provision are added as Rules 3(c)(4), 3(c)(5), and 3(c)(6), with the existing Rules 3(c)(4) and 3(c)(5) renumbered.

FORM 1A

Notice of Appeal to a Court of Appeals From a Judgment ~~or Order~~ of a District Court.

United States District Court for the _____
District of _____
File Number _____

A.B., Plaintiff v. C.D., Defendant

Notice of Appeal

Notice is hereby given that ___(here name all parties taking the appeal)__, (plaintiffs) (defendants) in the above named case,* hereby appeal to the United States Court of Appeals for the _____ Circuit ~~(~~from the final judgment ~~) (from an order (describing it))~~ entered in this action on the _____ day of _____, 20___.

(s) _____
Attorney for _____
Address:_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.*]

* See Rule 3(c) for permissible ways of identifying appellants.

FORM 1B

Notice of Appeal to a Court of Appeals From ~~a Judgment or~~ an Appealable Order of a District Court.

United States District Court for the _____
District of _____
File Number _____

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

Notice is hereby given that ___(here name all parties taking the appeal)__, (plaintiffs) (defendants) in the above named case,* hereby appeal to the United States Court of Appeals for the _____ Circuit ~~(from the final judgment) (~~ from ~~an~~ the order ___ (here describe~~ing~~ the order ~~it~~)_____~~)~~ entered in this action on the _____ day of _____, 20___.

(s) _____
Attorney for _____
Address:_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.*]

* See Rule 3(c) for permissible ways of identifying appellants.

TAB 5B

TAB 5B1

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, for the Subcommittee on Rule 42(b)

Date: March 8, 2019

Re: Rule 42(b) and agreed dismissals (17-AP-G)

At the October 2018 meeting of the Committee, the subcommittee presented a report regarding a possible amendment to Rule 42(b) that would require the dismissal of an appeal if all parties agree to a dismissal. A copy of that report follows.

The subcommittee believes that if all parties agree to a mere dismissal of an appeal, dismissal should be mandatory, as required prior to the restyling of the Federal Rules of Appellate Procedure. On the other hand, anything beyond a mere dismissal requires judicial action. In addition, the subcommittee thinks it appropriate to make provision for cases where judicial approval of a settlement is legally required.

The existing Rule appears to distinguish between mere dismissals and those requiring judicial action by providing that "no mandate or other process may issue without a court order." Modern readers find that language obscure, and the subcommittee thinks that the point is more clearly captured by stating that "Any order beyond the mere dismissal of an appeal or petition for review—including any order vacating any action of the district court or administrative agency or remanding the case to the district court or administrative agency—requires action by the court."

Neither any member of the subcommittee, nor the Clerk of Court Representative, Patricia Dodszuweit, could identify anything that would be barred by the current "no mandate" language that would not be barred by the proposed new language. Moreover, implicit in the current "no mandate" provision is that a mandate does not issue when all that happens is a dismissal of the appeal, but Ms. Dodszuweit reports that such dismissals include language that a certified copy of the

order is being issued in lieu of a formal mandate—because the Clerk's Office found it necessary to include this language to inform the lower court and litigants that jurisdiction was returned to the lower court. For these reasons, it would appear to be appropriate to delete the "no mandate" language.

Rule 20 makes Rule 42(b) applicable to the review or enforcement of an agency order, and defines "appellant" to include a petitioner or applicant, and "appellee" to include a respondent. But the application of Rule 42(b) is unclear, because Rule 42(b) speaks only of dismissal of an "appeal," not of a petition to review or an application to enforce an agency order. To clarify its application, the subcommittee proposes to define "appeal" for purposes of Rule 42(b) to include a petition to review or an application to enforce an agency order.

The subcommittee offers two options for the Committee's consideration. One works from the structure of the existing Rule 42(b). The other works from the structure of Supreme Court Rule 46.1. In both options, the "no mandate" language is shown in brackets.

Here is the first option:

Rule 42

*** * ***

(b) Dismissal in the Court of Appeals.

(1) Stipulated Dismissal. The circuit clerk ~~may~~ must dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due.

(2) Appellant's Motion to Dismiss. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

(3) Other Orders. ~~[But no mandate or other process may issue without a court order.]~~ Any order beyond the mere dismissal of an appeal—including any order vacating any action of the district court or administrative agency or remanding the case to the district court or administrative agency—requires action by the court. If judicial approval of a settlement is required by law or sought by the parties, the court may approve the settlement or remand for the district court to consider whether to approve the settlement.

(c) Review or Enforcement of Agency Orders. For purposes of Rule 42(b), "appeal" includes a petition for review or an application to enforce an agency order.

Here is the second option:

Rule 42

*** * ***

(b) Dismissal in the Court of Appeals

~~The circuit clerk may must dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. But no mandate or other process may issue~~

~~without a court order. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.~~

(1) At any stage of the proceedings, whenever all parties file with the circuit clerk an agreement in writing that an appeal 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 [must / will] enter an order of dismissal.

(2)

(A) An appellant may file a motion to dismiss the appeal or proceeding. No more than 10 days after service thereof, an adverse party may file an objection, and the party moving for dismissal may file a reply within 7 days.

(B) If no objection is filed, the clerk [must / will] enter an order of dismissal without further reference to the court.

(C) If an objection is filed, the clerk [must / will] enter an order of dismissal if so directed by the court.

(3) [Notwithstanding the clerk's power to dismiss under subsections (1), (2)(A), and (2)(B) above, no mandate or other process of the court may issue without a court order.] Any order beyond the mere dismissal of an appeal—including any order vacating any action of the district court or administrative agency or remanding the case to the district court or administrative agency—requires action by the court. If judicial approval of a settlement is required by law or sought by the parties, the court may approve the settlement or remand for the district court to consider whether to approve the settlement.

(4) For purposes of Rule 42(b), "appeal" includes a petition for review or an application to enforce an agency order.

The same comment would be appropriate for either version, with the bracketed language used only if the second option is adopted.

Committee Note

The amendment restores the requirement, in effect prior to the restyling of the Federal Rules of Appellate Procedure, that the circuit clerk dismiss an appeal if all parties so agree.

The amendment replaces old terminology and clarifies that any order beyond mere dismissal—including vacating or remanding—requires judicial action.

[A procedure for an appellant or petitioner to file a motion to dismiss, and for handling objections, is added. This procedure is modeled on Supreme Court Rule 46, but does not attempt to limit the grounds of possible objection as that Rule does.]

The amendment makes clear that if judicial approval of a settlement is required by law or sought by the parties, the court of appeals may approve the settlement or remand for the district court to consider whether to approve the settlement.

Pursuant to Rule 20, Rule 42(b) applies to petitions for review and applications to enforce an agency order. The amendment clarifies that

application by providing that, for purposes of Rule 42(b), "appeal" includes a petition for review or application to enforce an agency order.

And here, for purposes of comparison, is Supreme Court Rule 46:

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.

TAB 5B2

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, for subcommittee (Judge Chagares, Judge Bybee, Chris Landau)

Date: October 2, 2018

Re: Rule 42(b) and agreed dismissals (17-AP-G)

The subcommittee has been discussing FRAP 42(b), which provides:

> **Dismissal in the Court of Appeals.** The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. But no mandate or other process may issue without a court order. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

The central issue is whether it is appropriate for a court to decline to dismiss an appeal if all parties agree that the appeal should be dismissed. No one is suggesting that an appellant should be able to dismiss an appeal at will, over the objection of other parties.

The first sentence of Rule 42(b). Prior to the restyling of the Federal Rules of Appellate Procedure in 1998, the first sentence provided, "If the parties to an appeal or other proceeding shall sign and file with the clerk of the court of appeals an agreement that the proceeding be dismissed, specifying the terms as to payment of costs, and shall pay whatever fees are due, the clerk *shall* enter the case dismissed . . . ." (emphasis added). One of the tenets of the restyling project was to eliminate the use of the word "shall." The result in this instance was to replace the word "shall" with the word "may."

By contrast, Supreme Court Rule 46.1 provides:

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. (emphasis added).[1]

---

[1] In a pre- Tunney Act antitrust case, the Court recognized an exception to the prior version of this Rule, holding that "Ordinarily parties may by consensus agree to dismissal of any appeal pending before this Court. However, there is an exception where the dismissal implicates a mandate we have entered in a cause." *Utah Pub. Serv. Comm'n v. El Paso Nat. Gas Co.*, 395 U.S. 464, 466 (1969) (footnotes omitted). Justice Harlan vigorously objected:

> The action taken by the Court today will be dismaying to all who are accustomed to regard this institution as a court of law.
>
> All semblance of judicial procedure has been discarded in the headstrong effort to reach a result that four members of this Court believe desirable. In violation of the Court's rules, the majority asserts the power to dispose of this case according to its own notions, despite the fact that all the parties participating in the lower court proceedings are satisfied that the District Court's decree is in the public interest.
>
> ***
>
> The language of the rule could not be clearer—the parties to a lawsuit are given the absolute right to dismiss their appeal without judicial scrutiny. Since 1858, the rules of this Court have expressly recognized the existence of this right, see R[e]vised Rules of the Sup.Ct. of the United States, Rule No. 29 (1858), and I have found no decision in which this right has ever been questioned or limited. Nevertheless, the Court today, without any discussion whatever, ignores the heretofore unquestioned interpretation of the rule and declares that 'there is an exception where the dismissal implicates a mandate we have entered in a cause.'
>
> In handing down this ipse dixit, the Court not only overlooks the teachings of more than a century of judicial practice, but also undermines the basic policies which support Rule 60. The rule is not a mere technicality but is predicated upon the classical view that it is the function of this Court to decide controversies between parties only when they cannot be settled by the litigants in any other way. See Marbury v. Madison, 1 Cranch 137 (1803). On this view of the judicial process, it is difficult to perceive why the Court should feel constrained to enforce its mandate when the parties have subsequently agreed, in a completely voluntary and bona fide way, that a different solution will better accommodate their interests. We have labor enough in deciding those pressing disputes which the parties are unable to resolve; there is no need to 'do justice' when no litigant is complaining that a wrong has been committed. Nor will it do to say, as the Court seems to suggest, that antitrust decrees, being affected with a public interest, as they surely are, are always subject to sua sponte enforcement by the Court. 'Enforcement' of the laws of the United States is the province of the Executive Branch. It is no more a proper function of this Court to thwart the Department of Justice when it decides to terminate an antitrust litigation than it is to order this department of the Executive Branch to commence an antitrust case which some members of this Court may feel should be brought.

The Committee might consider amending FRAP 42(b) to require the Clerk to dismiss an appeal in these circumstances.

The second sentence of Rule 42(b). The second sentence insists that "no mandate or other process may issue without a court order." This prohibition existed prior to the restyling, but was part of the first sentence, and used the disfavored word "shall." It provided, " . . . but no mandate or other process shall issue without an order of the court." Supreme Court Rule 46.3 has the same prohibition, "No mandate or other process will issue on a dismissal under this Rule without an order of the Court."

The point of this prohibition is that there is a distinction between a mere dismissal of the appeal—which leaves the district court's decision undisturbed as if no appeal had ever been taken—and some judicial action by the court of appeals. A clear example of such a judicial action would be vacating the district court's judgment.

Judge Sloviter once explained:

> In this case, because the parties' motion asks not only that the appeal be dismissed with prejudice, but also that this court vacate the district court judgment and remand the case for dismissal with prejudice, we must consider whether to grant the motion.
>
> As should be self-evident even without reference to the terms of Rule 42(b), action by the court can be neither purchased nor parleyed by the parties. It follows that a judicial act by an appellate court, such as vacating an order or opinion of this court or the trial court, is a substantive disposition which can be taken only if the appellate court determines that such action is warranted on the merits. A provision for such action in a settlement agreement cannot bind the court.

Id. at 475–76 (Harlan, J., dissenting) (footnotes and citation omitted).

Clarendon Ltd. v. Nu-W. Indus., Inc., 936 F.2d 127, 128–29 (3d Cir. 1991).

The same idea was the foundation for the Supreme Court's decision in *Bonner Mall*, which held that "mootness by reason of settlement does not justify vacatur of a judgment under review" because "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26, 29 (1994).

The Committee might consider requiring courts to enter agreed judgments, but this is likely to produce opposition from judges, for the reasons expressed above.

The third sentence of Rule 42(b). The distinction between mere dismissal of the appeal and a judicial act by the court of appeals helps explain the third sentence of Rule 42(b), "An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court."

It is easy to see why a motion would be necessary if the parties do not agree, but why would a motion be necessary if the parties agree? Why not simply enter an order in accordance with the parties' settlement? The reason, as explained above, is that the "terms" to which the parties agree may involve a judicial act—such as vacating the district court judgment—and a court has no obligation to perform a judicial act simply because the parties so desire.

Where this left settling parties. Under the pre-restyling Rules, this left settling parties with a choice. If all they sought was a mere dismissal of the appeal, they were entitled to reach an agreement and have the appeal dismissed. But if they sought more than this—if they sought judicial action—they were required to file a motion.

Again, Judge Sloviter explained:

> Rule 42(b) provides two distinct paths to voluntary dismissal in the Court of Appeals. Under the first path, . . . no action by this court is necessary or contemplated under this route. The parties may make whatever arrangement they agree on and need not notify or involve the court of appeals panel.
>
> On the other hand, when the parties seek "a mandate or other process" from this court, we must perforce issue an order.

Clarendon Ltd. v. Nu-W. Indus., Inc., 936 F.2d 127, 128–29 (3d Cir. 1991).

If the first sentence of Rule 42(b) were amended to require a Clerk's dismissal rather than merely permit a Clerk's dismissal, settling parties would again face the same choice: If they settle on terms that call for the court to do nothing but merely dismiss the appeal, they would be entitled to reach an agreement and have the appeal dismissed. But if they settle on terms that call for the court to take some judicial action, they must file a motion and convince the court that it is appropriate to take the judicial action sought.

If amending the first sentence of Rule 42(b)—with an appropriate comment—does not make this sufficient clear, the Committee might consider overhauling Rule 42(b) to mirror the current Supreme Court Rule 46.

Rule 42

*** * ***

(b) Dismissal in the Court of Appeals

(1) If the parties to an appeal or other proceeding sign and file with the circuit clerk an agreement to dismiss the appeal or proceeding, specifying that all fees relating to the appeal or proceeding have been

paid and the terms for payment of any costs, the clerk [must / will] enter an order of dismissal without further reference to the court.

(2)

(A) An appellant may file a motion to dismiss the appeal or proceeding. No more than 14 days after service thereof, an adverse party may file an objection, and the party moving for dismissal may file a reply within 10 days.

(B) If no objection is filed, the clerk [must / will] enter an order of dismissal without further reference to the court.

(C) If an objection is filed, the clerk [must / will] enter an order of dismissal if so directed by the court.

(3) Notwithstanding the clerk's power to dismiss an appeal under subsections (1), (2)(A), and (2)(B) above, no mandate or other process of the court may issue without a court order.

If the committee pursues this route, it might consider whether to use the auxiliary verb "must" or "will" in connection with the clerk's entry of orders of dismissal. The style guidelines instruct that "must" is used to indicate "is required to" while "will" is used "for the future tense, not as an imperative." Under those guidelines, the question becomes whether it is sufficient to use the future tense rather than impose a requirement on the clerk.

Other considerations. At both the last meeting of the full Committee and in discussions among the subcommittee, situations have been identified in which court approval of settlements is required. Examples include class actions, actions involving minors, and actions under the Tunney Act. If the Committee were inclined to require

that courts generally enter judgments in accordance with settlements, it might be necessary to carve out exceptions for proceedings such as these.

But if the Committee were to accept the distinction drawn above between mere dismissal of an appeal and additional judicial action, such a provision might not be necessary: In any case in which judicial approval of a settlement was required, the district court would already have approved the settlement. And if all that is sought is a dismissal of the appeal, with no other judicial action taken, it might be thought that no further review of the settlement is necessary. Put somewhat differently, if the settlement leaves the district court decision in place, dismissal of the appeal is equivalent to no appeal being filed in the first place.

The Committee may wish to consider, however, whether any provision would need to be made for a settlement on appeal that does not call for any judicial action and leaves the district court judgment in place, but that, as a matter of contract, calls for something in addition to (or some forbearance from enforcing) that district court judgment. Perhaps there would be no such settlements in cases that require judicial approval of settlements, but the Committee may want to consider that question further.

TAB 5C

TAB 5C1

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To: Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, for Subcommittee on Rules 35 and 40

Date: March 11, 2019

Re: Possible amendments to Rules 35 and 40

Minor amendments to Rules 35 and 40 have been published for public comment. The subcommittee has continued to consider whether more extensive revisions might be appropriate.

The subcommittee considered, but decided against, the following:

- Revise Rule 35 to apply solely to initial hearing en banc, and revise Rule 40 to apply to both kinds of rehearing

  Although this option has the greatest potential, it also poses the greatest risk of disruption, and inappropriately highlighting initial hearing en banc.

- Revise Rule 35 and Rule 40 to make them more parallel to each other, or parallel to Rule 21

  Although there is little doubt that improvements could be made, the risk of disruption seems too great, given that no one has yet identified a problem that calls for an overhaul of the structure of these rules.

- Require a single petition rather than separate petitions for panel rehearing and rehearing in banc

  FRAP 35(b)(2) currently sets a word limit of 3,900 words for a petition for rehearing en banc, the same limit set by FRAP 40(b)(1) for petitions for panel rehearing.

  FRAP 35(b)(3) adds:

  > For purposes of the limits in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

  Thus under the current rules, each court of appeals is given the discretion to require separate petitions (and a party gets no word limit advantage by filing separately unless the court of appeals so requires).

Several courts of appeals, particularly some with the most judges, require separate petitions. By contrast, separate documents are *prohibited* in some of the circuits with the smallest number of circuit judges.

This is an area where national uniformity is not required, and there may be good reason for local variation.

- Add to Rule 35 the statement in Rule 40 that a grant of rehearing is unlikely without a call for a response

  Rule 40(a)(2) provides that ordinarily rehearing will not be granted in the absence of a request for a response, but Rule 35 does not. While at first blush, this seems odd, it may be appropriate.

  A petition for panel rehearing is designed to point out something that the panel has "overlooked or misapprehended." This is likely to involve a claimed case-specific error as to which a court would ordinarily want to hear a response.

  On the other hand, rehearing en banc is primarily concerned with the uniformity of a court's decisions. In these circumstances, it seems far more likely that a response to a petition might be wholly unnecessary for a circuit judge to conclude that rehearing en banc is appropriate.

The subcommittee does recommend adding provisions to clarify the relationship between petitions for rehearing en banc and for panel rehearing. Action here appears appropriate because typically, but not always, a party petitioning for rehearing will petition for both panel rehearing and rehearing en banc, and the relationship between Rule 35 and Rule 40 is not clear to the inexperienced.

The subcommittee considered various local rules and internal operating procedures for insights into possible provisions to add. Some courts of appeals provide that a petition for rehearing en banc will be treated as a petition for panel rehearing. This makes good sense: if the problem identified by the petition can be fixed by the panel, there is no need for the full court to act.

Some internal operating procedures also provide the converse, and treat a petition for panel rehearing as a petition for rehearing en banc. This seems less compelling: if a party has not sought rehearing en banc—presumably because the party does not think that the rigorous standard of Rule 35(a) can be met—but does

seek panel rehearing as to some matter that was "overlooked or misapprehended," it is not clear why the full court needs to get involved.

Drawing on various local rules and internal operating procedures, the subcommittee suggests the following:

Rule 35. En Banc Determination

(a) **When Hearing or Rehearing En Banc May Be Ordered.** A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

A petition for rehearing en banc may be treated by the panel as a petition for panel rehearing. If any judge on the panel requests, a petition for panel rehearing will be treated as a petition for rehearing en banc.

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

(1) The petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

In cases where these criteria are not met, panel rehearing pursuant to Rule 40 may be available.

* * * * *

Committee Note

A party dissatisfied with a panel decision may petition for rehearing en banc pursuant to this Rule or petition for panel rehearing pursuant to Rule 40. The amendment to Rule 35(a) explicitly provides for the common practice of treating a petition for rehearing en banc as a petition for panel rehearing, so that the panel can address issues raised by the petition for rehearing en banc, and treating a petition for panel rehearing as a petition for rehearing en banc, if any judge on the panel requests. The amendment to Rule 35(b) calls attention to the different standards for the two kinds of rehearing.

Rule 40. Petition for Panel Rehearing

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

* * *

(4) **Action by the Court**. If any judge on the panel requests, a petition for panel rehearing will be treated as a petition for rehearing en banc pursuant to Rule 35. If a petition for panel rehearing is granted, the court may do any of the following:

(A) make a final disposition of the case without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other appropriate order.

* * * * *

Committee Note

A party dissatisfied with a panel decision may petition for panel rehearing pursuant to this Rule or petition for rehearing en banc pursuant to Rule 35. The amendment to Rule 40 explicitly provides for treating a petition for panel rehearing as a petition for rehearing en banc, if any judge on the panel requests.

* This assumes that a pending amendment to change the word "answer" to "response" is adopted.

TAB 5C2

MEMORANDUM

TO: Rebecca Womeldorf
FROM: Ahmad AlDajani
DATE: December 17, 2018
RE: Advisory Committee on Appellate Rules: En Banc/Panel Rehearing Petitions Project

Dear Rebecca,

In response to Judge Chagares's request, I have reviewed local rules and internal operating procedures for each circuit to determine how the various circuits handle panel and en banc rehearing petitions. To my understanding, in addition to considering the structural realignment of rules 35 and 40, the Appellate Rules Committee is also considering:

1. Whether Rule 35 should focus solely on petitions for initial en banc hearings and Rule 40 on rehearing—panel and en banc;
2. Whether a petition for en banc rehearing should also be construed as seeking a panel rehearing, and vice versa, and;
3. Whether a party seeking both panel and en banc rehearing should be allowed to submit a single petition rather than a separate petition for each rehearing.

To assist the Committee's consideration of these steps, the attached table details the position that each circuit takes concerning the three matters listed above.

In sum, the trend among the circuits seems to consist of the following:

1. Concerning the focus of local rules:
    a. All circuits, except for the D.C. Circuit, have a Local Rule 35 that focuses on requirements for initial hearing and rehearing en banc.
    b. The First, Second, Third, Fifth, and Eighth Circuits use Local Rule 40 to address panel rehearing petitions.
    c. The remaining circuits, except for the D.C. Circuit, use their respective Local Rule 40 to outline the requirements for rehearing petitions in general.
    d. The D.C. Circuit has no Local Rule 40. Instead, they address requirements for rehearing petitions generally in Local Rule 35.

2. Concerning the number and construction of petitions:
    a. In the First and D.C. Circuits, a party seeking panel and en banc rehearing of the same decision must file a petition for both in the same document. Along those lines, the Seventh Circuit will construe separately filed petitions as one document subject to the same length limitation.
    b. In the Eleventh Circuit, a petition for en banc rehearing is automatically construed as a panel rehearing petition. Similarly, the Fifth Circuit

automatically construes a petition for en banc rehearing as a petition for panel rehearing. However, if a panel rehearing petition does not reference a request for en banc rehearing, it is construed as a panel rehearing petition only.

c. In the Tenth Circuit, a petition for panel rehearing may include a request for en banc rehearing, which would affect the number of copies that need be filed.
d. In the Fourth and Ninth Circuits, separate petitions for en banc and panel rehearing are required.

I hope that this is helpful to the committee's efforts. Please let me know of any further questions or concerns that you may have with regards to my findings.

Ahmad AlDajani
Rules Law Clerk | Standing Committee on Rules of Practice and Procedure
Judicial Law Clerk | Honorable David G. Campbell
U.S. District Court for the District of Arizona

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Enclosure: Rule 35 and 40 Comparison Table

TAB 5C3

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Court	Focus of Local Rule 35	Focus of Local Rule 40	How is a rehearing petition construed?	Is a party required to file multiple petitions where the party seeks panel and en banc rehearing?
First Circuit	Hearing and Rehearing En Banc	Panel Rehearing	**IOP at 120. (C)**: A petition for rehearing en banc will also be treated as a petition for rehearing before the original panel.	NO - Local Rule 35 requires a party seeking panel and en banc rehearing of the same decision to consolidate the petitions into a single document that is subject to Rule 35(b)(2), (3) length limits.
Second Circuit	Hearing and Rehearing En Banc	Panel Rehearing	Follows FRAP	Follows FRAP
Third Circuit	Hearing and Rehearing En Banc	Panel Rehearing	**IOP #9.5.1**: It is presumed that a petition for rehearing before the panel or suggestion for en banc rehearing filed by a party as provided by Fed.R.App.P. 40(a) or 35(b) requests both panel rehearing and rehearing en banc, unless the petition for panel rehearing under Rule 40(a) explicitly states that it does not request en banc rehearing under Rule 35(b).	NO - A petition has vice versa construction
Fourth Circuit	Hearing and Rehearing En Banc	Rehearing in General	**LRs 35 & 40**: A rehearing petition is construed as a panel rehearing petition, LR 35, unless an en banc rehearing petition is made at the same time and in the same document as the rehearing petition.	Yes
Fifth Circuit	Hearing and Rehearing En Banc	Panel Rehearing	**IOP at 35.** A petition for rehearing en banc is treated as a panel rehearing petition if one has not been filed. The filing of an en banc petition does not take the case out of the panel's control. The panel may grant a panel rehearing even if the full court has not taken action with respect to the en banc petition.	Yes - Two separate documents are required. See Page 10 of Clerk's Office FAQs
Sixth Circuit	Hearing and Rehearing En Banc	Rehearing in General	**IOP #35(d)(1)**: The court will treat a petition for rehearing en banc that accompanies a panel rehearing petition as a petition for rehearing before the original panel. If the panel does not modify its decision, the petition is circulated along with the panel's comments to the en banc court. **IOP #40(b)**: If a petition for rehearing en banc does not accompany a panel rehearing petition, the petition is treated as a panel rehearing petition only and is not reviewed by the court irrespective of the panel's actions.	No - En Banc petitions are treated as panel rehearing petitions.
Seventh Circuit	Hearing and Rehearing En Banc	Rehearing in General	While Circuit Rule 35 addresses en banc rehearing, Circuit Rule 40 addresses requirements for rehearing petitions generally. As a result, it is necessary that litigants consult both rules before filing for rehearing, irrespective of whether the petition seeks panel or en banc hearings	If a party files a panel rehearing petition and an en banc rehearing petition, both petitions are considered a single document even if separately filed.
Eighth Circuit	Hearing and Rehearing En Banc	Panel Rehearing	**LR 40A(b):** A panel rehearing petition in the Eighth Circuit will be treated as a petition for rehearing en banc on the request of any judge on the panel. That said, every petition for rehearing en banc is automatically deemed to include a petition for rehearing by the panel.	
Ninth Circuit	Hearing and Rehearing En Banc	Rehearing in General	No information - Likely follows FRAP.	Separate petitions required. When a petition for rehearing en banc is made in conjunction with one for a panel rehearing, a reference to the en banc petition as well as the panel rehearing petition must appear on the cover of the petition.
Tenth Circuit	Hearing and Rehearing En Banc	Rehearing in General	No information - Likely follows FRAP.	A petitioner may request en banc rehearing in a petition for panel rehearing. However, if a petition for panel rehearing also requests rehearing en banc, the petitioner must file 6 hard copies with the clerk in addition to satisfying ECF requirements. Further, a petition seeking en banc review in addition to a panel rehearing must include a copy of the opinion or order.
Eleventh Circuit	Hearing and Rehearing En Banc	Rehearing in General	**Rule 35 IOP:** A petition for rehearing en banc will also be treated as a petition for rehearing before the original panel. However, a petition for panel rehearing will not be treated as a petition for rehearing en banc.	Where the petition is for en banc rehearing, it will automatically be construed as a panel rehearing petition.
DC Circuit	Rehearing in General	NO LOCAL RULE	Separately Construed.	A party seeking both panel and en banc rehearing must consolidate both petitions into one document. IOP at 58.

TAB 6

TAB 6A

TAB 6A1

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Date: March 8, 2019

Re: Rule 4(a)(5)(C) and *Hamer* (no # assigned yet)

At its last meeting, in October of 2018, the Committee considered a subcommittee report regarding whether it would be appropriate to amend FRAP 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). The Rule provides that an extension may not exceed 30 days (or 14 days after the order granting the extension is entered, if later) but the governing statute does not have that limitation. (A copy of the report follows.)

In *Hamer*, the Supreme Court distinguished between statutory time limits for appeal, such as those contained in 28 U.S.C. § 2107(c), and mandatory claim-processing rules, such as those contained in a Federal Rule of Appellate Procedure. A mandatory claim-processing rule, unlike a jurisdictional rule, is subject to waiver or forfeiture. It did not decide, however, whether a mandatory claim-processing rule is also subject to equitable exceptions. *Id.* at 18 & n.3.

The Committee noted that the Supreme Court had granted certiorari in a case that presented the question undecided in *Hamer*. The Committee tabled this matter until that case was decided.

On February 26, 2019, the Supreme Court decided *Nutraceutical Corp. v. Lambert*, No. 17-1094, 2019 WL 920828 (U.S. Feb. 26, 2019), and held that a mandatory claims-processing rule is not subject to equitable tolling. It explained:

> Because Rule 23(f)'s time limitation is found in a procedural rule, not a statute, it is properly classified as a nonjurisdictional claim-processing rule. See *Hamer v. Neighborhood Housing Servs. of Chicago*,

138 S.Ct. 13, 20–21 (2017). It therefore can be waived or forfeited by an opposing party. See *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004). The mere fact that a time limit lacks jurisdictional force, however, does not render it malleable in every respect. Though subject to waiver and forfeiture, some claim-processing rules are "mandatory"—that is, they are " 'unalterable' " if properly raised by an opposing party. *Manrique v. United States*, 137 S.Ct. 1266, 1272 (2017) (quoting *Eberhart v. United States*, 546 U.S. 12, 15 (2005) (per curiam)); see also *Kontrick*, 540 U.S. at 456. Rules in this mandatory camp are not susceptible of the equitable approach that the Court of Appeals applied here. Cf. *Manrique*, 137 S.Ct., at 1274 ("By definition, mandatory claim-processing rules . . . are not subject to harmless-error analysis").

Whether a rule precludes equitable tolling turns not on its jurisdictional character but rather on whether the text of the rule leaves room for such flexibility. See *Carlisle v. United States*, 517 U.S. 416, 421 (1996). Where the pertinent rule or rules invoked show a clear intent to preclude tolling, courts are without authority to make exceptions merely because a litigant appears to have been diligent, reasonably mistaken, or otherwise deserving. *Ibid.*; see *Kontrick*, 540 U.S. at 458; *United States v. Robinson*, 361 U.S. 220, 229 (1960). Courts may not disregard a properly raised procedural rule's plain import any more than they may a statute's. See *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988).

Here, the governing rules speak directly to the issue of Rule 23(f)'s flexibility and make clear that its deadline is not subject to equitable tolling. To begin with, Rule 23(f) itself conditions the possibility of an appeal on the filing of a petition "within 14 days" of "an order granting

> or denying class-action certification." Federal Rule of Appellate Procedure 5(a)(2) likewise says that a petition for permission to appeal "must be filed within the time specified." To be sure, the simple fact that a deadline is phrased in an unqualified manner does not necessarily establish that tolling is unavailable. See Fed. Rule App. Proc. 2 (allowing suspension of other Rules for "good cause"); Fed. Rule App. Proc. 26(b) (similar); Fed. Rule Crim. Proc. 45(b) (similar); Fed. Rule Civ. Proc. 6(b) (similar). Here, however, the Federal Rules of Appellate Procedure single out Civil Rule 23(f) for inflexible treatment. While Appellate Rule 2 authorizes a court of appeals for good cause to "suspend any provision of these rules in a particular case," it does so with a conspicuous caveat: "except as otherwise provided in Rule 26(b)." Appellate Rule 26(b), which generally authorizes extensions of time, in turn includes this express carveout: A court of appeals "may not extend the time to file . . . a petition for permission to appeal." Fed. Rule App. Proc. 26(b)(1). In other words, Appellate Rule 26(b) says that the deadline for the precise type of filing at issue here may not be extended. The Rules thus express a clear intent to compel rigorous enforcement of Rule 23(f)'s deadline, even where good cause for equitable tolling might otherwise exist.

Nutraceutical, 2019 WL 920828, at *3–4 (footnotes omitted).

Although *Nutraceutical* addresses the time to petition for permission to appeal, its reasoning would appear to apply to the time to file a notice of appeal as of right. That's because FRAP 26(b)(1) provides:

> For good cause, the court may extend the time prescribed by these rules . . . to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:

> (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal . . . .

Given the reliance in *Nutraceutical* on the second phrase in 26(b)(1), it would be difficult to distinguish the first phrase in 26(b)(1).[1]

The Supreme Court also rejected the beg-forgiveness-rather-than-seek-permission argument that Rule 26(b)(1)'s prohibition on "extend[ing] the time to file" a petition for permission to appeal should be understood to foreclose only formal extensions granted *ex ante*, leaving courts free to excuse late filings on equitable grounds after the fact. "Whatever we would make of this contention were we writing on a blank slate, this Court has already rejected an indistinguishable argument in *Robinson*." *Nutraceutical*, 2019 WL 920828, at *4.

In rejecting equitable tolling, the Court left open the possibility that 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—might be available, and "whether an insurmountable impediment to filing timely might compel a different result." *Nutraceutical* 2019 WL 920828 at n.7 (citing FRAP 26(a)(3) (addressing computation of time when "the clerk's office is inaccessible")).

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[1] The Court did drop a footnote stating that "Lambert's other textual arguments center on rules addressed to appeals as of right. As noted above, Rules 5 and 26 specifically address petitions for permission to appeal from nonfinal orders such as the one at issue here. Lambert's attempts to reason by implication from other, inapposite Rules therefore bear little weight." *Nutraceutical* 2019 WL 920828 at n.4 (citations omitted). But those arguments focused on showing (1) that the time to appeal when one files a timely motion for reconsideration runs from the denial of the motion for reconsideration and (2) that Rule 3(a)(2) is more unforgiving with respect to the timely filing of a notice of appeal than the timely filing of a petition for permission to appeal.

The background rule is now largely clear, and the question is whether to alter that background rule. Even if the answer to that question is no, it might be appropriate—given that it is clear that the time limit in the Rule is forfeitable—to require that a motion for an extension be served on all parties and that it state the length of an extension sought.

TAB 6A2

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, for subcommittee (Judge Chagares, Judge Murphy, Chris Landau)

Date: October 2, 2018

Re: Rule 4(a)(5)(C) and *Hamer* (no # assigned yet)

The subcommittee has been discussing whether it would be appropriate to amend FRAP 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).

Rule 4(a) provides:

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

In *Hamer*, the district court granted plaintiff Hamer an extension for more than the 30 days permitted by Rule 4(a)(5)(C). Hamer filed a notice of appeal within the time set by the district court, but beyond the 30 days permitted by Rule 4(a)(5)(C). The court of appeals dismissed Hamer's appeal, treating the 30 day limit on extensions as jurisdictional.

The Supreme Court vacated the dismissal, distinguishing between statutory time limits for appeal, such as those contained in 28 U.S.C. §2107(c), and mandatory claim-processing rules, such as those contained in a Federal Rule of Appellate Procedure. It explained that the phrase " 'mandatory and jurisdictional' is erroneous and confounding terminology where, as here, the relevant time prescription is absent from the U.S. Code. Because Rule 4(a)(5)(C), not § 2107, limits the length of the extension granted here, the time prescription is not jurisdictional." *Hamer*, 138 S. Ct. at 21. A mandatory claim-processing rule, unlike a jurisdictional rule, is subject to waiver or forfeiture. The Court has not yet decided whether a mandatory claim-processing rule is also subject to equitable exceptions. *Id*. at 18 & n.3.

Accordingly, the Court left several questions open on remand, including (1) whether the defendants' failure to raise any objection in the District Court to the overlong time extension, by itself, effected a forfeiture; (2) whether the defendants could gain review of the District Court's time extension only by filing a cross appeal; and (3) whether equitable considerations may occasion an exception to Rule 4(a)(5)(C)'s time constraint. *Id* at 22.

As the subcommittee sees it, there are three major directions that the full Committee might take in light of *Hamer*:

1) delete Rule 4(a)(5)(C), leaving no time limit on the extension a district court could set;

2) amend Rule 4(a)(5)(C) to provide some room for flexibility in the 30 day limit for an extension and/or establish standards and procedures for determining forfeiture and waiver;

3) do nothing, leaving the 30 day limit in Rule 4(a)(5)(C) as a mandatory claim processing rule.

Delete Rule 4(a)(5)(C). One might think that there is no choice but to delete Rule 4(a)(5)(C) because the relevant statute sets no limit on the length of an extension granted by a district court, so long as the motion requesting an extension is "filed not later than 30 days after the expiration of the time otherwise set for bringing appeal," and the district court finds "excusable neglect or good cause." 28 28 U.S.C § 2107. But the Federal Rules are full of non-statutory time limits. See FRCP 4(m) (setting a time limit for service); FRCP 12(a) (setting a time limit to answer or move); FRCP 14 (setting a time limit to file a third-party complaint as of right); FRCP 15(a) (setting a time limit for amending a pleading as of right); FRCP 59(b) (setting a time limit for a motion for a new trial); FRAP 27(a)(3) (setting a time limit to respond to a motion); FRAP 29(a)(6) (setting a time limit for amicus briefs); FRAP 31 (setting time limits for filing briefs); FRAP 40(a) (setting a time limit for a petition for panel rehearing).

Perhaps one might distinguish these Rules as non-jurisdictional, but the very point of *Hamer* is that Rule 4(a)(5)(C) itself is non-jurisdictional.[1] And if there were any doubts about the legitimacy of the current Rule 4(a)(5)(C) it would be extraordinary that Justice Ginsburg's opinion for an unanimous Court breathed not

[1] And there is even an argument that the supersession clause of the Rules Enabling Act would allow a Rule to supersede a statutory time limit. See 28 U.S.C. § 2072 ("All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.").

a word of such doubt. Instead, the Court treated Rule 4(a)(5)(C) as a mandatory claim-processing rule, subject to waiver and forfeiture, and perhaps subject to equitable exceptions, and remanded for consideration of various ways those doctrines might apply to avoid the enforcement of Rule 4(a)(5)(C).

For these reasons, the subcommittee does not see any obligation to delete Rule 4(a)(5)(C). And there are very good policy reasons to not do so: permitting a limitless extension of time to file a notice of appeal would be quite inconsistent with the demands of finality.

Amend Rule 4(a)(5)(C) to provide more flexibility and/or procedures and standards for waiver and forfeiture. Now that *Hamer* has made clear that the current Rule 4(a)(5)(C) is not jurisdictional, and that the statute would permit a longer extension than 30 days, the Committee might consider providing the district court with some greater flexibility. A "good cause" standard for a longer extension seems too generous: after all, good cause is a basis for an extension at all. Another possible standard might be "extraordinary circumstances" as the pending amendment to FRAP 41(d)(4) provides.

Similarly, now that *Hamer* has made clear that the current Rule 4(a)(5)(C) is subject to waiver and forfeiture, the Committee might consider procedures or standards to determine waiver and forfeiture. For example, the Committee might consider requiring that any motion for an extension be served on all other parties (the current Rule permits ex parte motions in some circumstances) and request an extension of a particular length, so that failure to object to an extension of a particular length would forfeit that argument.

There are downsides to proceeding in this direction.

First, Rule 4(a)(5)(C) is not the only time limit set by the Federal Rules of Appellate Procedure that would appear to be a non-jurisdictional mandatory claim-processing rule under *Hamer*. E.g., Rule 4(a)(3) (14-day time limit for multiple appeals); Rule 4(a)(4)(A)(vi) (28-day limit for motions under FRCP 60 to have tolling effect); Rule 4(b)(4) (30-day limit on extension of time to appeal in criminal cases). If it is appropriate to establish a "good cause" or "extraordinary circumstances" exception for standard for Rule 4(a)(5)(C), is there any reason not to also do so for these Rules?

Second, issues of forfeiture and waiver are ubiquitous. If establishing procedures and standard regarding forfeiture and waiver are appropriate for Rule 4(a)(5)(C), is there any reason not to also do so more generally?

Third, it is an open question whether a mandatory claim-processing rule like Rule 4(a)(5)(C) is subject to equitable exceptions in general, and the doctrine of "unique circumstances" in particular. The "unique circumstances" doctrine "covers cases in which the trial judge has misled a party who could have—and probably would have—taken timely action had the trial judge conveyed correct, rather than incorrect, information." *Carlisle v. United States*, 517 U.S. 416, 435 (1996) (Ginsburg, J., concurring). Writing an exception into the text would immediately raise the question of the relationship between the textual exception (on the one hand) and equitable exceptions and "unique circumstances" (on the other).

Do nothing, leaving the 30 day limit in Rule 4(a)(5)(C) as a mandatory claim-processing rule. The downsides noted above are, naturally enough, reasons to do nothing. There are, however, at least two downsides of doing nothing.

First, lawyers and judges might think (*Hamer* notwithstanding) that Rule 4(a)(5)(C) is jurisdictional. Second, there may be extreme situations in which an extension longer than 30 days might be appropriate.

One final note: The Supreme Court has granted certiorari in a case pending this term that poses the question whether compliance with a mandatory claim-processing rule is also subject more broadly to equitable exceptions. *Nutraceutical Corp. v. Lambert*, No. 17-1094. The question presented states:

> Federal Rule of Civil Procedure 23(f) establishes a fourteen-day deadline to file a petition for permission to appeal an order granting or denying class-action certification. On numerous occasions, this Court left undecided whether mandatory claim-processing rules, like Rule 23 (f), are subject to equitable exceptions, because the issue was not raised below. See, e.g., Hamer v. Neighborhood Hous. Serv. of Chicago, 138 S. Ct. 13, 18 n.3, 22 (2017). That obstacle is not present here.
>
> The question presented is: did the Ninth Circuit err by holding that equitable exceptions apply to mandatory claim-processing rules and excusing a party's failure to timely file a petition for permission to appeal, or a motion for reconsideration, within the Rule 23(f) deadline?
>
> As the Ninth Circuit acknowledged below, its decision conflicts with other United States Circuit Courts of Appeals that have considered this issue (the Second, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits).

https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-1094.html

The pendency of *Nutraceutical* might be a reason to do nothing for the time being. If the Court decides that equitable exceptions generally apply to mandatory claim-processing rules, the Committee might think that no further action is required. If the Court decides that there are no equitable exceptions to mandatory claim-

processing rules, the Committee might think that some text-based exceptions are appropriate.

TAB 6B

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Date: March 8, 2019

Re: Departed Judges and *Yovino* (18-AP-D)

At the October 2018 meeting, the Committee discussed a proposal to prescribe how courts of appeals 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 Committee was aware that a petition for certiorari presenting this question was pending, and formed a subcommittee to consider the proposal if the petition were denied.

On February 25, 2019, the Supreme Court granted certiorari, and summarily vacated the court of appeals' judgment. *Yovino v. Rizo*, No. 18-272, 2019 WL 886486 (U.S. Feb. 25, 2019).

The Court noted that the petition "presents the following question: May a federal court count the vote of a judge who dies before the decision is issued?" *Yovino* at *1. Its answer was a clear "no":

> Because Judge Reinhardt was no longer a judge at the time when the en banc decision in this case was filed, the Ninth Circuit erred in counting him as a member of the majority. That practice effectively allowed a deceased judge to exercise the judicial power of the United States after his death. But federal judges are appointed for life, not for eternity.

Yovino at *3.

Accordingly, I suggest that there is no need for the Committee to act on this proposal and that it be removed from the Committee's agenda.

TAB 7

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Date: March 8, 2019

Re: Privacy in Railroad Retirement Act Benefit Cases (18-AP-E; 18-CV-EE)

Ana Kocur, General Counsel of the Railroad Retirement Board, proposes that the privacy protections afforded Social Security benefit cases be extended to Railroad Retirement Act benefit cases. Her memo follows.

Civil Rule 5.2(c) protects the privacy of Social Security claimants by limiting electronic access to case files. Although members of the public can access the full electronic record if they come to the courthouse, they can remotely access only the docket and judicial decisions. Appellate Rule 25(a)(5) piggybacks on Civil Rule 5.2(c): "An appeal in a case whose privacy protection was governed by . . . Federal Rule of Civil Procedure 5.2 . . . is governed by the same rule on appeal."

Coincidentally, this week the Supreme Court decided a case that emphasized the close parallels between Social Security and Railroad Retirement:

> Congress created both the railroad retirement system and the Social Security system during the Great Depression primarily to ensure the financial security of members of the workforce when they reach old age. See *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018); *Helvering v. Davis*, 301 U.S. 619, 641 (1937). Given the similarities in timing and purpose of the two programs, it is hardly surprising that their statutory foundations mirror each other.

BNSF Ry. Co. v. Loos, No. 17-1042, 2019 WL 1005830, at *3 (U.S. Mar. 4, 2019).

The Court applied its prior decisions interpreting the Social Security Act term "wages" to the Railroad Retirement term "compensation" in order to avoid an "unwarranted disparity between terms Congress appeared to regard as equivalents." *BNSF*, 2019 WL 1005830 at *5.

One might think that any change to be made could be made to Civil Rule 5.2(c), relying on the piggyback provision for appellate proceedings. The problem is that, unlike Social Security benefits cases, Railroad Retirement benefit cases go directly to the court of appeals. A pro se litigant from time to time will file such a case in the district court, only to have it dismissed for lack of subject matter jurisdiction. As General Counsel Kocur notes, the Railroad Retirement Board "does not generally litigate cases in the federal districts courts."

For that reason, it appears that it would be appropriate for this Committee to take up the matter and consider whether to amend Appellate Rule 25(a)(5) to provide equivalent privacy protection to Railroad Retirement benefit claims as currently provided to Social Security benefit claims.

UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD
844 NORTH RUSH STREET
CHICAGO, ILLINOIS 60611-1275

GENERAL COUNSEL

MEMORANDUM

TO: The Hon. David G. Campbell, Chair
Prof. Daniel R. Coquillette, Reporter
Standing Committee on Rules of Practice and Procedure
Judicial Conference of the United States

FROM: Ana M. Kocur
General Counsel
U.S. Railroad Retirement Board

RE: Federal Rule of Civil Procedure 5.2(c) and Privacy Protections in Railroad Retirement Benefit Cases

DATE: December 18, 2018

I understand from the May 1, 2018 memorandum of the Committee on Court Administration and Case Management of the Judicial Conference of the United States that the Standing Committee has been asked to consider whether any changes to Fed. R. Civ. P. 5.2(c) or related rules are needed to protect personal and sensitive information of individuals in social security and immigration cases. I am writing to propose that Fed. R. Civ. P. 5.2(c) be revised to include actions for benefits under the Railroad Retirement Act in the types of cases limiting remote access to electronic files.

The Railroad Retirement Act (RRA), 45 U.S.C. § 231 *et seq.*, replaces the Social Security Act with respect to employment in the railroad industry and provides monthly annuities for employees who meet certain age and service requirements, including annuities based on disability. Many family relationships in the RRA are defined by reference to the Social Security Act.[1] Courts have also consistently recognized the similarities between benefits

[1] Section 2(c)(4) of the RRA, 45 U.S.C. § 231a(c)(4) (defining "divorced wife" by reference to section 216(d) of the Social Security Act); section 2(d)(1) of the RRA, 45 U.S.C. § 231a(d)(1)) (defining "widow", "widower", "child", "parent", "surviving divorced wife", and "surviving divorced mother" by reference to sections 216(c), 216(g),

under the Social Security Act and the RRA, and have referred to social security case law in evaluating railroad retirement cases.[2] Much like claim files in Social Security benefit cases, claim files in Board cases contain substantial personal and medical information which is difficult to fully redact in a public court filing. Since the Advisory Committee on Civil Rules noted in 2007 that actions for benefits under the Social Security Act are entitled to special treatment due to the prevalence of sensitive information and the volume of filings, I believe it is appropriate to extend this recognition and privacy protection to actions for benefits under the RRA.

Section 8 of the RRA provides that decisions of the Board determining the rights or liabilities of any person under the Act shall be subject to judicial review in the same manner and subject to the same limitations as a decision under the Railroad Unemployment Insurance Act, except that the statute of limitations for requesting review of a decision with respect to an annuity, supplemental annuity, or lump-sum benefit must be commenced within one year of the Board's decision. 45 U.S.C. § 231g. In turn, section 5(f) of the Railroad Unemployment Insurance Act provides for review of a final decision of the Board by filing a petition for review in one of three United States courts of appeals:

1) The United States court of appeals for the circuit in which the claimant or other party resides or has its principal place of business or principal executive office;
2) The United States Court of Appeals for the Seventh Circuit; or
3) The United States Court of Appeals for the District of Columbia Circuit.

45 U.S.C. § 355(f). Under an agreement with the Department of Justice in place since September 1937, the legal staff of the Board handles litigation of benefits cases in the circuit courts of appeals. Although the Board does not generally litigate cases in the federal district courts, Fed. R. App. P. 25(a)(5) provides that privacy protection in proceedings such as appeals of final Board decisions is governed by Fed. R. Civ. P. 5.2. Because the Board may be called to litigate these types of cases across the country in any

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216(e), 202(h)(3), 216(d), and 216(d) of the Social Security Act respectively); section 2(d)(4) of the RRA, 45 U.S.C. § 231a(d)(4) (applying rules in section 216(h) of the Social Security Act when determining whether an applicant under the Railroad Retirement Act is a wife, husband, widow, widower, child, or parent of a deceased railroad employee).

[2] *See Bowers v. Railroad Retirement Board*, 977 F.2d 1485, 1488 (D.C. Cir. 1992) ("The standard for granting annuities under [section 2(a)(1)(v) of the Railroad Retirement Act] closely resembles that for making disability determinations under the Social Security Act."); *Burleson v. Railroad Retirement Board*, 711 F.2d 861, 862 (8th Cir. 1983) ("The standards and rules for determining disability under the Railroad Retirement Act are identical to those under the more frequently litigated Social Security Act, and it is the accepted practice to use social security cases as precedent for railroad retirement cases."); *Soger v. Railroad Retirement Board*, 974 F.2d 90, 92 (8th Cir. 1992) ("The regulations governing social security disability cases, 20 C.F.R. §§ 404.1501 *et seq.*, may be used by the Board in evaluating disability under the Railroad Retirement Act.").

geographic circuit, a uniform rule applicable to all actions for benefits under the RRA would be beneficial to both the Board and individual claimants who are seeking review of the Board's decisions and place railroad retirement beneficiaries in the same position as beneficiaries under the Social Security Act for privacy protection purposes.

Regarding the text of Fed. R. Civ. P. 5.2(c), this proposed change may be effectuated simply by inserting the phrase "or Railroad Retirement Act" in the first sentence of the rule, after "in an action for benefits under the Social Security Act". Thank you for your consideration. Please let me know if I can provide any additional information to help you evaluate this proposed change.

cc: Committee on Court Administration and Case Management